

Buffalo Law Review

Volume 69
Number 1 *Serious Fun: A conference with &
around Schlegel!*

Article 3

1-11-2021

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Recommended Citation

Charles L. Barzun, *The Tale of Two Harts; A Schlegelian Dialectic*, 69 Buff. L. Rev. 9 (2021).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol69/iss1/3>

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Buffalo Law Review

VOLUME 69

JANUARY 2021

NUMBER 1

The Tale of Two Harts; A Schlegelian Dialectic

CHARLES L. BARZUN†

[I]t is simply our total character and personal genius that are on trial; and if we invoke any so-called philosophy, our choice and use of that also are but revelations of our individual aptitude or incapacity for moral life. From this unsparing practical ordeal no professor's lectures and no array of books can save us.¹

[I]t is only through personal, self-reliant participation, by trial and error, in the problems of existence, both personal and social, that the capacity to participate effectively can grow. Man learns wisdom in choosing by being confronted with choices and by being made aware that he must abide the consequences of his choice.²

Good lawyers earn the big bucks you all hope to make by putting their butt on the line, by exercising the best possible judgment in circumstances where answers are unlikely and advice only possible in terms of better or worse alternatives.³

†Horace W. Goldsmith Professor of Law, University of Virginia. For helpful comments and discussions on this and earlier drafts, I'd like to thank Robert Condlin, Peter Danchin, Neil Duxbury, Hendrik Hartog, Nicola Lacey and the participants in the legal theory workshop at the University of Maryland Carey School of Law. And a special thanks to Schlegel for the honesty, humanity, and humor he has brought to our conversations over two decades of friendship.

1. William James, *The Moral Philosopher and the Moral Life*, 1 INT'L. J. ETHICS 330, 354 (1891).

2. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 410 (1958).

3. John Henry Schlegel, *To Dress for Dinner: Teaching Law in a Bureaucratic Age*, 66 BUFF. L. REV. 435, 453 (2018).

Schlegel once relayed to me, during one of our many long phone chats over the years, a story about a talk he once delivered at Yale in the late 1980s. During the Q&A, Owen Fiss asked him, in a somewhat exasperated tone, “Are you serious, or is this a *joke*?” Schlegel thought about the question for a moment and then responded, “both.” Fiss was apparently not amused. But I was, by the retelling. This Essay is not a joke, but it does aim to say something, albeit indirectly, about the organizing theme of this conference: “serious fun.”

I say “indirectly” because its more immediate subject matter is a pair of classic modern legal texts: HLA Hart’s *The Concept of Law* and the teaching materials for Henry Hart and Albert Sacks’s second-year course at Harvard Law School, *The Legal Process*.⁴ These two works are in some ways quite similar, including, most obviously, that they were both written for law students at elite universities at roughly the same time. But I am more interested in the differences between these works or, perhaps more accurately, differences between their authors. The differences are both substantive and methodological, but I will focus on the methodological difference because I think that it reflects an even deeper philosophical divide between the two thinkers.

My argument, if you can call it that, consists of several, related claims. The first thing I hope to show is that the two Harts—whom I will call Henry and Herbert, for clarity and simplicity—both were attempting to deal with the same underlying philosophical dilemma. That dilemma arises from the apparent incompatibility between our ordinary experience of meaning and value, on the one hand, and the

4. See generally H. L. A. HART, *THE CONCEPT OF LAW* (1961); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). The course was taught in 1957 and most of the materials in the first chapter finalized by 1959. It is commonly recognized that the materials mainly reflect Hart’s intellectual vision and that Sacks was the junior partner. See HART & SACKS, *supra*, at lxxvii–lxxxv.

mechanistic image of the world offered by modern science, on the other. The two Harts, however, took very different approaches to dealing with this dilemma, owing largely to the different philosophical traditions within which each was working.

My second point is that today we live in Herbert's world. That is true not only because his account of the nature of law remains the dominant one, but also because of a broader picture of law, and its relation to other disciplines of knowledge, that it has encouraged. In that picture, normative and doctrinal forms of scholarship are offered from an "internal" perspective on law, whereas historians and the social scientists study law from an "external" perspective.⁵ This tacit view of legal practice and theory has penetrated so deeply and pervasively that we cannot help but see Henry's own contributions to legal theory in its terms, relegating it to the "internal" side of the dichotomy.

For reasons I'll explain, though, I think Henry himself would have rejected that interpretation. I thus propose conducting a thought-experiment that imagines a reversal of explanatory roles. What if, rather than explaining Henry's theory of law in the terms of Herbert's, we explained Herbert's theory of law in terms of Henry's? More generally, how would such a picture alter our understanding of how law as a "discipline" relates to other forms of knowledge?

Answering this last question will bring us back to Schlegel. I will argue that Schlegel's thinking about law, history, and disciplines in general can be seen as part of the tradition to which Henry, rather than Herbert, belongs. That may sound counter-intuitive—paradoxical, even—since Schlegel was himself part of the critical legal studies

5. See generally Charles L. Barzun, *Inside-Out: Beyond the Internal-External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203 (2015) [hereinafter *Inside-Out*]. The current essay draws on, and develops further, points made in that article as well as those made in Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 51–52 (2013) [hereinafter *Forgotten Foundations*].

movement, one of whose primary targets was the legal-process approach Henry epitomized. Maybe it is paradoxical, but no more so than an instruction to have serious fun.

I.

The Concept of Law and *The Legal Process* are in many ways quite similar. But there are some critical differences. The question I'll raise is, what explains those differences?

The similarities between the two books extend beyond the primary authors' last names and the fact that they were both written for law students. Both works put procedure at the heart (no pun intended) of law and legal systems. In *The Concept of Law*, Herbert argued that the "key to the science of jurisprudence" was to recognize that what enabled the concept of "legal validity" to have any meaning was, in part, the existence of "secondary" or "power-conferring" rules that offer criteria for establishing which "primary" rules of conduct qualified as law. Such secondary rules enable courts and officials to (1) determine which primary rules count as *legal* rules, (2) change primary rules through certain procedures, and (3) apply and enforce the primary rules. Such secondary rules "remedied" the "defects" of a society governed exclusively by primary rules of conduct.⁶

At the same time, in Chapter 1 of the Legal Process teaching materials, Henry argued for something very similar. He explained that although people living in society often have competing interests or "wants," they all have an interest in living together in peace. Therefore, they develop both "substantive arrangements" as to how to allocate resources and "procedural" or "constitutive" arrangements as to decide how to create, change, and enforce those substantive arrangements. Given that such procedural arrangements are both the source of the substantive arrangements and the means by which they are applied,

6. See HART, *supra* note 4, at 91-98.

procedural arrangements are, in Hart's word "obviously more fundamental" than the substantive arrangements.⁷ Substitute "secondary rules" for "procedural arrangements" and "primary rules" for "substantive arrangements" and you have something like Herbert's rule of recognition.

