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PHILOSOPHICAL INQUIRY AND HISTORICAL PRACTICE

*John Henry Schlegel**

I really don't belong here, and somewhere deep down I knew it when I agreed to comment on Brian's Article. I did so because I think a paper of his from some years back that identified American Legal Realism with literary naturalism remains the smartest thing said about the topic in a very long time.¹ And reading his paper for our event, I was struck by the smartness of his rendition of Hart's positivism so as to make explicit that "the rule of recognition consists of the criteria that *officials actually apply in deciding what the law is* and which *officials treat as obligatory* rightly or wrongly."² I can't possibly know whether Brian's doing so is a singular contribution to the discussion of positivism, for I have spent the greater part of the last forty years of my life doing history and a few other things, not reading philosophy. Thus, I wish to speak for the rest of my time about why historians, and I carefully add, "like me," have a great difficulty with both philosophers and theory.

Back in college, I spent exactly one day in the History of Philosophy course. The first class was a lecture about the teachings of some of the pre-Socratics that never connected their work to their living in a group of cities in Mediterranean Europe. I dropped the course that afternoon. I had a similar, though somewhat more ironically funny, experience in 1973, the first semester after I came to Buffalo. At that time, we had a well-known Marxist legal philosopher named Mitchell Franklin on the faculty. He was giving a course in the philosophy of law. I started attending his class. As a good historical materialist, Mitchell began each lecture by situating each author he discussed in his class position. Thereafter, Mitchell did absolutely nothing with this bit of information. At about Kant I gave up. And then there was the time I annoyed a group of

* Professor of Law and Floyd H. and Hilda L. Hurst Faculty Scholar, University at Buffalo Law School/State University of New York. I wish to thank Charles and Dan for organizing the conference, the *Virginia Law Review* for publishing the papers presented at it, and Charles, Mark, and Fred for reading and commenting on my draft of this piece. Any outrage is my own special contribution.

¹ Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 *Tex. L. Rev.* 267, 314–15 (1997).

² Brian Leiter, Marx, Law, Ideology, Legal Positivism, 101 *Va. L. Rev.* 1179, 1188 (2015).

intellectual historians when I stated that intellectual history is about the history of intellectuals.

Historians, at least my kind of historians, like what Clifford Geertz called "thick description."³ We don't really have theories of history, except in that wretched garb of theories of historical method. The odd thing is that Marx, who it seems to me was primarily a moral philosopher whose work *was* informed by a theory of history, seemed to have liked thick description, at least sometimes. He or Engels or both of them knew a hell of a lot about the Industrial Revolution in England. The great English Marxist historian E.P. Thompson loved thick description too. Marx also liked what the Annales historians called *la longue durée*. Marx's *durée* was even longer than Braudel's four hundred years, for Marx starts his Theory of History back with Primitive Communism at about the time when fire was discovered. This theory then goes through Slave Society, Feudalism, Capitalism, Socialism, and finally Communism again.

As best as I can remember, false consciousness doesn't appear until the advent of Capitalism, where Brian takes off. But my memory is dubious, and in any case, after I read Alvin Gouldner's *The Two Marxisms*, I decided that to really understand Marx, I would have to spend the next ten or so years reading him to see whether Gouldner was right.⁴ I wasn't going to do that, and so I pretty much stopped paying attention to the scholarship on Marx. So, it was also a bit of a surprise to see false consciousness reappear in my life after maybe twenty-five years, for the concept then seemed to me only applicable to the bourgeoisie, not to the working class, and so really needed to be jettisoned by any serious social theorist.

Historians (I'm tired now and so am giving up "like me") have explanations or understandings or interpretations, rather than theories. They once had causes, but causation has fallen a bit out of style. For historians, things relate, cohere, suggest, lead to; they expose, clarify, elucidate, inform, reveal, illustrate. Buried by these words is a loss that our language tries to ignore. Historians really *know* a lot of things. One should never be allowed to forget this fact. But for us the difficulty

³ Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *The Interpretation of Cultures* 3, 6-7 (1973).

⁴ Alvin W. Gouldner, *The Two Marxisms: Contradictions and Anomalies in the Development of Theory* 8-16 (1980).

comes, and so the serious work begins, when one leaves the archives or other sources and so it is time to say what those things mean.

This question of meaning is the heart of historical practice, much as it is the heart of analytic philosophy, so holding this conference is not a mistake. Still, analytic philosophers (the qualifier “analytic” almost seems superfluous these days) seem to me not to like thick description. They know what things, mostly words or concepts, mean. They are just not very precise about exactly to what activities in the world these words or concepts might apply. And, unlike historians (and lawyers, I might add), they do not much like analogy as a form of understanding. The point of the philosophical activity seems to be to liberate “is” from “like” or “as.”

Now it would be wonderful at this point were I to be able to explain what I have said with an example from Marx’s life in England. However, I can’t do that except comfortably to say that I am not surprised that Marx understood law more like Hart than like Dworkin. So saying is, however, a long way from comfortably saying that I am reasonably sure that Marx understood “law” like Hart and not like Dworkin. For an historian, the space between “not surprised” and “reasonably sure” is a really important space.

