Chapter 2
Introductory Theoretical Remarks on the Alleged Problematic Nature of the Interaction of History and Law

> *He who loves practice without theory is like the sailor who boards ship without a rudder and compass and never knows where he may cast.*
>
> Leonardo Da Vinci

Abstract This first part of the book is of a theoretical nature. The first chapters introduce the concept of *Clio's Modern Paradox. Clio's Modern Paradox* explains why history and historians, from a theoretical point of view, are conceived as controversial in the courtroom. By discussing certain issues from theoretical history in an interdisciplinary context of law and history, I lay the theoretical groundwork in which I will discuss forensic history.

In the first part of this book I discuss the theoretical issues that have burdened historians and history in the courtroom. Litigation often encompasses more than only the historical facts and events relevant to the case addressed in the courtroom. Social credibility and legitimacy of the historical craft influences how the testimony of the expert historian is valued in court and determines the impact it has on the judge or the jury. As American historian Richard Golsan points out during his discussion of two French Vichy-related trials wherein historians were involved as expert witnesses; "History itself, with a capital "H", was, effectively, put on trial."[1] Why is it that historians serving as expert witnesses in court, not only have to defend their own research and credentials, but also the validity of their discipline? Why have lawyers often succeeded in convincing the judge or the jury that history and historians are not bringing anything valuable to the courtroom to aid the trier of fact?

I begin this first part of the book with an inquiry into the reasons why history is vulnerable to theoretical and epistemological attacks on its constitution as an autonomous field of knowledge. In order to research this, I present a minor overview

[1] Golsan, Richard. 2000. *Memory and justice on trial. The Papon affair*, 13. New York: Routledge.

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of theoretical history[2] since the nineteenth century in which I discuss three major developments which have contributed to the theoretical weakness of historians and their research in court: (1) The first reason is the unattainable but still influential traditional interpretation of Ranke's adage on objectivity.[3] (2) Secondly, I argue that theoretical history has failed to rebut postmodern relativism.[4] (3) The third and final reason is my claim that the historical profession suffers from a lack of theoretical conceptualization.[5] When historians are questioned about the epistemological basis of their profession in court, lawyers are merely repeating the general sentiment in society towards the historical craft, namely that there is little social appreciation for the historical discipline.[6] I claim that this is rather paradoxical, since our society is very concerned with the past.[7] Intriguingly, the past itself is very popular, whereas the historical discipline and historians themselves are not popular. This negative relation between the past and the historical discipline is what I call *Clio's Modern Paradox*.

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[2]Dutch historian Jan Romein described "theoretical history" as follows: "theoretical history aims at bridging the gap that divides the cautiously objective technique employed to ascertain the isolated facts of history, and the arbitrarily subjective method by which these facts are assembled into a picture of the past." Romein, Jan. 1948. Theoretical History. *Journal of the History of Ideas* 9, 54. I will define "theoretical history" following Romein, adding that "theoretical history" also discusses how historians *should* conduct their research. Another source for my definition of historical theory is the Dutch theoretical historian Chris Lorenz who defined "theory of history" as follows: "Theory of history consists of 'the philosophical examination of all aspects of our descriptions, beliefs, and knowledge of the past' and is both descriptive and normative." See Lorenz, Chris. 2011. History and Theory. In *The Oxford History of Historical Writing, Vol. 5*, ed. Daniel Woolf and Axel Schneider, 13–35. Oxford: Oxford University Press, 28. I have defined "theoretical history" in this book as follows: "The theories used by historians to discuss how their craft is functioning and how it should function." All other definitions described in this introduction are predominantly drawn from American historiography. I allow this Americanization of my theoretical discussion because of the fact that litigation-driven history is a predominantly American matter.

[3]The traditional interpretation of Ranke's adage is consequentially described as "positivist objectivity." In this book, "positivist objectivity" is defined as: "The conviction that facts can be presented as they have actually happened in the past, without any interference of the historian or his methods." I will argue in favour of an intersubjective objectivity, which I interpret as follows: "Objectivity of an intersubjective nature demands that historians publish their research in order to let their peers determine whether the historian has been objective or not. Objectivity is therefore essentially a shared idea between fellow historians on what professional historical research is comprised of."

[4]In this book I define "postmodern relativism" as follows: "Those postmodern historical philosophical assumptions that deny any relation between fact and historical narrative."

[5]Under "theoretical conceptualization" I understand: "The definition in clear terms of assumptions and analytical tools that are common in historical practice, such as epistemological concepts, concepts on objectivity, causality, narrative, temporality, spatiality, and ethics, shared by the majority of the historical profession."

[6]I define "the historical discipline" as: "The professional research of history that is practiced and taught in predominantly academic but also public environments."