The striking similarity between these two accounts corresponds to many similarities in their authors. Henry and Herbert were born three years apart (1904 and 1907, respectively), both spent part of their career practicing law, both participated in the war effort, and both then devoted themselves to legal teaching and scholarship in what were at the time their respective homeland's leading universities, Harvard and Oxford. The two Harts even spent a year teaching at the same university, when Herbert visited Harvard for the 1956-57 academic year—during which time Henry was working on his teaching materials and Herbert was working on the book that became *The Concept of Law*.⁸

They also shared a broadly similar scholarly agenda. While at Harvard, Henry and Herbert both participated in a "Legal Philosophy Discussion Group," along with Lon Fuller, Morton White, and others. There they circulated papers about the nature of courts, rules, discretion and other issues central to the "rule of law"—a particularly salient concern in the postwar period.⁹ In this way, both works could be seen as "responses" to—because they included criticisms of—legal realism and its perceived threat to traditional legal values.¹⁰

In short, from the perspective of today's academy—one more diverse than theirs in so many respects, including those of race, class, sex, and disciplinary method, among many

7. HART & SACKS, *supra* note 4, at 3–4.

8. See NICOLA LACEY, A LIFE OF H. L. A. HART: THE NIGHTMARE AND THE NOBLE DREAM 179, 190 (2004).

9. See *id.* at 188. See also *Forgotten Foundations*, *supra* note 5, at 51–52.

10. See *Forgotten Foundations*, *supra* note 5, at 3–4 (collecting citations to scholars that have characterized the teaching materials in this way); HART, *supra* note 4, at 136–47 (discussing and criticizing the "rule skepticism" of the realists).

others—the two Harts seem materially indistinguishable. Both were white, male lawyers of the same generation who operated within, and at the pinnacle of, a white, male legal establishment—an establishment which saw itself as charged with articulating and defending postwar understandings of democracy and the rule of law.¹¹

Yet in some ways the two Harts' contributions to legal thought point in quite different directions, substantively and methodologically. Let's take substance first. The two works seem to reach very different conclusions with respect to one of the most fundamental questions at stake in any discussion of the meaning and value of the "rule of law," namely whether citizens have a duty to obey the law.

A comparison of two passages from each of their works conveys the difference well. In the first chapter of the Hart & Sacks teaching materials, the authors state that the "central idea of law" is what they call the "principle of institutional settlement," according to which each individual in society has a duty to comply with "decisions which are the duly arrived at result of duly established procedures . . . unless and until they are duly changed."¹² The materials then go on to state that although we say in common speech that the law "is" such and such, "yet the 'is' is not really an 'is' but a special kind of 'ought.'"¹³ So, for Henry, there is such a duty.

Compare that passage to one of the more famous passages in *The Concept of Law*, where Herbert explains why it is so important to recognize the independence of law from morality:

What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not

11. See EDWARD A. PURCELL, JR., *THE CRISIS IN DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 235–45 (1973).

12. HART & SACKS, *supra* note 4, at 4.

13. *Id.* at 5.

conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.¹⁴

Herbert here rejects the idea that the legal validity of some directive is sufficient to compel the obedience of those ruled by it.

Henry and Herbert thus seem to draw nearly opposite conclusions from almost identical premises. Both see the existence of law as essentially connected not only to certain procedures, but to the *acceptance* of those procedures as the proper ones for resolving conflicts about the substantive norms that govern society. But whereas Henry infers from that fact something like a moral obligation to abide by the outcomes of such procedures, the lesson Herbert draws is just the reverse: since the rules validated by those procedures only count as “legal” because of the mere fact that they have been accepted by officials in the legal system as law-validating ones, citizens must subject those rules to moral scrutiny before assuming that obedience to them is required.

This contrast prompts a question: why do these two men, whose scholarly agendas and ideological assumptions are otherwise so similar, come to such different conclusions about something as fundamental as the power of law to morally compel obedience? Answering this question reveals the second, methodological difference between the two works.

Herbert’s own theory suggests one explanation. His advance over John Austin’s form of positivism was achieved in part by distinguishing between two “points of view” with respect to what Hart called a “social rule.” Those who view a rule from the “internal” point of view see the rule as a standard of evaluation or a justification for complying with it, whereas those who take the “external” point of view simply use it to predict how those living under it may behave.

14. HART, *supra* note 4, at 210.

For Hart, a legal system required some set of people, possibly only the “officials” of a legal system, to take the “internal point of view” of the ultimate rule of recognition.¹⁵ From that perspective (but *only* from that perspective), the secondary rules that authorize the promulgation and enforcement of the primary rules of conduct are seen to be legitimate, or at least demand (in some normative sense) official compliance.

Thus, Herbert’s theory offers an obvious explanation for why the Hart & Sacks teaching materials treat the American legal system as one that compels obedience. Its authors adopted the “internal point of view” with respect to the American constitutional order. Henry, after all, assumed that he was teaching the future legal and political elite of the country (and so he was—at one point a majority of the members of the Supreme Court were former students of Harvard’s Legal Process course¹⁶), so it is obvious why he would be interested in endorsing (we might even say *legitimizing*) the current legal regime.

That explanation is consistent with how the legal-process tradition has been treated and understood by legal philosophers. Hart’s most famous antagonist, Ronald Dworkin, whose theory of law owes much to the legal-process school, himself embraced the “internal point of view,” albeit in slightly modified form.¹⁷ In *Law’s Empire* (1986), Dworkin announced at the outset that in elaborating his theory of law he would not take the explanatory perspective of an “historian or sociologist” but would instead adopt the “internal point of view” of the judge, who seeks practical arguments about what to do.¹⁸ At the same time, other legal philosophers have interpreted (charitably, in their view)

15. HART, *supra* note 4, at 116.

16. HART & SACKS, *supra* note 4, at cxxv.

17. See Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 413–14 (1987); *Forgotten Foundations*, *supra* note 5, at 29 (observing that “Hart and Sacks seemed to foreshadow the work of Ronald Dworkin”).

18. RONALD DWORKIN, *LAW’S EMPIRE* 14 (1986).

legal-process theorists as adopting something like the “internal point of view.”¹⁹ They were, after all, *lawyers*, not sociologists, historians, or philosophers.

Moreover, we legal scholars today still operate according to the conceptual dichotomy Herbert’s theory of law set in motion. The distinction between “internal” and “external” forms of legal scholarship is now entrenched.²⁰ Normative, interpretive and doctrinal work is characterized as “internal”—the kind of stuff a practicing lawyer might conceivably (even if not actually) use—whereas social-scientific, empirical or explanatory work is treated as “external” scholarship.²¹ In fact, the dichotomy has become so entrenched in the legal academy that those who transgress it are accused of committing a “fallacy.”²²

However entrenched the dichotomy may now be, though, it was not how Henry saw things, at least not as expressed in the Legal Process materials and much of his other writing. Far from taking the basic legitimacy of current legal practice as a starting assumption, the materials try to provide a quasi-sociological foundation for law by explaining *why* it might it have a claim to obedience.²³ And far from adopting the “judge’s” point of view, one of the main tasks of the materials is to convey to students how differently various actors within a legal system might look at the same problem. Consider this passage, which concludes a discussion of “the nature of institutional decisions”:

Are the positions which have been taken thus far in these materials conventional and generally accepted? Might a

19. See, e.g., Frederick Schauer, *Fuller’s Internal Point of View*, 13 L. & PHIL. 285, 302 (1994); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 972 (1994).

