

Introduction

Writing the History of Law, Crime, and Punishment in Latin America

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Law is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but a distinctive manner of imagining the real. — Clifford Geertz

In recent years, the study of law, justice, and related phenomena (crime, prisons, criminology, courts, litigation, and so forth) has received increasing attention by scholars from a variety of disciplines within Latin American studies.¹ Although these efforts come from disparate methodological, theoretical, and disciplinary traditions, they all share the conviction that law and legal phenomena are crucial elements in the formation and functioning of modern societies and thus deserve more attention than they have hitherto received. Previous approaches had essentialized the law as either a purely normative framework that guaranteed social equilibrium through the application of “justice” or as a set of state-produced norms that reflected and reproduced elite power. These views have been challenged by more nuanced and sophisticated approaches that treat law as an ambiguous, malleable, and slippery arena of struggle the limits and parameters of which are themselves the result of contention and negotiation. According to these new perspectives, law produces and reformulates culture (systems of identity, practices, and meaning), and it shapes

and is shaped by larger processes of political, social, economic, and cultural change. Disassociating law from a strict and reductionist juridical/legalist approach is probably the single most important contribution of this body of scholarship. And although historians have contributed a good deal to effect this transformation, it has been very much the result of a multi-disciplinary effort in which other disciplines such as legal studies, political philosophy, anthropology, sociology, and cultural studies have made fertile contributions.

Within the field of Latin American history, this transformation has been some time coming. Long the domain of lawyers and amateur historians, and usually confined to the institutional/juridical study of codes, procedures, and institutions, *historia del derecho* (legal history) gradually lost its appeal among new generations of historians, much more interested in social, political, and economic history and, more recently, in the history of culture, representation, and identity formation. The study of law and legal phenomena — very narrowly defined — was left, with few exceptions, to the patriarchs of traditional history, when it was not abandoned altogether.

This trend has been reversed in recent years. In the last decade, the study of law and legal phenomena has come to the forefront in historical studies of Latin American societies, opening up a fascinating area of analysis. This novel territory, resulting from the convergence of multiple subdisciplinary endeavors and perspectives, promises to shed light on an important number of issues: the dynamics of social and cultural change, the nature of the state and its relationship with civil society, the formation of legal cultures, the operation of formal and informal systems of justice, the interaction between Western and indigenous legal systems, the mechanisms that give form and meaning to socially accepted forms of punishment, the role of courts and litigation in the dissemination of notions of rights and citizenship, the dynamics of gender, racial, and generational conflict, and so forth.

In dialogue with contemporary trends in international historiography, as well as with efforts in other disciplines, this renewed interest in law and legal issues has begun to yield a number of important monographs and theses. Scholarly conferences and panels on questions of law, crime, and punishment have consolidated this ongoing interest, producing a critical mass of valuable scholarly work. This volume provides an opportunity to showcase a sample of some of the best scholarship on the history of law and related issues. We expect that this collection will help to define better the contours and concerns of this burgeoning area of studies and to raise a set of

questions about the role of law, crime, and punishment in the history of Latin America. We think these concerns and questions could soon play an important role in forging a research agenda for our discipline. The individual contributions to this volume speak for themselves; their foundation on patiently taken archival evidence, their well-specified hypotheses and persuasive argumentation, and their attention to both context and text will be evident to the reader. What this introduction seeks to accomplish, therefore, is to locate these essays—and the research agendas from which they stem—within the frame of recent trends in the historiography of Latin America. In addition, our introduction attempts to offer a programmatic agenda for future work in the areas of law, crime, and punishment. But only by remembering where we have come from, can we understand where we are going. Thus, we ask the reader to tolerate a short detour into the historiography of law in the region, as a way of presenting the basic issues, characterizing the specific problems under scrutiny, and delimiting the contours of scholarly convergence. In the final section, we attempt to identify future avenues of progress.

From Historia del Derecho to the Social History of Law

The process of state consolidation initiated in the Latin American republics after their independence from colonial powers was dependent, to a great extent, on the successful implementation of an effective and universal legal system. Although numerous laws outlived the period of colonial domination (for instance, the *Siete Partidas*, a thirteenth-century text, and the *Recopilación de las Leyes de Indias*, issued in 1680, were still invoked by courts and judges well into the second half of the nineteenth century), there was usually a conscious effort on the part of republican legislators to abandon or at least to modify Spanish law in those aspects regarded as anachronistic, barbarous, unjust, or arbitrary. Spanish law, as we know, was fragmented into various jurisdictions (royal, ecclesiastical, customary, *de gentes*, natural), subject to various and contradictory interpretations, and laden with the intolerable admission of privilege. Not only were Spanish laws not rationally ordered (codified and subject to hierarchies), but they were also resistant to the principle of universality. The importance attributed to custom and the excessive discretion of judges created tremendous uncertainty and heterogeneity. Naturally, this type of law was not conducive to the experiment of modern nation-building. The new republics ascribed in

principle to notions of popular sovereignty, equality under the law, and representative government, notions that were inconsistent with the mosaic of legislation inherited from Spain.²

Postindependence legislators enacted an array of new laws, codes, and constitutions, but they were generally easier to write than to enforce. Although Spanish legal traditions continued to influence this effort, many legislative pieces were (selectively) cloned from French, British, and other European sources, which were usually considered the *non plus ultra* of juridical science and progress. The prominence of lawyers among the cadres of postindependence policy-makers is further evidence that legislation and codification were considered fundamental to the successful consolidation of the newly independent republics.³ But success was not immediate. At first “codifiers” found strong resistance among the very political elites whose values they shared. And the early constitutions fell rapidly, replaced by new constitutions or abandoned as instruments of the rival political party. *Caudillo* regimes continued to enact decrees, circulars, and other types of regulations in a manner reminiscent of the colonial *cédulas*, *ordenanzas*, and *bandos de buen gobierno*, and other similar legal statutes. But even these regimes believed that the new societies and politics could be ordered only under the supremacy of the law.⁴ It was only after 1850, as constitutional arrangements began to hold, that there was a new energy again to take up the enterprise of enacting a legislative corpus valid for the whole nation. So, legislators took upon themselves the task of compiling civil, commercial, and penal codes.

By the late nineteenth century, relatively solid legal traditions already existed in many Latin American cities, which materialized in lawyers’ guilds, law schools, legal journals, and international exchanges. Lawyers sought (and eventually achieved) state recognition and protection for their corporate privileges.⁵ This process of professional consolidation led, almost naturally, to the emergence of an interest in the history of law. The drafting of new codes and constitutions required the collection of legal antecedents and this engaged lawyers and jurists in a search for origins. In Argentina, in the 1850s and 1860s, the specialized publication *El Judicial* (which catered to lawyers) began to collect and publish some rare pieces of colonial legislation. Estanislao Zeballos, one of the prominent members of the Generation of 1880, founded the *Revista de Derecho, Historia y Letras*, responding to an audience that shared an interest in all three disciplines. Courses in legal history began to be taught regularly, and the first books and theses that

traced the history of law in Latin American countries began to appear in the 1870s. By the turn of the century, publications on legal history were already gathering momentum.⁶ This type of scholarly/legal activity (writing the history of law as a progressive sequence of codes and laws) had a strong political component as well, inasmuch as many of these jurists and amateur historians were also interested in developing solid legal institutions and traditions as part of state efforts to dispense with the anarchy and chaos associated with *caudillismo*. Nevertheless, intermittent political instability, as well as successive waves of enthusiasm and frustration with the application of laws, made it necessary—in the eyes of legislators and jurists—to revise codes and other pieces of legislation constantly. Profusion and confusion were the inevitable result. One of the virtues of these early efforts at writing the *historia del derecho* was precisely their authors' interest in ordering the information, very much as contemporary historians did with the political histories of their countries.

