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## Tuesday Afternoons with Schlegel

BARRY CUSHMAN†

I confess that I'm not at all certain why I was invited to this distinguished gathering. I suppose that it's because Schlegel and I are friends; but that just pushes the mystery back a remove. Because as Jack surely recognizes, it is not at all obvious that (or why) we should be friends. We are from different generations—Schlegel is my senior by nearly twenty years. I don't imagine that anyone would suggest that our personal styles bear a strong resemblance to one another. And our approaches to scholarship are almost antagonistic. Jack's message accompanying the invitation to this conference strongly discouraged contributions focused on legal doctrine. For better or worse, that is the topic about which I have been thinking and writing for much of the past three decades. When I first introduced Schlegel to my wife at the Toronto meeting of the American Society for Legal History in 1999, he smiled broadly, pointed at me, and told her, "He does the best of the kind of work that I hate." The closest he has ever come to complimenting my approach is to say, "I don't believe in your internalism, but I understand it." But the tone of reproach was unmistakable. As he said on another occasion, writing "doctrinal history" was a "misplaced" use of my energies. (In fairness, I must concede that he actually has said nicer things, but I don't want to damage his cred by quoting them here).

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And yet we are friends, and have been for many years. I have been sending Jack my reprints for more than a quarter century, and he always faithfully reads them. I know this because a few weeks after I have sent them out, I always receive a telephone call that my call screening device tells me is from the 716 area code, and since Fred moved to Boston some years ago, there is only one person who calls me from there. So I make myself comfortable, pick up the receiver and say “hello,” after which I hear the draw of a long breath, and then a familiar voice intoning in the vocative case, “Mr. Cushman.” Schlegel has called to talk about my articles. Not to converse about them, mind you, but to talk about them. At length. (Having a telephone conversation with Jack can be a bit like being Saul Bellow’s character Chick in *Ravelstein*.) He has given the articles a close read and a good deal of consideration. And so for the next hour or so I am treated to a thoughtful, constructive, sing-songy analysis of my scholarship that ranges from bass to mezzo-soprano, and spans the dynamic spectrum from a mumble to a shout. Along the journey of this discourse there are a few digressions, some of which I am able to follow. He almost invariably says something with which I disagree, and some things that I don’t fully understand. But I never interrupt to say so, because I don’t want to seem ungrateful for the effort that he has made, nor do I want to disrupt the singular virtuoso flow of his commentary.

Jack also often sends me his drafts for comments. Some of my remarks are more helpful to him than are others, and he never hesitates to tell me so, with the utmost candor. One of the things that I most admire about him is that, as a scholar at least, he is not prideful. I recall one occasion not long ago on which he sent me an early draft of a paper entitled, “Sez Who?: Critical Legal History Without a Privileged Position,” which appears in the *Oxford Handbook of Legal History* edited by Markus Dubber and Chris Tomlins. The piece begins by relating an anecdote: “Back around the turn of this century when Chris Tomlins was

working on the British colonization of North America, I happened to read a draft of some part of this wonderful work dealing with the language used by and about the colonizers. After reading Chris' critique all of the talk about helping the savages by bringing them Christianity and denigrating them for the uncivilized behavior, I e-mailed him with a question something like, 'Can you name a conquering civilization that lamented its destruction, and so colonization, of a more advanced, more noble civilization?' Trick question, I suppose. He shot back a not quite so brusque version of, 'No.' To which I immediately replied to the effect of, 'If such behavior is so ordinary, then why are you being so hard on this group of colonizers?'"

With his typical iconoclasm, Jack then proceeds, rather ironically it seemed to me, to offer extended criticism of Critical Legal Studies scholars for being insufficiently self-reflective about the assumptions that grounded their critiques of liberal legalism. After reading Jack's draft one evening, I sent him an email consisting of a single question: "Can you name a successful critical reform movement that devoted a lot of effort to analyzing and critiquing its own animating foundational assumptions?" This was admittedly a wiseacre response, and a lesser person might have taken offense. Within fifteen minutes he shot back a single-line reply: "I love you so much!" Shortly thereafter he sent another message addressing the question, and he revised the paper both to include the answer ("No") and to offer reasons for encouraging his fellow Critical Legal Scholars to mend their ways. But it was the initial response to my question that revealed so much about the man's character.