20. *Inside-Out*, *supra* note 5, at 1207.

21. See *id.* at 1207–08.

22. See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

23. See HART & SACKS, *supra* note 4, at 1; *Forgotten Foundations*, *supra* note 5, at 20–21.

representative chairman of the Republic National Committee, for example, be expected to agree with them? A chairman of the Democratic National Committee? A representative union leader? A representative president of the United States Chamber of Commerce? Of the American Bar Association? A representative member of the Soviet Russian Politburo? A younger professor of anthropology in an American university representative of the most recent trend of thought in this field? Of economics? History? Philosophy? Political science? Psychology? Sociology?

Does it make any difference to a hard-headed practicing lawyer whether the positions are accepted or rejected—or simply ignored?²⁴

This passage hardly suggests a work that adopts the judge's, lawyer's, or any other "internal" point of view. Far from shutting off other disciplinary perspectives on commonly held legal assumptions, the materials explicitly invite comparison to them. Indeed, the "hard-headed practicing lawyer" is only introduced as a *skeptic* of the entire enterprise, not as its personification.²⁵ Rather, what the materials encourage students to develop was an "Olympian"—one might even say a *philosophical*—perspective on law.²⁶

It may appear that I have sought to liberate Henry's ambitions from shackles of Herbert's internal/external point-of-view dichotomy only at the cost of ascribing to him an unattractive and unjustified lawyerly arrogance. Even putting aside the impossibility of ever attaining a "neutral" or "Olympian" perspective on political and legal questions,²⁷

24. HART & SACKS, *supra* note 4, at 113.

25. In notes for an unpublished lecture, Hart described Oliver Wendell Holmes's skeptical, predictive approach to law as "hard-headed." See Henry Hart, *The Morality of Function* 1-4 (unpublished manuscript) (on file with the Harvard Law Library).

26. See HART & SACKS, *supra* note 4, at 67 (providing a series of questions about a case problem under the subheading "The Problem from an Olympian Point of View" and concluding that "[a]ll the rest of these materials are designed to cast light on the questions under this last subheading").

27. See Ronald Dworkin, *Objectivity and Truth: You Better Believe it*, 25 PHIL. & PUB. AFFS. 87 (1996) (denying the possibility of attaining an "Archimedean point" that "stand[s] outside a whole body of belief, and to judge it as a whole from premises or attitudes that owe nothing to it"). Cf. MORTON J. HORWITZ, *THE*

it seems, at the very least, to encourage lawyers to think that they can do philosophy—or economics or sociology or psychology—without bothering to ensure competency in those fields. Such an attitude reflects what Mark Tushnet calls the “lawyer as astrophysicist” assumption, according to which the “generalist training of lawyers allows any lawyer to read a text on astrophysics over the weekend and launch a rocket on Monday.”²⁸ If anything like that assumption was ever justified, so this objection goes, it no longer is.²⁹

But I think this misunderstands what Henry was trying to achieve in asking students to try to imagine such a perspective. He was not assuming that one could actually achieve a perspective-less perspective. Rather, he was emphasizing that lawyers are constantly put in situations where they have to make a decision one way or another—whether to grant a plaintiff’s motion, whether to take a party’s case, whether (and if so, how) to make an argument in court, whether (and if so, how) to enforce a legislative command—even though it may be far from clear what the best decision would be. This is even true—it is *especially* true—when the decision is about whose facts to believe, what authority to trust, or to which institution to defer.³⁰

TRANSFORMATION OF AMERICAN LAW: 1870-1960 271 (1992) (criticizing “the 1950s search for ‘neutral principles’” as expressing a “yearning to find an Olympian position from which to objectively cushion the terrors of social choice”).

28. Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1338 n.140 (1979).

29. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 763 (1987) (observing that the confidence in law’s “autonomy as a discipline” was “empirically supported” at the time Posner was in law school).

30. See HART & SACKS, *supra* note 4, at 112 (“The further examination of the nature of the process of institutional decision, and of the problems involved in making and appraising the decisions in each of the major types of institutional processes [e.g., adjudication, voting, etc.], is the concern of these materials from this beginning to the end.”); *id.* at 149 (explaining that “there may be thought to be a justification for describing [a magistrate’s] act of interpretation as one of discretion But this would be obscure what seems to be the vital point—namely, the effort, and the importance of the effort, of each individual deciding

Deliberating about such questions requires looking at them from different angles and then coming to a judgment about what to believe and what to do.³¹

Under this view, far from being a *condition* for practical reasoning, the lawyer's aspiration to achieve the "Olympian" perspective is simply the perspective that is entailed by whatever decision she ends up making. It is the goal, not the starting point; the conclusion, not the premise.³² And if seeking such a perspective counts as "philosophy," then legal practice is inescapably philosophical. So understood, the aspiration reflects not so much Henry's faith in the *intellectual* prowess of his students as it did his insistence on their ultimate *moral* responsibility for their decisions. As Henry put it elsewhere, "[m]an learns wisdom in choosing by being confronted with choices and by being made aware that he must abide the consequences of his choice."³³

II.

If explaining Henry's theory in terms of Herbert's cannot make sense of what Henry actually wrote, how about the reverse? What if we explained Herbert's theory in terms of Henry's? That is exactly what I'd like to do. Doing so, however, first requires understanding the philosophical traditions in which each of the two Harts was operating. Then we can see how interpreting their work in light of those

officer to reach what *he* thinks is *the* right answer").

31. *Id.* at 110 ("[T]he conclusions of the science [of society] must depend ultimately upon judgment—upon judgment informed by experience and by all the objective data that can feasibly be assembled, but upon judgment nevertheless. The chief business of a student of the science, therefore, is to train his judgment.").

32. *Id.* at 67 (explaining that "[a]ll the rest of these materials are designed to cast light on the questions under [the subheading 'The Problem from the Olympian Point of View']" but clarifying that "[t]he questions are put at this point to invite reflection and not with any thought that what has so far been presented makes possible a confident answer").

33. HART, *supra* note 2, at 410.

traditions might revise the conventional reading of Herbert's great work.

The two Harts worked in quite different intellectual traditions. Whereas Herbert was immersed in the ordinary-language philosophy that dominated Oxford at the time, Henry was operating within a legal tradition deeply influenced by American pragmatism.³⁴ Let me say a few—inevitably crude and over-simplified—words about each of these philosophical traditions.

Both traditions developed as an effort to solve the same philosophical problem, though they did so in different ways. The problem is how to reconcile our commonsense experience of the world with the image of the world delivered by modern science. In our everyday lives, concepts like knowledge, mind, agency, meaning, and value make sense and have significance for us. But from the perspective of science or, as Thomas Nagel puts it, the “view from nowhere,” it is not clear how they can attach to anything in the physical world; it is hard to know where to place them or, therefore, how to make sense of them.³⁵ So when it comes to understanding those critical concepts, which ought we trust, our “subjective” experience of the world or the “objective” description of the world offered by science? We can call this philosophical problem the Essential Dilemma.