This approach to legal history continued well into the twentieth century. At this time, most practitioners of history were interested in the study of institutions (such as the church or the army), politics (understood as the contention of forces around and through state institutions), and major military episodes such as foreign wars. Within this historiographical context, legal history occupied an important niche, even if university courses on *historia del derecho* were generally taught in law-school classrooms and by professional lawyers, not historians. The consolidation of this trend also brought important fields of specialization. For example, the history of penal law was developed by criminologists and penologists whose efforts achieved disciplinary maturity in the 1920s.⁷ Also, the emergence of (official and unofficial) *Indigenista* currents in countries such as Peru and Mexico in the 1920s, 1930s, and 1940s brought with it an interest in what was sometimes called indigenous law—more properly, the history of state legislation about Indians.⁸ The effort of compilation and systematization was almost always accompanied by proposals to enact specific reforms favoring indigenous populations. The need for tutelary legislation that would putatively protect the Indians as they were assimilated into the national state was a major concern for *Indigenistas*.⁹

A parallel but somehow distinctive trend was developed since the early 1900s in both Spain and Spanish America: the history of *derecho indiano*, that is, the body of legislation that governed the Spanish American colonies until the early nineteenth century. Ricardo Levene (1885–1959) in Argen-

tina and Rafael Altamira (1866–1951) in Spain are generally recognized as founders of this field of study.¹⁰ Historians took on the task of reviewing, summarizing, and ordering the rather immense Spanish legislative effort in the so-called Indies. Studies on economic, social, labor, racial, and religious colonial legislation became abundant and constituted, especially up to the 1950s and 1960s, an important branch of the historiography of colonial Spanish America. Levene and Altamira had a number of younger disciples in both Spain and Hispanic America: José María Ots y Capdequí and Alfonso García-Gallo in Spain, Ricardo Zorraquín Becú in Argentina, Bernardino Bravo Lira in Chile, Silvio Zavala and Toribio Esquivel Obregón in México, Guillermo Lohmann Villena in Perú. The *historia del derecho indiano* became a genuine specialty within the historical profession — and even today its practitioners continue to publish important monographs and organize international conferences.¹¹ Historians of *derecho indiano* very rarely moved beyond the institutional / juridical framework for studying the history of Spanish law in colonial Spanish America, and very frequently they adopted a sympathetic view of Spanish rule.

During the 1970s and early 1980s, a renewed interest in the study of law and legal phenomena in the region flourished, especially among North American historians. Some efforts focused on key institutions of the state, trying to understand the mechanisms used to ensure authority, legitimacy, and political control. Stuart Schwartz analyzed the Brazilian colonial system of high justice; Woodrow Borah studied the institution of the “Protector of the Indians” in colonial Mexico; Thomas Flory analyzed the formation of the judicial system in nineteenth-century Brazil; and Colin MacLachlan reconstructed the history of the Tribunal de la Acordada, a *sui generis* penal institution in late colonial Mexico.¹² These were not just traditional histories of judicial institutions, for they posed important questions — quite centrally, about the relationship between state and society mediated by the law. But in all these works, interest continued to center on legal and state institutions; they were not attentive to the questions raised, for example, in the work of British “new social historians” (the so-called Warwick school). Thus, they did not focus on the problem of the law as a theater of power, nor seek to discover in judicial records the voices and tactics of the powerless, those until then abandoned to “the condescension of history.” The publication of *Albion’s Fatal Tree* in England and of *Roll, Jordan, Roll* in the United States, which had started a minor revolution in the writing of history, had little if any immediate repercussions in the Latin American field.¹³

Interest in investigating crime as a prism of society, as a treasure chest holding clues about class formation and class conflict (as the British new social historians believed) remained exceptional. Seminal works were not followed up and consequently the “social history of crime” did not gather momentum in Latin America. There were some exceptions, though, such as William Taylor’s book on homicide and rebellion in colonial Mexico and Paul Vanderwood’s study of banditry in nineteenth-century Mexico.¹⁴ The influence of E. P. Thompson and other “bottom-up historians” was felt more powerfully in studies of slavery, peasant rebellions and, especially, labor history. Very few historians ventured, however, into the study of law and legal phenomena, for there was an overwhelming interest in more open forms of conflict and social change such as rebellions, revolutions, workers’ strikes, and the like.¹⁵ And when historians did pay attention to law — Steve Stern’s study of Indian litigiousness in early colonial Andean Peru is a case in point — they did so within the parameters of a clearly Marxist framework, viewing law as a mask for colonial power and as an inhibitor of more confrontational (and allegedly more effective) ways of contesting colonial power.¹⁶

About the same time, a less theoretically oriented trend developed among quantitative urban and social historians. They began to study crime in urban societies such as Buenos Aires, Mexico City, or San Juan, with their interest focused on quantifying crimes, perpetrators, arrests, victims, and the like. Following similar efforts in Europe and North America (by historians such as Eric Monkkonen, among others), they offered insights into issues such as modernization, urbanization, and social change. But they were generally limited in their ability to illuminate the complexities of crime in urban societies, inasmuch as they very rarely moved beyond the legal definition of crime and the use of statistics to identify trends in criminality and policing. Once again, many of the important questions being raised by social historians such as Thompson or Hay were not of interest to these historians.¹⁷ True, they borrowed from British “new social historians” the insight that crime and criminal records held the key to examining social conflict, but the latter’s reflections on the role of the legal system within the process of class formation were not put under scrutiny.

A more fruitful trend was the study of banditry. Here, the influence of Eric Hobsbawm’s seminal work stimulated a short debate about the social or political nature of Latin American banditry. A number of monographs studied banditry in Brazil, Peru, Cuba, Mexico, and other countries, most

of them concluding that the “social bandit” model was nonexistent or, at least, very rare. Later, historians began to move beyond the often sterile dichotomy of social bandit versus common bandit, striving to connect banditry with other forms of rural struggle such as peasant rebellions, the development of national politics, and a variety of forms of subaltern agency.¹⁸

From the Social History of Crime to Poststructuralist Legal Studies

Several theoretical and disciplinary trends that developed since the late 1970s and early 1980s have lately become important sources of renovation within the historiography of law and legal phenomena in Latin America. The social history of crime and criminal justice in Britain; the increasing attention to Gramscian concepts such as hegemony, historical block, and subaltern culture; the Foucauldian emphasis on power, knowledge, and the body; the work of “subaltern studies” in India and elsewhere; developments in legal anthropology; and the growing and renewed interest in cultural history — all began to influence work done on Latin American history in general and in the study of law in particular. The so-called conflict theory of law, for instance, offered an important, though in some ways reductionist, approach to the study of law. Historians such as E. P. Thompson, Eugene Genovese, Peter Linebaugh, and Douglas Hay insisted on the essentially conflictive nature of law, but they generally reduced it to an expression of *class* conflict.¹⁹ These scholars made an interesting and creative use of the Gramscian notion of hegemony,²⁰ relating it very closely to the use of legal tactics to offer dominated groups the fiction of a system of rule of law through a very well calculated display of mercy and justice. One of the virtues of this approach was its insistence on viewing the operation of the law from below, thus taking into account the perceptions, initiatives, and input of the lower groups not just in the operation, but even the formulation of the law.

Another source of renovation came from the revitalized interest that emerged around the mid-1970s in the operation of the criminal justice system, which offered new angles from which to analyze the impact of law and the state’s repressive apparatus on the common folk. A number of European and North American historians revisited the history of institutions of confinement and punishment, searching for clues to understand the nature of past social relations and ideologies. Prisons, in particular, but also

other forms of punishment such as public executions, received considerable attention. Authors such as David Rothman, Michael Ignatieff, Pieter Spierenburg, Patricia O'Brien, David Garland, and Peter Linebaugh took on the task of unpacking the several rationales behind the use, abuse, reform, or dismissal of certain forms of punishment.²¹ Working with quite different theoretical frameworks these authors nonetheless shared the conviction that punishment is a socially constructed artifact, that is, the product of a variety of social, political, cultural, and legal circumstances.²² If this is true, the study of punishment could illuminate a number of themes that were of interest to historians: namely, the nature of the state, changes in cultural sensibilities, forms and dimensions of class conflict, the formation of labor markets, and the struggles around social and labor discipline, among others.

Although Michel Foucault's *Discipline and Punish* was translated into Spanish almost immediately after its original publication in France, its impact was, for a while, almost nonexistent among Latin American historians. It was only in the 1990s that Foucault's influence was felt more powerfully and with a much broader scope than merely the history of punishment. Several essays in the volume *The Birth of the Penitentiary in Latin America*, for example, engaged some of the themes that Foucault developed: the constructed nature of crime, the ways in which prisons "fabricated" deviance, the resonance of crime and punishment throughout society, the capillary forms of power effected inside the prisons, and so forth. Critically incorporating Foucault's concepts and themes, Latin American historians have certainly benefited from his agenda for deconstructing the social and cultural logic behind the formation of modern societies.²³

Simultaneously, a vociferous revolution was taking place in European and North American intellectual circles: the poststructuralist turn. Among the topics debated was the disappearance of the modern and the emergence of the postmodern (condition), the complexity of layers in which social reality is embedded, the death of the author, the opacity and literacy of most texts, the questioning of the written as the only sensorial "reality," and the importance of spectacle in modern life. This renovation brought forth a problematization of the "texts" that historians were reading and a greater interest among historians in the methods of anthropology and literary criticism. The lack of a clear historical dimension in these discussions (despite some valuable exceptions), however, delayed the adoption by historians of these new conceptual and hermeneutic tools.²⁴ Especially among North

American historians of Latin America, the impact of poststructuralist currents was quite limited and piecemeal.