[7]"The past" is understood in this book as follows: "The past is a much broader term than history; "the past" does not only encompass history but also memory, remembrance, and heritage."

Law and all legal institutions have an increasingly important role to play in our democratic and litigious society as well as in our daily lives.[8] Judge Posner wrote in his introduction of *Law and Literature* that: "Law so permeates American life that all of us should take an interest in it."[9] Social norms and other non-legal regulation have been gradually displaced by legal regulation.[10] Laws are based on the social norms they replace, most of which are of a historical nature.[11] How has the study of law convinced the general public that law can generate truthful knowledge and therefore is at liberty to judge them? Which developments have contributed to the fact that law has become so important in society, while the historical discipline has slowly disappeared into a peripheral social role? This dichotomy is very interesting, since history and law fundamentally share the same object of study: human conduct and the irregularity bound to it.[12] The relationship between law and history has, moreover, always been a close one. The Italian historian Carlo Ginzburg called the relationship of history and law intricate and yet ambiguous.[13] American historian Richard Wilson wrote that "[l]aw and history are inextricably linked and share similar methods and aims."[14] If both studies are so alike, why are expert historians treated with such hostility in the courtroom by the legal profession. In order to find the answer(s) to this question, I retrace the developments that shaped Clio's Modern Paradox.

Theory has not been central to studies of historians as expert witnesses in court. Most literature on the subject does not offer a theoretical frame on the issues that arise with historians serving as experts. Ignorance has been the foremost reason for the opposition with which history is met by the legal profession in court. In order to diminish these prejudices amongst historians and lawyers alike, I draw from an interdisciplinary body of works from noted historians and legal scholars to offer a heterogeneous overview on the topic. In general, I use the works written by the famous Italian historian Carlo Ginzburg, who has published on the relationship between law and history in: *History, Rhetoric, and Proof* and *The Judge and the*

[8]I define "the law" in this book as: "A body of legal rules and standards that have been the result of research [the study of law] and practice [legal doctrine and advocacy] with the aim to regulate social interaction as best as possible."

[9]Posner, Richard. 2009. *Law and Literature*. Cambridge: Harvard University Press, XVI.

[10]Posner, Eric. 2002. *Law and Social Norms.* Cambridge: Harvard University Press, 8.

[11]Posner, as n. 10, 8.

[12]Generally, law is equated with advocacy but law is also legislation and legal doctrine. Legislators, judges, and legal scholars try to study human conduct in order to regulate and maintain ways of social interaction which allow the greatest happiness for the greatest number of people.

[13]Ginzburg, Carlo. 1999. *The Judge and the Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice.* Trans. A. Shugaar. London: Verso, 4.

[14]Wilson, Richard. 2005. Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia. *Human Rights Quarterly* 27, 917.

Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice.[15] Ginzburg's arguments are put to work to counter, on the one hand the positivist idea of history and history as a science,[16] and on the other hand to defend historical theory against postmodern relativism. To discuss law, I focus on the works of the American Federal Judge and noted legal scholar Richard Posner. Posner is an international authority on the theory of law and the most cited legal scholar of the twentieth century. In this theoretical part of my work, I have incorporated Posner's *How Judges Think* and *Law and Literature.*[17] These core works are reinforced with articles and books written by a broad array of theoretical historians and legal scholars. Moreover, I give special attention to public history and historians and lawyers who have studied or even participated in expert witnessing or criminal tribunals.

My research aims to be interdisciplinary by examining research from the historical profession as well as from the study of law. By discussing perspectives of legal scholars and historians on the same subjects, I can compare the issues brought forward by the two disciplines when they meet in court, thereby creating a more nuanced picture of the controversial practice of expert witnessing. I analyse the developments in theoretical history which have made the historical discipline so vulnerable for epistemological attacks in court. By challenging the generalizations that rule the debate amongst historians and legal scholars on the incompatibility of history and law, I will be able to propose theorized answers to a polemic debate. This theoretical part aims to be generally applicable to all cases I discuss in the rest of this work, which is why I refrain from encumbering this theoretical part with references to specific cases of expert witnessing. Casuistry will mark parts II and III of the book. This theoretical introduction will help frame the general setting of the historian's entrance into the courtroom on a meta-level.

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[15]Ginzburg, Carlo. 1999. *History, Rhetoric, and Proof.* Hanover: University Press of New England. & Ginzburg, as n. 13.

[16]I define the contemporary dominant idea of "science" in this book as follows: "Intellectual disciplines that research "natural" objects through testable and objective [neutral, impartial] methods or general laws which allegedly produce absolute and usable facts."

[17]Posner, Richard. 2008. *How Judges Think.* Cambridge: Harvard University Press. & Posner, as n. 9.

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