34. I have discussed both in previous work. See *Forgotten Foundations*, *supra* note 5, at 2–25 (discussing influence of William James and Roscoe Pound on Hart); *Inside-Out*, *supra* note 5, at 1213 (discussing influence of Gilbert Ryle, J. L. Austin and other linguistic philosophers on Hart); see also Leslie Green, “Introduction to *The Concept of Law*,” in HART, *supra* note 4, at xlvii (same).

35. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 3 (1986) (“This book is about a single problem: how to combine the perspective of a particular person inside the world with an objective view of that same world, the person and his viewpoint included.”). Philosophers today sometimes refer to this as the “placement problem.” See David Macarthur & Huw Price, *Pragmatism, Quasi-Realism, and the Global Challenge*, in *NEW PRAGMATISTS* 93–95 (Cheryl Misak ed., 2007); see also Charles L. Barzun, *Metaphysical Quietism and Functional Explanation in Law*, 34 L. & PHIL. 89, 92 (2015) (discussing and criticizing Macarthur and Price's solution to the placement problem).

Both traditions took this dilemma seriously in one sense: neither thought that opting for one horn of it was an acceptable route. We cannot abandon the empiricist methods that have produced so much knowledge about, and technological progress in, the world; but nor can we dismiss talk of human value as meaningless.³⁶ In this way, both responses rejected extreme forms of idealism or rationalism, on the one hand, and materialism and empiricism, on the other.³⁷ Both insisted that another path must be found.

But the two traditions differed as to how they forged that alternative path. Ordinary-language philosophers sought to defuse or deflate the dilemma by suggesting that it only arises from confusions produced by our language. To use Gilbert Ryle's example, we say that "minds exist," and that "bodies exist." But we fail to see that when we do so we mean different things by "exist," just as, when we say "the tide is rising" and "hopes are rising," we use the same word to refer to two distinct relations. Both are intelligible uses of the term, but they carry different meanings, depending on what we are trying to do or say in any particular context.³⁸ So understood, the mind-body problem (which is one instance of the Essential Dilemma) is revealed to be what Ryle called a "category mistake"—falsely thinking, for example, that "mind" belongs to the same category of phenomena that bodies do. Such a way of thinking reflects, in Ryle's famous phrase, "the dogma of the ghost in the machine." Under this view, then, the Essential Dilemma is a kind of illusion that, once revealed as such, dissolves away, leaving only the

36. That was the view associated with logical positivism. *See, e.g.*, ALFRED JULES AYER, *LANGUAGE, TRUTH AND LOGIC* 38–39 (2d ed. 1946) ("[I]t is the mark of a genuine factual proposition . . . that some experiential propositions can be deduced from it in conjunction with certain other premises without being deducible from those other premises alone.").

37. Technically, idealism and materialism refer to metaphysical theses, while rationalism and empiricism refer to epistemological ones, but the pairs tend to travel together.

38. *See* GILBERT RYLE, *THE CONCEPT OF MIND* 16 (1949).

particulars of linguistic usage for philosophers to study and analyze with precision.

The pragmatist path—or at least the one forged by the particular strand of pragmatism that I’m tempted to call the *existentialist* strand—took a very different approach.³⁹ Rather than claiming that *neither* horn need be chosen because the dilemma itself arises from confusion, it suggests that *both* horns can be—indeed, must be—chosen. The reason is that our theoretical reasoning (about what there is in the world) is both driven by practical concerns (about what matters, what is good) and is (therefore) properly evaluated by reference to practical criteria.⁴⁰ Under this view, then, “minds” exist in the world if (and *only* if) our theories that treat them as real work well for us, enabling us to create a world that has meaning and value for us.⁴¹ As William James put it, the whole notion of “truth” is “essentially bound up with the way in which one moment in our experience may lead us towards other moments which it will be worthwhile to have been led to.”⁴² So, according to this view, the Essential Dilemma is very real, but we resolve it for ourselves every time we make a decision about what to believe or what to do.

We can see, then, that the two traditions advance nearly opposite approaches to resolving the dilemma without opting for one horn or the other. According to the first, the dilemma just reflects a linguistic confusion, so *neither* horn need be (or

39. It is a strand I associate most closely with William James. See *Forgotten Foundations*, *supra* note 5, at 22–25. Others have noted the similarity between James’s views and those of European existentialist philosophers. See, e.g., WILLIAM BARRETT, *IRRATIONAL MAN* 18–19 (1958) (“Of all the non-European philosophers, William James probably best deserves to be labeled an Existentialist. . . . There are pages in James that could have been written by Kierkegaard”).

40. WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* 203 (1907) (“The possession of truth, so far from being here an end in itself, is only a preliminary means towards other vital satisfactions.”).

41. See *id.* at 204.

42. *Id.* at 204–05.

ought to be) chosen. According to the second, the dilemma is inescapable and yet irresolvable, so that, in some sense, *both* must be chosen.

Arguably, neither of these responses is satisfying, in part because each could be seen as effectively choosing one horn of the original dilemma after all. The linguistic philosophers essentially treat the dilemma as a *theoretical* one, susceptible to traditional philosophical analysis and in no way threatening to modern science. Linguistic usage is simply treated as a form of human behavior capable of being observed and analyzed like any other behavior.⁴³ But if so, then one is still left with a question: when we analyze how people use ethical terms, are we learning something about *ethics* or just about how (some) people talk about ethics? Unless it's the former, we have not really escaped the dilemma, and yet going that route seemed to invite the kind of metaphysical worries that originally prompted the dilemma.

Meantime, the pragmatist treats the dilemma as a *practical* one that constantly demands choices about what to do (and, therefore, judgments about what there is). That is so because, under this view, questions about what to believe are inevitably answered (and properly so) by reference to practical considerations. Yet, this solution fails to do justice to the deep epistemic intuitions that lead to the dilemma in the first place. It seems hard to shake the thought that there is a difference in principle between some fact or theory being *true* and it being *useful*, or valuable, or fit for a better world, however defined. And yet, taken literally, the pragmatist approach seems to leave such a difference unintelligible.

If the above analysis is correct, then the Essential Dilemma just recurs in a slightly modified, second-order form: is the problem of reconciling our commonsense

43. Julia Tanney, *Rethinking Ryle: A Critical Discussion of The Concept of Mind*, in *THE CONCEPT OF MIND*, at xxii-xxiii (Gilbert Ryle ed., 2009) (noting the criticism of Ryle's work that it amounts to a defense of behaviorism).

“subjective” experience with “objective” methods of gaining knowledge a *theoretical* problem about what to believe there is in the world or is it a *practical* problem about what to do? And the same kinds of responses could be offered: It is neither because it arises from a confusion (ordinary philosophy), or it is both because every decision one makes is a decision that reflects practical and theoretical commitments (pragmatism). Infinite regress looms.