Three components of this trend have had important consequences for the study of law and related issues. First, there is a growing attention to culture. Using new and old sources, and clearly influenced by the new trends in literary criticism and cultural studies (the so-called New Historicism, American studies, French “new” cultural history, and more recently, cultural, postcolonial and subaltern studies), historians have begun to look at culture as less a “derivation” or “manifestation” of structural factors and more as a domain of generation of social action and concepts — a domain that in itself is a locus of contestation and struggle and both illuminates and problematizes other areas of social life. Whether a “new cultural history” has already come to fruition is subject to discussion.²⁵ Yet it is possible to argue that today, in Latin American historiography, cultural history has not only reached maturity and legitimacy, but has taken a sort of “imperialist” outlook, to use Eric Van Young’s term.²⁶

Second, there is a renewed interest in a much more contextualized political history. Studies of the state, for instance, have taken a clear position in viewing it less as a “structure” that exerts its impact on “civil society” than as a field of force, an arena of contestation, in which not only powerful but also marginal, subordinate, and previously neglected groups have a bearing.²⁷ This contestation, we may add, appears as centrally mediated by the law. Studies on “state formation” that focus on the making of a legal system offer fascinating angles from which to analyze the relationship between state and society in historical perspective.²⁸ Recent work pays greater attention to the workings of the legal system and the formation (or reshaping) of legal cultures among the lower groups. This is not the only possible outcome of the fruitful confluence of political and legal history, though. The formation of local clusters of power (in which economic, social, and judicial power are intermixed), the legal ramifications of protracted conflict between social groups, and the political resonance of legal rituals (such as public executions, for instance), are all promising areas of research, as some papers in this collection attest.

Third, there is an increasing dialogue between anthropology and history. In the 1980s, anthropologists rediscovered the role of law in community cohesion and conflict and came to view law as a battleground in which different groups and individuals competed against each other around issues of power, control, prestige, and meaning.²⁹ New work focused on litigation

and court procedures as central elements in the formation of legal cultures and the definition of social boundaries. Forms of argumentation and court appearances, for instance, became important areas of anthropological analysis.³⁰ Legal anthropologists have also long been interested in indigenous customary legal orders and the interaction of Western and non-Western legal systems. More recently, they have revisited the study of the relationship between law and colonialism. In Africa, for instance, studies on the making of “customary law” have emphasized its “invented” nature as a means to assure the cooptation of colonial subjects. These studies have also underlined the Janus-type nature of colonial law: while it brought new forms of oppression and control, it also opened up new arenas of dispute — not just between colonizers and colonized subjects, but within each of these groups as well.³¹

Recent interest in subaltern studies has also proved to be fruitful in rethinking the history of law in Latin America.³² Like previous, notably Marxist, attempts at writing history from below, scholars belonging to this perspective have sought to uncover the experience of the subordinate, but, unlike such precedents, subaltern studies offers a much more conscious critique of the strategies of representation advanced not only by members of those elites, but also by the scholarly and political communities that pretend to “speak for” the subaltern. Furthermore, practitioners associated with subaltern studies also question the viability of “grand narratives” (including Marxism, structuralism, and nationalism in its various forms) that offer comprehensive agendas for interpreting and acting upon social reality. This recent perspective offers fruitful ways to rethink the relationship between law, domination, and power. First, the very insistence on finding alternative, subaltern narratives about the social, encourages the search for the voice of the weak in legal documents, procedures, and performances.³³ Prominent attention to issues of language, representation, and narrativity, on the other hand, has made historians mindful of the importance that the subtleties and nuances of discursive practices have for exploring conflict, meaning, and power relations. Thus, interest in legal discourses (texts of codes and treatises, the development of criminology, forms of argumentation, and others) is likely to produce fruitful results in the future. Finally, the emphasis on the multidimensionality of processes of identity formation and re-creation translates into the demand for a more attentive look at the forms and content of legal disputes by different sets of actors (slaves, women, peasants, workers, Indians, and the like). An Indian subject, to

give but one example, may want to appear as a poor and indigent member of the “Indian race” at one moment, and as a member of the national community who wants to assert his/her rights as citizen at another.

Thus, the historiography of Latin America began to experience interesting changes in the 1980s. There has since been an outburst of historical studies in a myriad of directions: culture and daily life, sexuality, violence, gender issues, discourse and representation, family, and so forth. A few, important studies on prostitution, for example, raised the question of the relationship between the regulatory powers of the state, the medical profession, and the construction of subaltern alterity. Foucault’s work on the history of sexuality stimulated fruitful research, engaging historians of gender in questions of social discipline, the hygienic movement, and prostitution.³⁴ The influence of the third wave of studies of the *Annales* school, concerned with *mentalités*, culture, and daily life, was felt in the work of historians such as Alberto Flores Galindo in Peru and Joao J. Reis in Brazil.³⁵ To a large extent, the methodological renewal of our discipline has had to do with the growing interest in questions hitherto appropriate to anthropological research: group identity, symbolic exchange, ritual practice, and spirituality. The interaction between history and anthropology generated quite stimulating studies dealing with issues such as indigenous memory and religion, workers’ traditions and rituals, the deconstruction of dominant ideologies, and the like.³⁶ Regrettably, the progress made in legal anthropology has had less impact on historians of Latin America. The pioneering work of Laura Nader has had relatively little diffusion among historians of the region.³⁷ Works such as the recent books by Charles Cutter and Susan Kellogg have brought back to the field of historiography some of the questions posed by Nader and her colleagues.³⁸ Indigenous communities seem to prefer justice systems that privilege communal “harmony,” and this requires a great deal of judicial discretion and a preference for damage compensation over punishment. Was the colonial judiciary more benevolent and accommodating toward indigenous demands and cultural preferences? This is but one of the important questions raised in the recent scholarly work that has emerged in the convergence between history and anthropology.

The Complexity and Multidimensionality of the Law

The historical study of law, crime, and punishment is currently undergoing a substantial transformation. It has only been in the 1990s that a new and

seemingly consistent interest in the history of law and legal phenomena in Latin America has come to fruition. This volume is, in many respects, an initial attempt to map both the achievement and the promise of this field. Among the dimensions of this transformation the most important has been the extension of the concept of “the law” into multiple directions. What does this multidimensionality and complexity entail?

The law is a complex and often confusing arrangement of norms of different hierarchy and origin intended to order social interaction. It assumes basic social agreements, and thus can be viewed as another type of “imagined community.” It is a powerful instrument of social control designed to mold the bodies and souls of those subject to its rule. Its enforcement mobilizes an important part of the state apparatus: the police, the judiciary, the army, and an array of penal and welfare institutions. Furthermore, the law contributes “reasons” for state governance, serving perhaps as the fundamental element conveying legitimacy to government. Hence, the legal sphere is a “theater” or forum in which a pedagogic work takes place in a continuous fashion—from here emanate normative messages about illicit behavior, crime, and punishment. As an ideology, the law assumes rhetorical forms of substantive impact on everyday discourse, for the law constitutes the reference system to which people appeal in defense of their rights—the law is not only *ley* but also *derecho*. As we can see, the law is many things at the same time.

In addition to all this, the law is an arena of social contestation. It is a terrain in which individuals and groups with different interests, resources, and quotas of power confront each other and try to “work the system” (Hobsbawm) to their own advantage. Naturally, there is always a previous step: legal norms have to be written and enacted, and this is a process (one that certainly deserves much more attention than it has received by historians) in which elite and state interests are generally preponderant—though by no means omnipotent. The operation of the law, not surprisingly, has generally reflected the continuous power exercised by state officials, members of the upper classes, and professional lawyers and jurists. But to say this is just the beginning of any inquiry, for law has always offered avenues for the subaltern to challenge, circumvent, manipulate, and even profit from the law.³⁹ Certain areas of legal regulation are, of course, more likely to offer this avenue to the underprivileged. Litigation around slave or family rights, for example, may offer to contending parties more room to maneuver and manipulate the law than penal legislation, where

one of the contending sides is usually the state—represented by prosecutors—and where certain groups or individuals are much more vulnerable to abuse by law-enforcing agents such as the police or the military. But even here, as some of the articles in this collection show, there is usually latitude for the subaltern to challenge the powerful or, at the very least, to attempt to put limits to the exercise of command.

Our interest in the history of law, thus, goes well beyond merely investigating and establishing who won what and how often. Law and legal phenomena offer a unique window from which to explore not just the execution (or violation) of legal precepts, but also the confrontation, appropriation, reshaping, and dissemination of values, concepts, notions, ideas, images, social tactics, and forms of argumentation whose study can offer valuable insights for our understanding of any given society.⁴⁰ The concept of “legal cultures” may be used here to encapsulate all these components of the population’s relationship with, and attitudes towards, the law. We would like to emphasize the plural in the concept of “legal cultures,” for there is usually more than one “distinctive manner” of “imagining the real”—to use again Geertz’s phrase—at any point in time and space.