For reasons that are not entirely clear to me, I have a number of friends who send me various humorous stories, mostly about the endlessly entertaining things that our fellow humans do. Occasionally I pass these stories along to Schlegel. He responds almost invariably, typically quickly, and usually laconically. His reactions have the character of little reviews. He often remarks on how "strange," "bizarre,"

“odd,” “weird,” “amazing,” “astonishing,” “peculiar,” “dumbfounding,” or “unbelievable” something is. Schlegel finds things “wonderfully ridiculous,” “charmingly nutty,” “dumbfoundingly silly,” “creative, but dumb,” “nutso,” and “dumber than usual for the judiciary.” He explores alternative explanations for behavior, such as, “stupidity is another possibility.” He displays intellectual curiosity, asking questions like, “How dumb can anyone be?” And occasionally he offers such world-weary observations as: “humans are so strange”; “this would be unbelievable even here in Buffalo”; “these people are nuts”; “it’s nice to know the Brits can screw up road work as well as we can”; “it is truly sad to be in a circumstance where we are able to find this funny”; “these people are so tiresome”; “the internet is going to wipe out the profession of joke writing”; “shooting fish in a barrel is made easier when the fish call attention to themselves”; “sounds like these guys have been using consultants from Chicago where no show jobs were an art form”; “honesty is in such short supply”; “in its own way this is the most frightening thing I have read in years”; “yeah, it’s silly, but it should have happened 50 years ago”; “it is Texas, after all”; “the real problem with this is that it is not from the Onion”; “this is really too much”; “these things always bewilder me”; and “this is both absurd and not very surprising.”

Most of Schlegel’s reviews are rather generous. He almost always expresses gratitude for stories he enjoys, with exclamations like, “thanks for a morning chuckle,” “thank you for today’s belly laugh,” and “such laugh out loud joy – thanks.” This is especially the case when the humor arrives at an auspicious time. I get a sense of how Schlegel’s day is going when I receive responses like, “just what I needed,” “very tired – humor much appreciated,” “needed a good belly laugh today,” or “hard day -- thanks for the laugh -- As Dogbert says, ‘I love stories with lots of idiots.’” He frequently remarks on how “charming,” “special,” “wonderful,” “droll,” “lovely,” “funny,” “wondrous,” “hilarious,” “perfect,” or

“marvelous” he finds an item, and how much he (and sometimes Joanne) likes or even loves it. He favors me with responses such as “that’s a winner,” “you really hit the target today,” or “I am really having a hard time stopping laughing over this one.” He offers commentary such as, “how wonderfully Middle America,” “unusually droll even for England,” and “irony for breakfast – how delicious.” And I can discern the point at which I have entered my friend’s day from responses such as “nice to wake up to” and “how kind of you to finish my day this way.”

As if to remind me that his praise does not come cheap, however, Schlegel periodically gives me a raspberry review. He has criticized my offerings as “weak,” as “too long,” as “not very funny,” and as relating a “bad joke” and even a “terrible joke.” Sometimes I am able to shrug these off as matters of taste, sometimes not. On one occasion, however, he replied saying, “Not up to your usual standards.” That packed a sting. Because I knew that he had considered that carefully before sending it. And I also knew that he was right.

The point of these anecdotes is simply to say that, despite his avowed pessimism and gruff exterior, if my experience is at all representative, Schlegel will engage with *anyone* about *anything* (except sports). And through the humility, open-mindedness, sense of humor, and generosity of spirit with which he does so, he sets an example that we would all do well to emulate.

Except, of course, for the hair.