Consider: I’m an historian who studies the Twentieth Century, not an historian who studies the Nineteenth Century, and an historian of America, not of England. When I need to say something about the Nineteenth Century, I am very worried that in this strange land I don’t really understand what is going on. Earlier than that, I am more seriously worried that I cannot tell whether I am being told about colonials or aliens. And when it comes to England, all I know is purely potted history. What I have just told you about myself is what historians mean by the importance of deep contextual understanding. “You gotta know the territory,” as it was said in *The Music Man*.⁵ In Nineteenth-Century Iowa, I’m a bit foggy. In Eighteenth-Century Massachusetts, I am downright scared of the natives. In Sixteenth-Century England, I might well buy a bridge that you have for sale.

Now, you can be sure that I would read more philosophy if Hart had asked the question: “What did ‘law’ mean among barristers in 1880s London?” But I rather think that were he to have done so, he would not have been doing philosophy as he or many other people at Oxford in the

⁵ *The Music Man* (Warner Brothers Entertainment 1962).

1950s or today would have understood it. And that's OK. After all, I'm not King of the Universe with the accompanying power of telling other people what they must do in their professions. Since I'm not the person who has to do the work, it is best that I should shut up.

What, then, about my somewhat incendiary statement that intellectual history is the history of intellectuals? Well, I still consider myself an intellectual historian, even though I have spent the greater part of the past fifteen years working on the history of economic change in America. The pile of "stuff," a technical historian's term, for my return to American Legal Realism still sits longingly in my office. Perhaps that counts. But I feel that I paid at the office with my book about American Legal Realism by showing what it was like for the group that I still call "my people" to participate in the early empirical research that they repeatedly said was important for law and law study.⁶ So, I think that I may talk as I do about intellectual history and remain true to my previous stricture about not telling people what to do if one is unwilling to do it.

Still, all I am saying when I say that intellectual history is the history of intellectuals is that more or less formal thought has a context beyond that of the things said by those other people who participate in the activity of producing more or less formal thought. Meaning is often, though not always, deeply contextual. Part of the context is how a thinker earns a living, what else the thinker does each day, whom the thinker talks with and what they talk about. Then there is home, family, parents, neighbors, lovers, siblings, local politics, national politics, academic politics (that most local of politics), and last, but not least, the great knapsack of the rapidly accumulating past that any person first carries, but by my age drags, along each day.

All of this is not a bit of materialist determinism. It is possible that, for some thinkers, none of the detritus of everyday life matters. However, my guess is that such is not true for most thinkers and, at the least, the historian ought to feel obliged to negate the relevance of such "stuff"—again, that technical term. Even for great thinkers, context matters. It is quite unlikely that had Kant been transported to Stuart England he would have still written the *Critiques*. It is just as implausible that he would have written *Leviathan*. The same could surely be said had Hobbes been magically plunked down as first a tutor, then a professor, in Königsberg.

⁶ John Henry Schlegel, *American Legal Realism and Empirical Social Science* 1–5 (1995).

Thus, it seems to me that there is something irreducibly personal to the intellect and irreducibly contextual as well, not the least of which is the initially slow and later galloping incorporation of philosophy into what first became the modern university of von Humboldt's dream and, only second, the contemporary university of our nightmare. Consider this list of scholars: Hobbes, Locke, Blackstone, Bentham, Austin, Hohfeld, Hart, Dworkin. Over four hundred years, this progression illustrates a shift from independent gentlemen philosophers to employees that accompanies a shift in the audience from other gentlemen to young lawyers and eventually to other academics. At the same time, the university shifts from having but one professor of each subject to having a few in a department and finally to many in departments that are parts of schools and, accompanying this final shift, to increasingly intrusive action of the bureaucratic administration of both schools and universities. And the accompanying shift from the gifted, far-ranging amateur to an academic professional who tosses the amateurs out of the field, and then to academics who cannot even talk about the field, but only about increasingly specialized (by topic and/or method) portions of the field, screams loudly too. Hobbes and Dworkin are both intellectuals in the most abstract of senses.

With these words I quite intentionally offer a nod in the direction of the absent Nicola Lacey for her magnificent work on Hart.⁷ She set a standard that few of us will ever meet, if only because we will never have the resources with which she was blessed. Still, if one is doing history, coming to understand the meaning of a text at the time and place of its composition, or derivatively at some later time and place, which is what she tried to do, is what intellectual historians need to strive for, though of course seldom reach.

To conclude, I wish to offer a tiny example of what I am talking about from the work of an utterly trivial thinker: me. I developed asthma by the time I was eight years old. In the Fifties, asthma treatment consisted of the instruction not to exercise and an unbelievably foul-tasting drug to deal with serious episodes. Unable to go out and play, I read a lot, and by the time I was fourteen I read two Chicago newspapers each week-day. Thus, my knowledge of graft and corruption came fairly soon after the end of mother's milk. Based on my reading, I understood that law was about lots of things other than the formal justification of norms. The

⁷ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* 3–6 (2004).

result was that I was completely bewildered when I got to law school and still really can't understand why we do what we do every day in law school classrooms. Anyone who has wasted their time reading my stuff about legal education would find it easier to understand what planet I am from were that person to know about my Chicago upbringing, though, of course, none of this would explain my deep attachment to existentialism, something I leave you to ponder about.