Furthermore, what an individual or group may think about the law is subject to specific forms of appropriation and use, for a certain legal consciousness is far from being essential or immutable. In other words, legal attitudes (and thus, legal actions, arguments, and practices) are changing and malleable: the individual that violates the legal prohibition to drink and drive might ferociously argue about the strict application of the law when his or her rights are being abused. Law thus becomes not just a contested terrain, but also a terrain in which the forms and nature of contestation are subject to change and negotiation, and in which the actors’ own perception about rights, justice, and legality may vary accordingly.⁴¹

The Law in Latin America: Rule, Unrule, or Misrule?

According to standard interpretations, Latin American countries—with only a few partial exceptions—have not been able to establish solid, effective, and universal legal systems. Political turmoil, economic shortages, and authoritarian cultures, this line of reasoning contends, have historically combined to thwart the establishment of cohesive and reliable legal frameworks. According to political scientist Guillermo O’Donnell, a system of “rule of law” can be defined as a system in which (at the very minimum)

“law is fairly applied by the relevant state institutions, including, but not exclusively, the judiciary.”⁴² Such a system, according to this view, has never existed in most countries of the region, and it does not exist even today, when formal democracies have been established and constitutional rule has become the norm. This position maintains that law has usually been, and to a large extent still is, arbitrary, and its effects have customarily been used to consolidate privileges, informal modes of appropriation, power, and authority, and a variety of kindred illegalities. In this scenario, legal rights have been quite difficult to assert, and resistance against arbitrariness (generated by either private or state sources) has been difficult to carry out.

If anything, this perspective maintains, the law in Latin America has been the source of much more injustice than fairness, has been more often manipulated than revered, and has created—in some countries more than others—a scenario of legal fiction that conceals the injustices of the *país real*. Such a situation, furthermore, has affected not just interactions among individuals, but the relationship between them and the state, and has ultimately served as one of the bases for the weakness of the whole constitutional order. The lack of democratic traditions in the region would be very closely linked to this disregarding of the law and its application. As Jeremy Adelman and Miguel Angel Centeno have argued, “the rule of law, to the extent that it exists in Latin America, still faces its foundational challenge: its inability to bear equally upon the rulers and the ruled.”⁴³

This depiction needs to be elaborated, for it fails to discuss the social bases that have nurtured over the centuries a system of unfairness that, paradoxically, may be the only stable feature amidst a rather unstable social milieu. But, in addition, it insists on testing the Latin American cases against a certain ideal type of situation (total equality before the law) that has never existed and probably never will. Instead of an impossible system of rule of law we would prefer to refer to regimes that achieve (or do not achieve) the hegemony of the law, that is to say, a political or institutional regime in which a substantial portion of the litigants and people under legal processes understand and abide by the procedures and institutions designed by lawmakers and judges. In a more strict sense, we could add a second condition, that people valorize the legal order as a component of their social and civic identity and exercise of rights. Under this definition, the power of the laws to define the social order and people’s positions with respect to it prevails over other formal, institutional criteria.

We would suggest that the arbitrary nature of the legal systems in Latin

America has contributed to (and has been shaped by) a type of legal culture that attributes to law more elasticity than it is supposed to have. In this regard, one cannot fail to see some continuity with the colonial justice system. An excessive amount of judicial discretion and an amazing complexity in the legal order facilitates the negotiation of power relations and patronage in the sphere of justice. Moreover, if we are to believe recent scholarly work on the subject, this system enjoyed a great deal of legitimacy among the less privileged, the Indian pueblos, mestizos, and lower classes. We are not suggesting that arbitrariness always helped the underprivileged; quite the contrary. We are simply arguing that by virtue of its very arbitrariness (which includes a good dose of corruption), the legal system in Latin America has generally created a greater sense of optimism regarding the eventual outcome of legal procedures than the poor and underprivileged had reason to expect, given the actual record of the tribunals' and courts' allocation of sentences. Future research on the formation and development of legal cultures in the region will bring us closer to understanding this process.⁴⁴

Our proposal to study law in its multiple dimensions and to view it as a contested terrain, then, becomes all the more critical in the Latin American context, for this contestation takes place in a highly malleable arena, one in which the rules of the game are themselves subject to negotiation, dispute, manipulation, and corruption. This does not turn the situation into a more democratic kind of confrontation, but it does transform it into a contest in which other (informal, illegal, subjective, monetary) means become more central than would have been the case if a system of rule of law were solidly entrenched. In addition, the kind of scenario we have described is much more likely to occur in remote, provincial, and rural areas. Here, as many scholars have observed, the designs of central state authority are even more difficult to enforce. By and large, justices of the peace and other local judicial authorities have been less powerful and (at the very least, in the perception of the litigant) more permeable than their counterparts in the major cities.⁴⁵

The enforcement of laws and the hegemony of the legal systems (as different from the rule of law) has historically varied according to political regime. Some regimes have been more keen than others in disseminating a pedagogy about the law. And some regimes, more than others, have allowed the judiciary to establish its own rules, procedures, and traditions. Hence, subaltern subjects have faced over the course of Latin American

history a variety of systems of justice, predicaments about the law, and different degrees of duress in law enforcement. Equally important, law enforcement has been quite directly related to the centralization or decentralization of governmental authority. Over time, the degree of arbitrariness of the judicial system varied considerably: different regimes of governance (caudillismo, elitist liberal constitutionalism, oligarchic liberal regimes, populisms) influenced the procedures and forms of the justice system in ways that historians still need to determine. This degree of arbitrariness and discretion was augmented, rather than diminished, with the consolidation of modern states guided by positivist, medico-legal technologies of social discipline. At this point, only further research can help identify these different situations and trace out the broader trends in the evolution of justice.

Have Latin American countries, then, become disciplinary societies? Yes and no. The formation of a disciplinary society, with its institutional network of prisons, hospitals, asylums, and schools, has achieved in Latin America a notable development. And, judging from the increase in prison populations, there has been a trend toward a greater exposure to this kind of coercive modernity. Yet, at the same time, the region's long experience with republican regimes of government (operating at less than full throttle, if you will) has exposed many in the population to the forces of the state, with its legal arguments and its extralegal mechanisms of persuasion. The legal terrain (as an arena of contestation) has expanded and contracted throughout history, providing a learning experience to subalterns about the contrasts between the promises of legal modernity and the realities of a society divided along class, gender, and ethnic lines. The Habermasian sphere of rights coexists with the Foucauldian disciplinary machinery, producing interactions and subjectivities that are complex, ambivalent, and changing, and that historians are only now beginning to understand.

Toward a New Social and Cultural History of the Law

The study of law and legal phenomena in Latin America is therefore reaching an exciting moment. Numerous publications, panels, and conferences, testify to the field's vigorous development. We tried both to subject to scrutiny and to explore the potential of this new wave of scholarly interest at an international conference organized at Yale University in April 1997. Thirty scholars, mostly historians, gathered for three days to discuss twenty-three papers, a selection of which is included in this volume. The discussions that

took place during the conference greatly enriched each of the contributions, which were afterward revised by the authors. The resulting products are offered here, organized around three major themes.

The first section, “Legal Mediations: State, Society, and the Conflictive Nature of Law and Justice,” includes four essays that explore law as both a mediator of social conflict and an essential agent of state building. The operation of the legal system appears here as a dynamic, malleable, and conflictive scenario, in which competing forces — the state, elites, interest groups, subalterns — strive to advance their own agendas. Focusing on Indians in eighteenth-century Cuzco contesting state intrusion into local affairs (Walker), cane workers negotiating rights with the Brazilian Estado Novo (González), women in nineteenth-century Caracas facing new state regulations on family and gender rights (Díaz), or farmers disputing rural power in early twentieth-century Buenos Aires province (Palacio), these articles illuminate crucial aspects of the political, cultural, and social history of their regions by looking at the ways in which various actors relate to each other through the legal system. These essays demonstrate the richness and usefulness of legal sources, the attention due to litigation as an important component of the political strategies of quite diverse social actors, and the importance of analyzing the spheres of power surrounding each and every legal battle.

The second section, “The Social and Cultural Construction of Crime,” brings together essays that attempt to deconstruct the social and cultural (as opposed to the strictly legal or juridical) nature of crime. Firmly rooted in the most innovative developments in cultural history, these essays explore the intersections, exchanges, resonances, and mutual borrowings occurring between different forms of discourse in order to produce social phenomena that came to be considered as criminal. The essentially multifaceted nature of crime, the conflictive views that shape and are shaped by it, and the creative ways in which those views are both reproduced and challenged, are clearly demonstrated in the essays in this section. Pablo Piccato uses the character of the *vatero* in order to explore competing views about the lower classes in early-twentieth-century Mexico City; Dain Borges tracks the differing images of religious healing in legal, medical, and literary documents in turn-of-the-century Brazil; Cristina Rivera-Garza uses the case of prostitutes in Mexico City to explore state and medical treatment of the body and social hygiene in late-nineteenth-century Mexico City; and Kristin Ruggiero examines how “passion” was played out in the

arguments put before criminal courts in turn-of-the-century Buenos Aires. Together, and clearly departing from previous approaches to the study of crime, these essays advance our understanding of the cultural ramifications of social phenomena that, far from being just a legal event, are clearly immersed in complex webs of meaning and both create and irradiate symbols, images, and other cultural forms.