Now let's get back to law and legal theory. As the title of his book indicates, Herbert opted for the same route as his fellow Oxford linguistic philosophers.⁴⁴ As it relates to law, the Essential Dilemma poses the question of whether law is best understood as an element of practical reasoning (natural law) or is simply a brute fact (positivism). We can now see that Herbert's distinction between two “points of view” is just the linguistic philosophers' approach to resolving that dilemma.⁴⁵ Those who take the internal point of view, use words like “ought” and “should” and so treat the rule of recognition as a rational standard or criterion for legal validity. But others may take the “external” point of view and so treat such rules as only indicators of behavioral regularities.⁴⁶ Just as with Ryle, one can make an existence claim from both points of view, but when they are made, each means something different by saying that the law “is” X. From the internal point of view, such a statement implies a normative judgment about what a person to whom the rule applies ought to do (“rules passed by Congress and the signed by the President must be enforced as law”); from the external, a merely factual one about official behavior (“judges

44. Compare Gilbert Ryle, *THE CONCEPT OF MIND*, with H. L. A. Hart, *THE CONCEPT OF LAW*. See also Green, *supra* note 34.

45. But see Green, *supra* note 34, at xlvii (observing that, despite the influence of Ryle and Austin on Hart, “what is most striking, given its vintage and provenance, is how *little* linguistic analysis there is in the Concept of Law”).

46. HART, *supra* note 4, at 89.

tend to treat as law rules passed by Congress and signed by the President").⁴⁷

Henry, meanwhile, took the (existentialist) pragmatist's approach. He, too, recognized that from the perspective of a social scientist, one *could* look at the American legal system as a natural scientist would look at the behavior of an amoeba.⁴⁸ But rather than simply treating that as another, equally valid, "external" point of view with respect to the foundational rules of the legal system, he sought to reconcile and combine such a scholarly perspective with that of a lawyer practicing law, whether as an advocate, a legislator, judge, or executive officer. That meant that the choice of research methods was itself an ethical choice, as judged at least in part by what the effect of taking such a view might be.⁴⁹ According to Henry, all such lawyers were concerned with what the teaching materials call the "science of society," namely the field of knowledge related to institutional processes of social decision-making.⁵⁰ Such a science, in his view, was partly empirical, partly normative. Hence, the teaching materials repeatedly refer to law as a "prudential" or "judgmatical" science.⁵¹

With these considerations in mind, we can now pose the thought experiment mentioned at the outset. What would it look like to explain Herbert's legal theory in the terms of Henry's? The answer, I think, is that, under Henry's approach, *The Concept of Law* is revealed to be a work of profound ambivalence as to the power of law to compel obedience. Why? Well, under Henry's pragmatist view, both law and legal theory are properly guided by, and subject to evaluation by reference to, *practical* criteria (about what to

47. *Id.*

48. HART & SACKS, *supra* note 4, at 108.

49. I offer more textual support for this claim in Barzun, *supra* note 5.

50. *Id.* at 107.

51. *Id.*

do). And yet, the relevant practical implications of Herbert's theory cut in opposite directions.

On the one hand, Herbert wants to suggest (just as Henry did) that having generally recognized procedures for generating and identifying some rule as "law" is inherently valuable insofar as such procedures offer a means for the peaceful resolution of social conflict.⁵² If that is so, then a norm's status as "legally valid" would seem to be at least relevant to, even if not dispositive on, the question of whether it deserves obedience. And indeed, Herbert sometimes says things that imply exactly that, such as in the passage quoted above.⁵³

On the other hand, though, Herbert insists that whether something counts as law is, from the "external" perspective, entirely a factual question about the behavior of officials—namely, which rules they treat as legally valid. The views of the people actually living under those rules are irrelevant. As Hart says, those people's attitudes can be "deplorably sheeplike" and "the sheep can end up in the slaughterhouse."⁵⁴ That view can explain why the Nazis had "law," but it does so at the cost of explaining why judges or citizens would have even a *prima facie* obligation to treat such law as compelling any obedience whatsoever.⁵⁵

52. HART, *supra* note 4, at 94–98 (explaining how the introduction of secondary rules of recognition "remedy" the "defects" of a system with only primary rules of obligation).

53. *See supra*, p.18 and text accompanying note 52; HART, *supra* note 4, at 210.

54. *Id.* at 117.

55. I understand Lon Fuller to have been making a similar criticism of an earlier version of Hart's argument when he complained that the "dilemma" that Hart suggests, an unjust law, presents the citizen with the following: "[t]he verbal formulation of a problem, but the problem it states makes no sense. It is like saying I have to choose between giving food to a starving man and being mimsy with the borogoves." Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 656 (1957). I should note here that more or less everything I say in this Essay about Henry Hart's philosophical ambitions could also be said of Fuller's, a fact which may bear on how one should understand the so-called Hart-Fuller debate.

Interestingly, Herbert's biographer has concluded that Hart experienced anxiety over precisely this tension. After examining Herbert's notebooks, Nicola Lacey observes that he "struggled with the concept of legal obligation" and that he hoped that his concept of *legal* obligation "would be the linchpin of his delicate middle way between Realism or crude positivism and natural law."⁵⁶ That middle way was enabled by his division between two "points of view," one "internal" and normative and the other "external" and sociological. But ultimately, Lacey concludes, "Herbert was never convinced that he had satisfactorily resolved this dilemma about the restricted, but genuinely normative, notion of obligation in law."⁵⁷

He was not the only one. Henry, too, was unconvinced by his own effort to reconcile fact and value—to accommodate both scientific and moral knowledge. But he dealt with the issue, and the problem it presented for him, more openly and directly. When he was invited to be the first Harvard Faculty member to give the Oliver Wendell Holmes Lectures in 1963, Henry entitled his lectures "Conversations about Law and Justice."⁵⁸ They took the form of an imagined Socratic dialogue between Henry and a second-year law student with "an undergraduate education in behavioral political science." In the first lecture, he put these words in his fictitious and skeptical student: "I'm having trouble getting my bearings in the law. What really troubles me is not so much the question of the nature of law, but the question of knowledge about it. How do we connect the law and what we know about law with the way things are in the world?"⁵⁹

56. LACEY, *supra* note 8, at 228.

57. *Id.*

58. Michael J. Henry, *Hart Converses on Law and Justice*, 36 HARV. L. REC. 7–8 (1963).

59. *Id.* Cf. David Plunkett and Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, 128 ETHICS 37, 44 (2017) (defining general jurisprudence as a form of "metalegal inquiry" which "aims to explain how legal thought, talk, and reality fit into reality").

Ultimately, Henry was never able to answer that question to his own satisfaction. By some reports, he abruptly ended his final lecture, having declared that he had failed in his endeavor. But in the process, he made clear that for him, recognizing the inherent difficulty of the problem was part of the solution. He did so by wondering aloud what it would be like if “ethical philosophers by purely secular reasoning were able to tell us with ruthless scientific exactitude just what it means for things and actions to be good.”⁶⁰ In a passage worth quoting in full, he explained why he considered this possibility more a nightmare than dream:

All that would be left for Man would be to summon the power of will to do what the ethical philosophers told him to do. What then would become of human dignity and the responsibility upon which human dignity rests? It is the mission of Man on earth to try to find out about these things for himself, or else to make his peace with God and to accept the basic principles upon faith.⁶¹

In short, the anxiety Herbert reserved for his diary, Henry made a central pillar of his legal and social philosophy.