The essays in the third and final section, “Contested Meanings of Punishment,” offer valuable insights into the workings of criminal justice systems, in an effort to uncover the cultural, political, and social implications of a variety of forms of punishment. As David Garland, among others, has suggested, punishment is a sort of artifact that needs to be analyzed in its multiple meanings and roles. In accordance with such a conceptual framework, these essays provide us with new angles from which to understand the nature, role, representation, and effects of different forms of punishment. Once again, far from considering punishment as merely a legal phenomenon, or as the inevitable result of the appetite for social control among social and political elites, these essays adopt a much more contextualized perspective that helps us situate punishment within its social, political, and cultural coordinates. Carlos Aguirre and Lila Caimari attempt to recover the voices and views of prisoners about incarceration and freedom, respectively — a perspective usually absent in standard histories of imprisonment. Donna Guy offers a detailed analysis of the rationales behind correctional institutions for minors in Buenos Aires; Diana Paton explores the social and political ingredients of punishment in post-emancipation Jamaica; and Ricardo Salvatore sees the death penalty as a pedagogical tool used by the Argentine state in order to instill an array of social and cultural values among the population.

The concluding remarks by prominent social historian Douglas Hay offer a valuable appraisal of this set of essays from a widely comparative perspective. Hay’s comments raise a number of interesting issues, suggest avenues for further research, and highlight the specificities of the Latin American cases and the commonalities they share with those of other regions of the world.

An Agenda for Further Research

The coming to fruition of a new approach to the study of law and legal phenomena in the Latin American context opens up a number of avenues

for future research that promise to enrich a variety of ongoing multidisciplinary debates.

With good reason, Douglas Hay notes in his commentary the lack of attention devoted by Latin American legal historians to the question of “popular justice.” The construction of a moral order centered on custom, the appropriation and adaptation of state law by popular or subaltern agents, and the understandings derived from a protracted contact with legal authorities appear to have escaped historiographical inquiry, reflection, and debate. This is not only because, as Hay puts it, Latin America belongs to the other side of the great divide separating common law and statutory law traditions. The question of popular legal culture (or cultures), we believe, should be central to the analysis of the social history of law in Latin America. Unfortunately, very few authors have directed their inquiries in this direction. There is some recent work on the ways indigenous peoples used the colonial legal system, but these have remained tied to old discussions regarding the benevolence or wretchedness of Spanish colonialism.

The transition from colony to independence presents us with an interesting dilemma to resolve. The new patriot leadership built a new layer of laws (*derecho patrio*) on top of a legal edifice they did not bother to tear down, the *derecho indiano*. This created ambiguity, uncertainty, and a great deal of judicial discretionary powers. How did subaltern subjects experience this transition? Did they claim “rights” contemplated in the old legislation? Did they oppose new decrees, ordinances, and laws based upon a knowledge and understanding of colonial laws? How did the abolition of “privilege” and the decline in the military and ecclesiastical *fueros* affect the chances of subaltern subjects to attain justice? Did the distance between “the popular” and “the legal” widen with the consolidation of nation-states? Before we generalize imprudently about how backward and “illegal” popular understandings about justice in the region were, we need to sift through tons of archival materials to really begin to understand the relation between *state* and *popular* legal cultures. Perhaps the overlapping of colonial and post-independence legislation opened up new opportunities for subaltern subjects. Perhaps the contrary was true, as judges acquired increased discretionary powers that ultimately denied rights previously granted to subalterns.

That our collection deals more with *state legal culture* than with popular understandings of the law and its uses cannot be denied. But there is a reason for this. Our comprehension of the procedures, arguments, and understandings used by the judicial system is still terribly inadequate. We

have only begun to pose rather basic questions about the formation of this judicial system: for example, its prerequisites and antecedents, the education of lawyers, the tensions between reformers and traditionalists, the role lawyers and judges played in the consolidation of centralized nation-states, and so forth.⁴⁶ The importance of the positivist revolution in the legal system (not only in the criminal and penal systems) still needs to be addressed. Before we begin to pose questions about the legal culture of popular or subaltern agents, it is worthwhile to examine what happened to statutory law, how judges interpreted it, and how major processes in Latin American history (e.g., the postindependence fragmentation of political sovereignty, the substitution of *cabildos* by justices of the peace, the loss of autonomy of appellate courts, the struggle for constitutional supremacy, and the dramatic centralization of state authority at the end of the nineteenth century) affected the dynamic relationship between law and society.

Furthermore, we need to separate the activities, tactics, and understandings of subjects seeking justice from the intricacies of the justice system, the discretionary powers of its authorities, and the regularity with which they impose the burden of the law on the powerless and not on the powerful. Both sides of the question need to be addressed separately, even though elite and popular agents interacted. In other words, our understanding of legal cultures has to be connected to and understood in relation to popular agents' interaction with the state in general and with the judicial system in particular. In this regard, a crucial question relates to the pedagogic work of the law. To what extent has law been a predicament, stubbornly beaten upon the heads of the subaltern? Did lawyers' guilds, newspapers, union publications, or other civil associations disseminate legal concepts among the population? Have our courts served as theaters of authority in which the powerful could teach the powerless lessons about the necessity of legal/moral conduct? How much did popular agents know about the parts of a legal (criminal or civil) legal process? The reception, understanding, dissemination, and refashioning of legal concepts in popular culture is a pending task for Latin American legal historians.

Another problem that needs to be addressed refers to the decline over the postindependence period of corporate *fueros*. The consolidation of a secular, centralized state authority was predicated upon the dismantling of these corporate privileges, more in tune with the colonial *sociedad estamental*. What was the effect of this crucial reform in the legal system and procedures of the independent nations of Latin America? How did the legal

know-how from ecclesiastical, military, and mercantile courts influence the formation of the modern civil and criminal courts?⁴⁷ If the period of civil wars was dominated by military politics and strategies, was it also true that military law dominated the procedure and logic of the justice system? If not, how could judicial authorities attain the degree of independence and autonomy needed to enforce important statutes and regulations, against the interest of military authorities? Those who find in present-day Latin America that an independent judiciary still remains an elusive goal have reasons to doubt that such an entity existed in the past. But it is reasonable to hypothesize that in the postindependence period the judiciary gradually acquired a certain autonomy from the three major corporations of the colonial period (the church, the military, and the merchants' guilds).

We should also recall that the actual operation of a given legal system is never circumscribed to a straightforward execution of the legal norm, nor is it limited to the face-to-face encounter of litigants, judges, and lawyers. In the first case, it is important to analyze the myriad ways in which the written law is interpreted, argued, and used, as well as the rhetorical and even theatrical tactics used by the many actors involved. Here, we need to learn more from legal anthropologists who have long realized the importance of looking at courts as "performances." Although a shortage of sources may hinder the historian's efforts to deconstruct these strategies, a more creative and subtle reading of archival records may yield interesting observations. In the second case, we need to look at what Gil Joseph called "legal lubricators," that is, the assortment of legal "experts" (informal attorneys — called *tinterillos* in some countries — community leaders, local power brokers, legal clerks, and the like) that have played (and certainly continue to play) a central role in facilitating the access of important sectors of the population to the legal system.⁴⁸ A closer look at these mediating agents will certainly sharpen our understanding of how national legal systems were constructed and how effectively they were implemented throughout Latin America, how different sets of actors (urban lower groups or rural peasants, for instance) got in contact with codes, judges, and tribunals, and how certain aspects of a given legal culture were disseminated.

This connects with the question of accessibility to the courts of law by poor people, which Hay raises in his commentary. In the context of Latin American history, getting at this problem means investigating the difficulties that legal language presented to subalterns and the possible appropriation and use they made of it.⁴⁹ We must pay special attention to the

practical results that ensued from the employment of a private representative and compare them to the results that were attained by people resorting to the *Defender de Pobres* (defendant of the poor). The rationality of the judicial tactics of subalterns (or the absence of same) depends on the answer we give to this question. Whether “justice” was or became more accessible is related to the actual interventions and results produced by these state legal agents and by the counsel and encouragement provided by tinterillos to people willing to litigate. Another aspect of this question relates to the ability of subaltern witnesses to present testimony to the courts. This crucial issue has not been sufficiently investigated. Were women, people of African origins, slaves, children, or the insane denied the right to present evidence or to give testimony? Did independence and, more generally, the formation of a national state produce major changes in the rights of witnesses?