III.

The difference just identified between the two Harts bears on the question of law’s status as a “discipline” of knowledge and its relation to other disciplines. It does so because their contrasting responses to the Essential Dilemma correspond to two different ways of understanding the nature of disciplinary knowledge itself. Because Schlegel has himself long chafed against one of these ways of understanding it, his thoughts on the subjects of law, history, and disciplinary knowledge will usefully illuminate the contrast.

It is not too hard to see that the academic division of labor, entrenched in the modern university and often

60. Henry, *supra* note 58, at 7.

61. *Id.*

replicated within law schools, offers the same strategy for resolving the Essential Dilemma that Herbert did: divide and defuse. What is the distinction between “internal” and “external” points of view other than an erection of a disciplinary boundary in generic form? Sure, from the perspective of lawyers and judges, and the legal scholars who write for them (or a constructed version of them), the foundational criteria of legal validity in our society carries normative weight. But to “external” historians or to political scientists who study the legal system in their official capacity they are just brute facts about how people speak and behave about certain things and are thus of no intrinsic moral significance. So who is right: Does marking something as “law” constitute an evaluative judgment, or merely a factual one? Well, it depends on whom you ask.

It is but a short step from such logic to a more global approach that sees each of the various disciplines as offering different “perspectives” on legal practice, each contributing something interesting but inoffensive and unthreatening to others. Everyone is kept contented so long as everyone else sticks to their own turf. The handful of academics who call themselves “legal philosophers” can argue endlessly about the “nature” of law. But no need to bother with that question ourselves; better that we get along and get on with our own thing.⁶²

But that response, as we have seen, treats the Essential Dilemma as a purely theoretical one. For Henry, it was practical as well. That is why he thought it an evasion of responsibility to relegate the study and evaluation of law to other disciplines.⁶³ Law, in his view, was a *craft* that required learning how legal institutions, from courts to legislatures to agencies to regimes of contract, worked and one that

62. Elsewhere I have described (and criticized) this sort of view as “quietist.” See Barzun, *supra* note 35, at 89.

63. See Henry, *supra* note 57, at 7 (“However, law too, [Professor Hart] noted, has been dogged by the idea of rooting itself in the facts and letting some other discipline take the responsibility for the evaluations”).

demanded techniques for maintaining and improving those institutions.⁶⁴ It is at once practical and theoretical. Often lawyers must defer to experts, or to some other institutional authority, but identifying the circumstances in which that is true itself requires understanding and judgment.

Under this view, then, law is not simply a social institution that can be viewed from the “inside” by the actors who work within it as well as from the “outside” by social scientists who take it as an object of study.⁶⁵ Rather, it is itself a “science of society” that strives to make use of the best, even if inevitably incomplete and uncertain, knowledge we have of the world in order to resolve various forms of social and political conflict. It is this ambition to see law as a way of simultaneously thinking about and engaging in the world—in other words, law as a “prudential science”—that is obscured when we treat legal-process theory through the lens of Herbert’s internal/external dichotomy.

This ambition, to see law as craft and a way of thinking about the world, is a capacious one that can take many forms. Schlegel is proof of that. There is irony, of course, in suggesting that Schlegel is an heir to Henry’s philosophical approach. Not only was Schlegel part of the Critical Legal Studies movement, one of whose central targets was the legal-process school of Hart and his contemporaries,⁶⁶ but

64. Cf. HART & SACKS, *supra* note 4, at 113 (explaining that “speaking intelligibly and sensibly to the future” is one of the techniques “at the heart of the lawyer’s craft”).

65. That may be because law is not like a circle or box, with an inside and outside, but rather a mobius strip or Klein Bottle, which is a three-dimensional shape with only one side. See John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 450 (1989) (suggesting that these shapes are better metaphors than a circle for the “hermeneutic circle”). For an illustration of a “Klein Bottle,” see Appendix.

66. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976) (explaining that one of the two primary theses of his article is to vindicate the intuition that “substantive and formal conflict in private law cannot be reduced to disagreement about how to apply some neutral calculus that will ‘maximize the total satisfactions of valid human wants’”) (quoting and citing HART & SACKS, *supra* note 4).

Schlegel is himself no fan of Henry's. I base that judgment primarily on conversations we have had about legal-process theory, as well as the copy of the teaching materials that Schlegel had marked up when a student, which he sent me once when I was working on an article about them. In the margin next to the paragraph about constitutive arrangements of a society being "obviously more fundamental" than the substantive arrangements—arguably the core assumption of the entire set of teaching materials and legal-process theory as a whole—Schlegel had written just one word: "Nonsense." As a law-school student, Schlegel found the portrait those materials offered of the legal system to bear little if any resemblance to how legal power was actually exerted by real human beings living in cities and towns across the country.⁶⁷

But the resemblance is real. Consider a recent essay of Schlegel's, published in this law review.⁶⁸ In that essay, he describes the difficulty with which he is confronted by teaching at a time when students have no sense of what it means to be cultivated in the arts of lawyering. "[S]tudents," Schlegel observes, "do not appear to equate wanting to be a lawyer with wanting to be a good lawyer—a skillful lawyer, a successful lawyer, a winning lawyer, a decent and ethical lawyer, a lawyer who knows the craft."⁶⁹ That fact is lamentable to Schlegel because even though, like flipping burgers, the job of most lawyers is often tedious, it remains true that "perhaps once a month a lawyer may face a problem that cannot be handled by resort to the formulaic responses and the boilerplate that lawyer has deployed a hundred

67. Actually, that's somewhat of an understatement: "Indeed, I think it is shitty, politically repressive, contrary to what I see as the point to an education—giving one a purchase on the world so that one may try to choose, or in default make, one's place in it—and generally cowardly, in that it avoids explicit justification of social practices." John Henry Schlegel, *A Certain Narcissism; A Slight Unseemliness*, 63 U. COLO. L. REV. 595, 607 (1992).

68. Schlegel, *supra* note 3.

69. *Id.* at 453.

times before.” In such circumstances, “[j]udgment, craft, creativity, and even wit occasionally may be found highly useful, even if not strictly required.”⁷⁰

Schlegel sees his job as a law teacher to lie, at least in part, in trying to get his students to develop such good judgment. He cannot develop it *for* them; it is something they must do for themselves. And it requires them to do more than merely master written material, whether in the form of cases, academic commentary, or anything else. Developing a sense of good lawyerly judgment requires “close, laborious, critical reading of texts; careful and self-critical reflection.”⁷¹ It demands “critical thinking” in the sense that it requires one to engage with the world from a skeptical posture. This act involves, in Schlegel’s words, “reading against (and sometimes across) the grain, whether the grain is that of written materials, understandings of human behavior, or of human institutions in an attempt to gain a different perspective.”⁷²

But skepticism does not mean critique for its own sake. It is just as bad to apply some stock theoretical lens—whether Marxist or Freudian or some other, more fashionable “theory”—to, say, a judicial opinion than it would be to apply a doctrinal filter that strips away everything but the application of a rule to a set of facts.⁷³ Both would be “inimical to critical thought” because in neither case is the reader’s mind allowed the sort of free play necessary for genuine insight.