An issue deserving special attention is the particular situation of women with regard to the law in the different countries of the region, and its evolution over time. Certainly, the enactment of civil codes in the second half of the nineteenth century put women in a situation of strict legal subordination vis-à-vis men. While married, they ceased to be treated as “capable persons” and acquired a legal condition similar to that of children. The same could be said with regard to the criminal codes that were enacted near the end of the nineteenth century. These statutes made women explicitly “irresponsible” for many crimes, because of their “naturally emotional” personality structure. But what happened in the interregnum? What was the legal condition of women during the late colonial and early national periods? How did early postcolonial constitutions deal with the question of women? Were they denied legal “personhood” and legal representation? Did women succeed after independence — as Arlene Díaz suggests — in exploiting the loopholes of disordered legislation to argue for their own economic and social rights within the institution of marriage? Did inheritance laws stemming from the Hispanic legal tradition make it easier for women to acquire and administer property than in countries of the Common Law tradition?⁵⁰ This period of transition (1810–1860) — before the advance of codification, positivist criminology, the social hygiene movement, the consolidation of national states, and the project of “progress” — seems to be crucial for understanding the encounter between women and state law and, therefore, should be made a priority in our research agenda.

Another important question relates to the relationship between law and

ideology in the nineteenth century. New scholarship, in this collection and elsewhere, affirms the centrality of medical discourse and power in the re-making of legal and state practices in Latin America starting in the 1880s.⁵¹ Medico-legal concepts seem to have had an earlier and more lasting impact on the societies and culture of Latin America than on those of Europe and the United States. Why was this so? Why did liberalism and classic penology fail to dominate legal structures and state practices? Why was the doctrine of “social defense” able to displace notions of individual responsibility, free will, and the contractual nature of human behavior? Much work of a comparative nature needs to be done to “place” Latin America within contemporary trends in legal thought and ideology. We can no longer take a few essays on moral or legal theory and use them to examine the replication and adaptation of liberalism to postindependence Latin America. For the changes in legal cultures that marked the transition between *derecho indiano* and *derecho patrio* were of gargantuan proportions. In between, there were isolated performances, reforms that did not congeal, untenable constitutions, and a multiplicity of laws and decrees that bore the marks of liberalism. But liberalism was merely an *intermezzo* — a brief transition between colonial notions of justice and a justice organized around the principle of social defense. The legal arena provides another enticing opportunity to revisit the failure of liberalism as a viable organization of society-state relations.

The study of forms of representation of criminals and their impact on both the formulation of codes and the prosecution of suspects, to mention but one possible course, ought to become a central component in the future development of legal studies in Latin America. The study of images of crime and criminals as presented in literature, media reporting, scientific treatises, testimonies, poems and popular ballads, and other forms of representation will allow us to explore the (sometimes subtle, sometimes quite evident) links between them and specifically legal phenomena.⁵² Instances of “moral panic” are another possible avenue to explore the connections between law and popular culture. In such cases, a combination of real events, rumors, media manipulation, and public paranoia, generally in the midst of an otherwise critical situation, may generate stiff state repression as well as popular support of it — which may in turn affect the relationship between the law and those groups affected by the cleanup campaign, generally in the form of criminalization of certain conducts and practices.⁵³

Finally, there is the matter of the penal institutions and their impact on

the captive populations. Prisons, reformatories, penal colonies and other such institutions continued the work of law in both a legal and illegal manner. They were the territory of extralegal coercion, unobserved internal bylaws, punishments not prescribed in the judicial sentence, and “customary orders” built by inmates, guards, and authorities alike. How did this system of practices relate to the hegemonic discourse about the law (equality and justice)? These institutions operated under principles of obedience to rules and classification; hence, the premium was on difference, not equality. Implicit in the idea of rehabilitation were notions of “fall,” “disease,” and “vice.” How did these institutions combine ancient (religious) and modern (medical) discourses and put them at the service of perverse systems of sociability? These institutions constituted the other face of the law, a sphere where the subaltern subject had almost no possibility of contestation. How and to what extent were these institutions colonized by medico-legal power? Was this process irreversible?

As we can see, there is plenty to do in this attempt to refashion one of the oldest traditions in the historiography of Latin America. This volume, needless to say, does not represent the culmination of this effort, but only a small contribution to its flourishing. We are confident that the reader will find in the pages that follow a confirmation of the potential that this endeavor has for rewriting the social and cultural history of Latin America.

Notes

- 1 For recent collective efforts see Ricardo D. Salvatore, ed., “Criminal Justice History in Latin America,” special issue of *Crime, History & Societies*, no. 2, vol. 2 (1998); Ricardo D. Salvatore and Carlos Aguirre, eds., *The Birth of the Penitentiary in Latin America* (Austin: University of Texas Press, 1996); Carlos Aguirre and Robert Buffington, eds. *Reconstructing Criminality in Latin America* (Wilmington, Del.: Scholarly Resources, 2000); Juan Méndez, Guillermo O’Donnell, and Paulo Sérgio Pinheiro, eds., *The (Un)Rule of Law and the Underprivileged in Latin America* (Notre Dame, Ill.: University of Notre Dame Press, 1999).
- 2 For a discussion about the complexity of colonial legislation, see Víctor Tao Anzoátegui, “Ordenes normativos y prácticas socio-jurídicas: la justicia,” in *Nueva Historia de la Nación Argentina*, vol. 2 (Buenos Aires: Planeta, 1999), pp. 283–315.
- 3 On lawyers in the early independent period, see especially Víctor Uribe, “Kill All the Lawyers! Lawyers and the Independence Movement in New Granada, 1809–1820,” *The Americas* 52, no. 2 (Oct. 1995): 175–210.
- 4 Rosas, for instance, insisted that *paysanos* (country folks) learn the norms of the

- land and obey them without exceptions. See Ricardo D. Salvatore, *State Order and Subaltern Experience in Rosas's Buenos Aires Province* (Durham, N.C.: Duke University Press, forthcoming), chap. 4.
- 5 It would be interesting to study the process by which each republic granted lawyers the exclusive right to represent litigants, thus banning (at least in theory) informal legal practitioners. This process was neither automatic nor swift, and its study may yield important elements for understanding several aspects of the process of state formation.
 - 6 See, for example, Román Alzamora, *Curso de historia del derecho peruano* (Lima: Imprenta del Estado, 1876); Alberto Brenes Cordoba, *Historia del derecho* (San José, Costa Rica: Tip. Lehmann, 1913); Tomás Miguel Arganaraz, *Contribucion al estudio de la historia del derecho* (Córdoba, 1919); Toribio Esquivel Obregón, *Apuntes para la historia del derecho en México* (México: Antigua Librería Robredo, 1900); Carlos Bunge, *Historia del derecho argentino* (Buenos Aires: Facultad de derecho y ciencias sociales, 1912); and Fernando Velez, *Datos para la historia del derecho nacional* (Medellin: Imprenta del departamento, 1891).
 - 7 Spanish penologist Luis Jiménez de Asúa, for example, contributed greatly to developing this field in several Spanish American republics. Among his numerous books, see especially *La legislación penal y la práctica penitenciaria en Suramérica* (Valladolid: Talleres Tipográficos "Cuesta," 1924). See also Miguel Macedo, *Apuntes para la historia del derecho penal mexicano* (México: Editorial Cultura, 1931).
 - 8 Atilio Sivirichi, *Derecho indígena peruano* (Lima: Ediciones Kuntur, 1946).
 - 9 See, for example, José Antonio Encinas, *Contribución a una legislación tutelar indígena* (Lima: C. F. Southwell, 1918). A perceptive analysis of this trend in relation to penal legislation on Indians is Deborah Poole, "Ciencia, peligrosidad y represión en la criminología indigenista peruana," in Carlos Aguirre and Charles Walker, eds., *Bandoleros, abigeos y montoneros: Criminalidad y violencia en el Perú, siglos XVIII–XX* (Lima: Instituto de Apoyo Agrario, 1990), pp. 335–67.
 - 10 See, especially, Rafael Altamira, *Estudios sobre las fuentes de conocimiento del derecho indiano* (Lisboa: Empresa Nacional de Publicidade, 1900); Ricardo Levene, *Introducción a la historia del derecho indiano* (Buenos Aires: V. Abeledo, 1924); Rafael Altamira, *Técnica de investigación en la historia del derecho indiano* (México: J. Porrúa e Hijos, 1939); José María Ots Capdequí, *Manual de historia del derecho español en las Indias y del derecho propiamente indiano* (Buenos Aires: Editorial Losada, 1945); Rafael Altamira, *Manual de investigación de la historia del derecho indiano* (México: Instituto Panamericano de Geografía e Historia, 1948). For a recent synthesis, see Ismael Sánchez Bella, Alberto de la Hera, and Carlos Díaz Rementería, *Historia del derecho indiano* (Madrid: MAPFRE, 1992).
 - 11 For a recent overview, see Víctor Tau Anzoátegui, *Nuevos horizontes en el estudio histórico del derecho indiano* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1997).
 - 12 Stuart B. Schwartz, *Sovereignty and Society in Colonial Brazil: The High Court of*