Nor does such insight involve the mere discovery of something out in the world. Rather, it emerges from a complex interplay of mind and world.⁷⁴ The inquiry thus

70. *Id.* at 454.

71. *Id.* at 455

72. *Id.* at 455 n. 14.

73. *Id.*

74. Schlegel, *supra* note 65, at 443 (endorsing the view that “the mind has a constitutive role that it plays in perception,” so that “[w]hat the subject perceives

involves not a small amount of “exploring the content of one’s own head,” in a way that most law students do not quite grasp.⁷⁵

Another way to put the point would be to say that good judgment, or prudence, is an ethical as well as an intellectual virtue. That means human responsibility takes center stage.⁷⁶ Exercising judgment in legal practice will require Schlegel’s students to “put[] their butt on the line, by exercising the best possible judgment in circumstances where answers are unlikely and advice only possible in terms of better or worse alternatives.”⁷⁷ And that means accepting responsibility when things don’t work out as planned: “A lawyer who exercises judgment accepts the risk that the advice given will be less than optimum, even wrong, and so accepts the blame that follows from poor judgment.”⁷⁸ In short, like Henry, Schlegel sees law as a “prudential” science of sorts.

Of course, Schlegel’s vision of what a good legal education actually looks like is not the same as Henry’s. Far from it.⁷⁹ In a symposium from the early 1990s, Schlegel imagined a law school based on books “about law”—or offered from an “external” (his quotes) perspective on the legal system⁸⁰—the aim of which would be to teach students “the regularities in what lawyers do across practice specialties and, if well done, across legal regimes.” It would offer courses on “the structure of the legal profession or on the economic

‘out there’ is not what is ‘really’ out there, but only what the mind is somehow ‘able’ to see”).

75. Schlegel, *supra* note 3, at 455.

76. *See cf.* Ralph McInerny and John O’Callaghan, ST. THOMAS AQUINAS STANFORD ENCYCLOPEDIA OF PHILOSOPHY (“Prudence is an intellectual virtue since it bears upon the goal of truth in the good ordering of action.”).

77. Schlegel, *supra* note 3, at 453.

78. *Id.* at 464.

79. *See* Schlegel, *supra* note 67, at 609 (treating Hart as a foil).

80. *Id.* at 607.

and social system in which it is embedded.”⁸¹ Such a law school, Schlegel argued, would offer students a better legal education because it would give them a more theoretical perspective, thereby offering them intellectual “tools with which to work for the duration of an honorable professional life.”⁸² This is not your father’s Legal Process course.

But that’s just the point.⁸³ Because we live in Herbert’s world, Schlegel’s idea of training lawyers using materials that look at law from such an “external” perspective is difficult to even make sense of. Hardly surprising, then, that Robert Post concluded in a comment in the same symposium that Schlegel’s effort to use “external” scholarship for the sake of improving legal education and practice, rendered him “paralyzed, half in and half out of the traditional legal academy.”⁸⁴ Post saw Schlegel as caught in a “self-defeating tension.”

That seems exactly half right. It’s certainly a tension. But although that tension can be uncomfortable, it need not be self-defeating. Recall that in the pragmatist view, the Essential Dilemma is just part of the human condition, unresolvable in the abstract and yet inescapable in particulars. So understood, facing it can lead to productive and creative thought. Jerome Frank called it a posture of “painful suspension,” which he thought critical for intellectual advance.⁸⁵ Schlegel once described it to me, in discussing the CLS movement, as a “vibration” that those in the CLS movement experienced—one between their deep

81. *Id.* at 604.

82. *Id.* at 607.

83. A point I have made before. *See* Barzun, *supra* note 5, at 1283–85.

84. Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615, 622 (1992).

85. JEROME FRANK, *LAW AND THE MODERN MIND* 172–73 (1963) (endorsing, and ascribing to Hans Vaihinger, the view that the most advanced (but least comfortable) stage of human development is one in which “it is recognized that although thought may not be in complete correspondence with factual reality, it may lead to ultimate practical coincidence with the facts of existence”).

moral convictions and their equally deep doubts as to how they could ever rationally justify those convictions.⁸⁶

Under this view, then, we would see Schlegel's imagined law school as simply a rival hypothesis as to what particular habits, skills, methods and ideas are properly cultivated in law students. We would test that hypothesis in the only way possible—by trying it out and comparing its fruits against those of the traditional methods, for the students, for legal practice, and for society. That is no easy task because it would require those teaching such courses to have the courage of their convictions and to preach (in class) what they practice (in their scholarship). It was precisely Schlegel's lack of confidence in the typical CLS scholar's will or capacity to do so that made him skeptical of the likelihood of such a law school actually coming into existence.

Professor Post may have worried (and perhaps Henry would have as well) that such an approach, if adopted pervasively, would threaten the very existence of the legal order, shaking students' faith in the reality, and therefore value, of the "rule of law." But for his part, Schlegel thought the legal system could handle it. "[C]ontrary to most of my intellectual friends," he explained, "I think the law would likely survive such criticism."⁸⁷ The reason, at least in part, is that books "about law" are just as vulnerable to skeptical doubts as is mainstream legal practice and theory.

This last point leads to yet another example where we can see the same creative tension at work. Take Schlegel's view of legal history, a field to which he himself has made significant contributions.⁸⁸ Schlegel has long insisted that intellectual history would be improved by treating it as a "history of intellectuals," rather than one of ideas.⁸⁹ Now, the

86. Whether Schlegel's is an idiosyncratic account of CLS I cannot say.

87. Schlegel, *supra* note 67, at 607.

88. See, e.g., JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (2011).

89. See, e.g., Schlegel, *supra* note 65, at 435; see also *id.*, at 453–67.

suggestion that one can only understand ideas from the past by examining the social context in which they arose in some ways reflects (again) the belief in the interdependence of facts and values, objective and subjective, theoretical and practical reasoning that marks the pragmatist tradition to which I have suggested both Schlegel and Henry belong.⁹⁰ It is also more or less conventional wisdom today among legal and intellectual historians generally, many of whom have used it as a basis for undermining the doctrines and concepts of legal practice by revealing its historical contingency.⁹¹

But what makes Schlegel stand apart is that he is equally concerned to make the same point about the historians themselves. For him, such contextualized accounts and contingency-exposing critiques do not offer “true” accounts of legal practice or (therefore) a secure basis from which to issue a final verdict on legal practice. After all, those accounts can be contextualized, and the contingency of those critiques can be exposed, in precisely the same manner. Historians are intellectuals, too. As Schlegel recently put it, in typically colorful language, “[w]e are always trapped by our past and our present, by our race and ethnicity, our gender and sexual orientation, our education and class position, our toilet training and other rebellions.”⁹² This fact does not undermine historical inquiry; instead, it gives us a reason to celebrate it:

90. See, e.g., James T. Kloppenberg, *Thinking Historically: A Manifesto of Pragmatic Hermeneutics*, 9 MOD. INT. HIST. 201, 202 (2012) (“Every text must be studied in relation to its author or authors, particular persons existing in a particular time and place, and interpreted as the embodiment of a particular set of practices and purposes.”).

91. For an example in the legal domain, see MARK GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991) (drawing on the work of Quentin Skinner to contextualize, and criticize the “social interest” justification for protecting free speech). Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 B.Y.U. L. REV. 259, 269 (criticizing Graber’s account).

92. JOHN HENRY SCHLEGEL, *SEZ WHO? CRITICAL LEGAL HISTORY WITHOUT A PRIVILEGED POSITION* IN OXFORD HANDBOOK OF HISTORICAL LEGAL RESEARCH 578 (Markus D. Dubber & Christopher Tomlins, eds. Oxford University Press 2018).

[B]eing trapped does not mean that we have no obligation to do our very best to understand the many worlds of the people in our various stories about the past. We need to understand, and not in caricature, simultaneously both the workers and the capitalists, the feminists and the misogynists, the racists and the objects of their vilification. This is not because their beliefs and actions are of equal value—our writing ultimately discloses how we value them, as it should—but because they are all humans, all trapped in their past and present just as we historians are.⁹³

If Schlegel's view about the limits of our own knowledge is right, then it's a lot harder to launch devastating critiques—at least in the short run—because the ground from which one launches the attack is always vulnerable to crumbling underneath.⁹⁴

The point can be generalized. Some of those sympathetic to CLS-style critiques tend to fetishize other disciplines, seeing them as sources of purer forms of knowledge, uncorrupted by the professional pressures that distort scholarly efforts and produce “law-office history.”⁹⁵ Schlegel, though, recognizes that scholars in *all* fields are susceptible to institutional and professional pressures, rendering their perspectives on legal practice just as partial and potentially distorted as those of lawyers and law professors. Academics, too, have bills to pay, promotions to secure, and thus, intellectual turf to protect.⁹⁶

93. *Id.* at 578.

94. *Id.* (answering “no” to the question, which he attributes to Barry Cushman, “Can you name a successful critical reform movement that devoted a lot of effort to analyzing and critiquing its own animating foundational assumptions?”).

95. See, e.g., Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 *Yale J. L. & Human.* 155, 165 (2006) (defining “law-office history” as the mining of a historical record to support one’s own legal conclusion).

96. John Henry Schlegel, *If the Music Hadn’t Stopped, or Reflections on the Great Kerfuffle: Historicism’s Continuing Grasp for Truth*, *YALE J. L. & HUMAN.* (forthcoming, 2020) (manuscript at 3) (on file with authors) (observing in the rise of academic disciplines in the early 20th century, “[e]ach group began by staking out part of the intellectual world as its ‘turf,’ adopting a particular way of looking at that turf, a method as it were, and moving to cut out the ‘amateurs’ who

To make such observations is not to indict the integrity of other disciplines. It is merely to recognize that writing and teaching in history, literature, philosophy, political science, psychology, economics, or anything else is its own sort of *craft*, which involves not only mastering certain sources and methods but also expressing judgments about what does and does not matter. “In the classroom, if not elsewhere,” Schlegel points out, “a teacher is implicitly making a representation that whatever material is transmitted to one’s students is something worth acquiring, something worth paying for.”⁹⁷ True, we can say that such representations reflect the “internal” point of view of whatever discipline is being taught. And so they do. But such a statement does not answer the question of whether the disciplinary perspective itself—its methods, materials, and assumptions—are worthwhile ones.

That is why Schlegel sympathizes with Paul Carrington’s suggestion in 1984 that CLS scholars should resign their posts in law schools.⁹⁸ True, Carrington was wrong on the merits, because he profoundly misunderstood what CLS scholars believed and were arguing for (he had mistakenly thought them nihilists).⁹⁹ He was right, though, to underscore the inescapably ethical component of the scholarly debate over CLS. “For a scholar who understood that it is not possible to establish the Truth of scholarship,” Schlegel recognizes, “Carrington’s proposition has more bite.”¹⁰⁰ That is because they see that what they write and teach as an expression of who they are and what they value.

Which is all just to say that what is true for the law student preparing for practice is also true for the law professor, teacher, and scholar. As Lon Fuller, a

formerly had a claim to that turf”).

97. *Id.* at 20.

98. *See id.*

99. *See id.*

100. *Id.* at 20–21.

contemporary and friend of both Harts, put it, the only gospel for both groups is that “there is no gospel that will save us from the pain of deciding at every step.”¹⁰¹ To raise a question, to treat it as worthy of investigation, and to devote one’s time to investigating it are all simultaneously decisions about what to do and what to believe.

But why think that the “pain” (or Schlegel’s “vibration”) that facing the Essential Dilemma head-on produces is more likely to bear fruit than result in self-defeat? Here I offer no argument. The thought that it will, I think, rests on a kind of faith. The hope is that by confronting (rather than evading through an intellectual division of labor) the felt contradictions in our deeply held beliefs—tensions between and among our most deeply held moral convictions and epistemic commitments—we can somehow gain insight and understanding.¹⁰² That means, as it applies to law, that it is a faith which underlies both (1) the ambition to conceive of law as an “autonomous discipline” and (2) the refusal to accept as final the particular and contingent way that the modern academy has carved up intellectual life and packaged it for progress. And it is a faith exhibited by those who strive mightily (even if unsuccessfully) to reconcile those contradictions (as Henry did) *and* those who proceed in full, conscious awareness of the impossibility of doing so (as

101. Lon L. Fuller, *The Place and Uses of Jurisprudence in the Law School Curriculum*, 1 J. LEGAL EDUC. 495, 507 (1949).

102. Cf. NAGEL, *supra* note 35, at 4 (“Certain forms of perplexity—for example, about freedom, knowledge, and the meaning of life—seem to me to embody more insight than any of the supposed solutions to those problems.”). Cf. Schlegel, *supra* note 92, at 578–89 (“As a utopian I believe that when not in a Maoist mode, self-criticism would more fully reflect the position that scholars, especially the historians whose work I know and love, are in when and whatever they write. And I hope that such more capacious reflection on the limitations of positionality just might allow our critique to be effective for more than the statutory fifteen minutes of Warholian fame.”).

Schlegel does).¹⁰³

If those seem like strange, perhaps even paradoxical, pairings, then consider one final point. Although throughout this Essay I've described this posture towards the Essential Dilemma as "pragmatist," another label would be *humanist*. That term is a contested one, and I will not defend here either my use of it, or the implication that law properly belongs to the "humanities." Suffice it to say that the spirit intended is well captured by Leonard Cohen in his lyrics that Schlegel quotes in a different, though I think related, context:

*There's a crack, a crack in everything. That's how the light gets in.*¹⁰⁴

103. Cf. Charles L. Barzun, *Jerome Frank, Lon Fuller, and a Romantic Pragmatism*, 29 YALE J. LAW & HUMAN. 101, 129 (2017) (making an analogous, perhaps even identical, claim about two other legal thinkers not typically classed together).

104. LEONARD COHEN, ANTHEM (Columbia Records 1992). See Schlegel, *supra* note 3, at 472.

APPENDIX: Klein Bottle (shape with only one side)