- Bahia and Its Judges, 1609–1751* (Berkeley: University of California Press, 1973); Thomas Flory, *Judge and Jury in Imperial Brazil, 1808–1871: Social Control and Political Stability in the New State* (Austin: University of Texas Press, 1981); Woodrow Borah, *Justice by Insurance: The General Indian Court of Colonial Mexico and the Legal Aides of the Half-Real* (Berkeley: University of California Press, 1983); Colin MacLachlan, *Criminal Justice in Eighteenth-Century Mexico: A Study of the Tribunal de la Acordada* (Berkeley: University of California Press, 1974).
- 13 Eugene Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Vintage, 1976); Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1975).
- 14 William B. Taylor, *Drinking, Homicide, and Rebellion in Colonial Mexican Villages* (Stanford: Stanford University Press, 1979); Paul Vanderwood, *Disorder and Progress: Bandits, Police, and Mexican Development* (Lincoln: University of Nebraska Press, 1981; 2d ed., Wilmington, Del.: Scholarly Resources, 1992).
- 15 Here we can offer only a sample of the best scholarship in these areas. Work on peasant rebellions and revolts was surveyed in two anthologies: Steve J. Stern, ed., *Rebellion, Resistance, and Consciousness in the Andean Peasant World* (Madison: University of Wisconsin Press, 1987), and Friedrich Katz, ed., *Riot, Rebellion, and Revolution: Rural Social Conflict in Mexico* (Princeton, N.J.: Princeton University Press, 1988). On slavery and slave agency, see Rebecca Scott, *Slave Emancipation in Cuba: The Transition to Free Labor* (Princeton, N.J.: Princeton University Press, 1985); Robert Paquette, *Sugar is Made With Blood* (Middletown, Conn.: Wesleyan University Press, 1988); Joao J. Reis, *Rebelião escrava no Brasil: a história do levante dos malês, 1835* (Sao Paulo: Brasiliense, 1986). Studies on labor history include Daniel James, *Resistance and Integration: Peronism and the Argentine Working Class, 1946–1976* (New York: Cambridge University Press, 1988); Peter Winn, *Weavers of Revolution: The Yarur Workers and Chile's Road to Socialism* (New York: Oxford University Press, 1986); John French, *The Brazilian Workers' ABC: Class Conflict and Alliances in Modern São Paulo* (Chapel Hill: University of North Carolina Press, 1992). An overview in Emilia Viotti da Costa, "Experience versus Structures: New Tendencies in the History of Labor and the Working Class in Latin America: What Do We Gain? What Do We Lose?" *International Labor and Working Class History* 36 (fall 1989): 3–24. More recently, John French has offered an illuminating example of the confluence between labor and legal history. See his "Drowning in Laws but Starving (for Justice?): Brazilian Labor Law and the Workers' Quest to Realize the Imaginary," *Political Power and Social Theory* 12 (1998): 181–218.
- 16 Steve J. Stern, "The Social Significance of Judicial Institutions in an Exploitative Society: Huamanga, Peru, 1570–1640," in George Collier et al. eds., *The Inca and Aztec States, 1400–1800* (New York: Academic Press, 1982), pp. 289–320.
- 17 See Lyman Johnson, ed., *The Problem of Order in Changing Societies: Essays on Crime and Policing in Argentina and Uruguay, 1750–1940* (Albuquerque: University of

- New Mexico Press, 1990); Blanca Silvestrini, *Violencia y criminalidad en Puerto Rico, 1898–1973: apuntes para un estudio de historia social* (Río Piedras: Universidad de Puerto Rico, Editorial Universitaria, 1980); Boris Fausto, *Crime e Cotidiano: A Criminalidade em Sao Paulo (1880–1924)* (São Paulo: Ed. Brasiliense, 1984).
- 18 The bibliography on banditry in Latin America is enormous. Key works include Vanderwood, *Disorder and Progress*; Linda Lewin, “The Oligarchical Limitations of Social Banditry in Brazil: The Case of the ‘Good’ Thief Antonio Silvino,” *Past and Present* 82 (Feb. 1979): 116–46; Richard Slatta, ed., *Bandidos: The Varieties of Latin American Banditry* (New York: Greenwood, 1987); Gonzalo Sánchez and Donny Meertens, *Bandoleros, gamonales y campesinos: El caso de la violencia en Colombia* (Bogotá: Ancora, 1984); and Aguirre and Walker, eds. *Bandoleros, abigeos y montoneros*. A suggestive reappraisal of this issue is Gilbert Joseph, “On the Trail of Latin American Bandits: A Reexamination of Peasant Resistance,” *Latin American Research Review* 25, no. 3 (1990): 7–53. See also the ensuing debate in *Latin American Research Review* 26/1 (1991).
 - 19 E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon, 1975), Peter Linebaugh, *The London Hanged: Crime and Civil Society in Eighteenth-Century London* (New York: Cambridge University Press, 1992); Genovese, *Roll, Jordan, Roll*; Douglas Hay, “Property, Authority, and the Criminal Law,” in Hay et al. *Albion’s Fatal Tree*, pp. 17–63.
 - 20 By *hegemony* the Italian Marxist thinker Antonio Gramsci meant a system of domination in which the ruling groups managed to gain the seemingly voluntary acquiescence of the subordinated. See the introduction to Chantal Mouffe, *Gramsci and Marxist Theory* (London: Routledge & Kegan Paul, 1979).
 - 21 David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution* (New York: Pantheon, 1978); Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression* (New York: Cambridge University Press, 1984); Pieter Spierenburg, *The Prison Experience: Disciplinary Institutions and Their Inmates in Early Modern Europe* (New Brunswick, N.J.: Rutgers University Press, 1991); Patricia O’Brien, *The Promise of Punishment: Prisons in Nineteenth-Century France* (Princeton, N.J.: Princeton University Press, 1980); David Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot: Gower, 1985); Peter Linebaugh, *The London Hanged: Crime and Society in the Eighteenth Century* (London: Penguin, 1991).
 - 22 On this, see especially David Garland, *Punishment and Modern Society* (Chicago: University of Chicago Press, 1990).
 - 23 For a valuable effort at identifying Foucault’s relevance for historians, see Randall McGowen, “Power and Humanity, or Foucault among Historians,” in Colin Jones and Roy Porter, eds., *Reassessing Foucault: Power, Medicine, and the Body* (London and New York: Routledge, 1994), pp. 91–112.
 - 24 These exceptions include Sean Wilentz, *Chants Democratic: New York City and the*

- Rise of the American Working Class, 1788–1850* (New York: Oxford University Press, 1984); Patrick Joyce, *Visions of the People: Industrial England and the Question of Class, 1840–1914* (Cambridge: Cambridge University Press, 1990); Keith M. Baker, *Inventing the French Revolution* (Cambridge: Cambridge University Press, 1990); Lynn Hunt, *The Family Romance of the French Revolution* (London: Routledge, 1992); and Robert Darnton, *The Great Cat Massacre* (London: Allen Lane, 1984).
- 25 See the special issue of *Hispanic American Historical Review* devoted to discussing Mexico's "new" cultural history (vol. 79, No. 2, May 1999).
- 26 Eric Van Young, "The New Cultural History Comes to Old Mexico," *Hispanic American Historical Review* 79, no. 2 (1999): 211–247.
- 27 See, for example, Florencia Mallon, *Peasant and Nation: The Making of Post-Colonial Mexico and Peru* (Berkeley: University of California Press, 1995); Peter Guardino, *Peasants, Politics, and the Formation of Mexico's National State: Guerrero, 1800–1857* (Stanford: Stanford University Press, 1996); Charles Walker, *Smoldering Ashes: Cuzco and the Creation of Republican Peru, 1780–1840* (Durham: Duke University Press, 1999); Gilbert Joseph and Daniel Nugent, eds., *Everyday Forms of State Formation: Revolution and the Negotiation of Rule in Modern Mexico* (Durham, N.C.: Duke University Press, 1994); Salvatore, *The Wandering Working Class*.
- 28 See, for example, Eduardo Zimmermann, "El poder judicial, la construcción del estado, y el federalismo: Argentina, 1860–1880," in Eduardo Posada-Carbó, ed., *In Search of a New Order: Essays on the Politics and Society of Nineteenth-Century Latin America* (London: Institute of Latin American Studies, 1998), pp. 131–52.
- 29 See the important collection edited by Mindie Lazarus-Black and Susan F. Hirsch, *Contested States: Law, Hegemony and Resistance* (New York: Routledge, 1994).
- 30 Sally E. Merry, "Courts as Performances: Domestic Violence Hearings in a Hawai'i Family Court," and Susan F. Hirsch, "Kadhi's Courts as Complex Sites of Resistance: The State, Islam, and Gender in Postcolonial Kenya," both in Lazarus-Black and Hirsch, eds., *Contested States*.
- 31 For a review of these studies, see Sally E. Merry, "Law and Colonialism," *Law and Society Review* 25, no. 4 (1991): 889–922. See also Kristin Mann and Richard Roberts, eds., *Law in Colonial Africa* (Portsmouth, N.H.: Heinemann, 1991).
- 32 On the usefulness of subaltern studies for Latin American historiography, see especially Florencia Mallon, "The Promise and Dilemma of Subaltern Studies: Perspectives from Latin American History," *American Historical Review* 99, no. 5 (1994): 1491–1515. See also "Subaltern Studies in the Americas," Special Issue of *Dispositio/n* XIX, no. 46 (1994), and John Beverley, *Subalternity and Representation: Arguments in Cultural Theory* (Durham, N.C.: Duke University Press, 1999).
- 33 See, for an example of this strategy, Ricardo Salvatore, "Stories of Proletarianization in Rural Argentina, 1820–1860," *Dispositio/n* XIX, no. 46 (1994): 197–216.
- 34 Margaret Rago, *Do cabaré ao lar: A utopia da cidade disciplinar* (Rio de Janeiro: Paz e Terra, 1987); Luis Carlos Soares, *Prostitution in Nineteenth-Century Rio de Janeiro* (London: Institute of Latin American Studies, 1988); Donna J. Guy, *Sex and*

- Danger in Buenos Aires* (Lincoln: University of Nebraska Press, 1991); Sueann Caulfield, "Getting Into Trouble: Dishonest Women, Modern Girls, and Women-Men in the Conceptual Language of *vida policial*, 1925–1927," in Barbara Laslett et al., eds., *History and Theory: Feminist Research, Debates, Contestations* (Chicago: University of Chicago Press, 1997), pp. 328–58; Sueann Caulfield and Martha de Abreu Esteves, "Fifty Years of Virginity in Rio de Janeiro: Sexual Politics and Gender Roles in Juridical and Popular Discourse, 1890–1940," *Luso-Brazilian Review* 30, no. 1 (summer 1993): 47–73; Magali Engel, *Meretrizes e doutores: saber médico e prostituição no Rio de Janeiro, 1840–1890* (São Paulo: Editora Brasiliense, 1989); Margareth Rago, *Os prazeres da noite: prostituição e códigos da sexualidade feminina em São Paulo, 1890–1930* (Rio de Janeiro: Paz e Terra, 1991).
- 35 See, for example, Alberto Flores Galindo, *Buscando un Inca: Identidad y utopía en los Andes*, 4th edition (Lima: Editorial Horizonte, 1988); João José Reis, *A morte é uma festa: ritos fúnebres e revolta popular no Brasil do século XIX* (São Paulo: Companhia das Letras, 1991).
- 36 Joanne Rappaport, *The Politics of Memory: Native Historical Interpretation in the Colombian Andes* (New York: Cambridge University Press, 1990).
- 37 Laura Nader, ed., *Law in Culture and Society* (Chicago: Aldine, 1969. Reprinted, Berkeley: University of California Press, 1997).
- 38 Charles Cutter, *The Legal Culture of Northern New Spain, 1700–1810* (Albuquerque: University of New Mexico Press, 1995); Susan Kellogg, *Law and the Transformation of Aztec Culture, 1500–1700* (Norman: University of Oklahoma Press, 1995).
- 39 In the words of anthropologist John Comaroff, "the law may serve those who contest authority as well as those who wield it." Comaroff, "Foreword," in Lazarus-Black and Hirsch, eds. *Contested States*, pp. ix–xiii.
- 40 This is precisely the kind of exploration that Allen Wells and Gilbert Joseph attempted in their monograph, *Summer of Discontent, Seasons of Upheaval: Elite Politics and Rural Insurgency in Yucatán, 1876–1915* (Stanford, Calif.: Stanford University Press, 1996).
- 41 This perspective challenges, in many respects, the view of the law as just an instrument of social control. Certain interpretations grounded in both Marxist and Foucauldian theories continue to view law as, in the first case, a weapon of class domination and, in the second, as one of the most important devices in the creation of modern "disciplinary" societies. Though we will not deny that there is ample support for these views, they nonetheless offer a sort of reductionist rendition of the role of law in modern societies. For an insightful discussion of Marxist views on law, see Philip Corrigan and Derek Sayer, "How the Law Rules: Variations on Some Themes in Karl Marx," in Bob Fryer et al., eds., *Law, State and Society* (London: Croom Helm, 1981), pp. 21–53. An illuminating discussion of Foucault's views on power, government, and the law is Mitchell Dean, *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (New York: Routledge, 1994). Needless to say, the literature on both issues is overwhelming.

- 42 O'Donnell further explains: "By 'fairly' applied I mean that the administrative application or judicial adjudication of legal rules is consistent across equivalent cases, is made without taking into consideration the class, status, or power differentials of the participants in such processes, and applies procedures that are pre-established and knowable." Guillermo O'Donnell, "Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion," in Méndez et al., eds., *The (Un)Rule of Law*, pp. 307–308.
- 43 Jeremy Adelman and Miguel Angel Centeno, "Between Liberalism and Neo-Liberalism: Law's Dilemma in Latin America" (unpublished manuscript), p. 12.
- 44 It is worth emphasizing, though, that a view like this will help overcome notions that always attribute to the victims of legal arbitrariness a sort of stubborn stupidity, for they keep believing that justice will eventually come.
- 45 There is a critical difference between the amount and nature of power held, for instance, by a magistrate in nineteenth-century Lima or Mexico City, and a local justice of the peace in a remote village in the Andes. Quite different rules would apply in each case. As Joanna Drzewieniecki has suggested for the case of judges in Andean Peruvian villages, "even though they were quite obviously representatives of the system of domination and part of their legitimacy rested on the fact that they had power, judges still had to please peasants to some extent if peasants were to continue to provide them with a source of income and if everyday levels of tension were to be kept within acceptable levels." Joanna Drzewieniecki, "Indigenous Peoples, Law, and Politics in Peru" (paper delivered at the LASA 1995 conference, Washington, D.C.).
- 46 See the work by Víctor Uribe and Eduardo Zimmerman, previously cited. See also Fernando de Trazegnies, *La idea de derecho en el Perú republicano del siglo XIX* (Lima: Pontificia Universidad Católica del Perú, 1980).
- 47 As Douglas Hay suggests, we need to do research not only on the workings of the criminal justice system but on the whole machinery of justice, with its various overlapping layers and jurisdictions. It is the very complexity of this multilayered system that generates the ambivalence, the contradictions, and sometimes the bureaucratic cruelty that real actors encounter in their interactions with legal authorities.
- 48 Joseph's comment came during the discussions at the Yale conference. A fascinating treatment of this issue for China is Melissa Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China* (Stanford, Calif.: Stanford University Press, 1998). See also Carlos Aguirre, "Tinterillos and Leguleyos: Subaltern Subjects and Legal Intermediaries in Modern Peru" (paper presented at the LASA 2000 congress, Miami).
- 49 Here, again, the figure of the tinterillo as a key translator of legal lexicon for subaltern subjects takes on crucial relevance.
- 50 Díaz's assertion that Venezuelan middle-class women had incorporated by the mid-nineteenth century the rhetoric of liberalism and were arguing for rights in terms of

ciudadanía (citizenship) should challenge social historians of the period. For if this pattern of behavior and discourse were generalized, it would mean that women in nineteenth-century Latin America were a bit ahead of contemporary advocates for women's rights in Europe and the United States, actually claiming citizenship rights in court.

- 51 See Ricardo D. Salvatore, "Positivist Criminology and the Emergence of a Medico-Legal State in Argentina," in Peter Becker and Richard Wetzell, eds. *The Criminal and His Scientists* (Cambridge: Cambridge University Press, forthcoming).
- 52 An exemplary study in this regard is Marie-Christine Leps's examination of the mutual borrowing of images and themes between criminology, literature, and journalism in nineteenth-century Europe, *Apprehending the Criminal: The Production of Deviance in Nineteenth-Century Discourse* (Durham, N.C.: Duke University Press, 1992). For a study of literary representations of Argentine criminals, see Josefina Ludmer, *El cuerpo del delito: un manual* (Buenos Aires: Perfil Libros, 1999).
- 53 See, for instance, Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Oxford: Blackwell, 1994).