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## John Henry Schlegel and The Muppet Show

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# Buffalo Law Review

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## John Henry Schlegel and The Muppet Show

ALFRED S. KONEFSKY†

I intend to take seriously Schlegel’s admonition, which was a kind of proxy for a call for papers, that we are to engage in “serious fun,” because if anyone knows how to have fun being serious, it’s Schlegel. And Schlegel’s fun is not frivolous, though it contains an element of whimsy, and I would and will argue that in some sense it is the key to understanding his work in the classroom and in his scholarship because it captures a certain critical stance that animates that work. (That is not to say that Schlegel does not know how to laugh, which he often does, even at himself. Indeed, you could often hear Schlegel’s voice and laugh reverberating off the walls in the stairwells and hallways of the law school, well before he appeared at your office door.)

In order to set the scene, I want to recur to a certain pattern established early in my relationship with him as a

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†University at Buffalo Distinguished Professor Emeritus, University at Buffalo School of Law, State University of New York. I would like to thank Robert Berger, Barry Cushman, David Engel, George Kannar, Bruce Mann, Lynn Mather, Matthew Steilen, Robert Steinfeld, Barry Sullivan, Winnifred Sullivan, David Westbrook, and G. Edward White for reading and commenting on this symposium contribution. In particular, Dianne Avery patiently provided an extremely thoughtful, perceptive, and careful reading, proving once again that it may take more than one person to understand Schlegel, who characteristically did not wish to read this paper, saying “I’ll deal with it later.” Nevertheless, I need to thank him anyway, for more than forty years of reading, conversation, and friendship.

colleague and friend. For almost forty years, Schlegel and I talked on the phone once or twice nearly every day (not texted or emailed). A typical phone call might begin with Schlegel calling and starting the conversation midthought, beginning with a stream of consciousness, often excited, occasionally annoyed, always engaged, that expressed his desire to communicate something he had just discovered, observed, or read, or discussed with someone else, a byproduct of the restless range of his intellectual curiosity. I usually let him talk for about 45 seconds or a minute before gently interrupting him and saying something like, "Schlegel, what the hell are you talking about?" (Though it is possible that I didn't always say "hell.") He, of course, simply assumed I knew what was on his mind and where it came from. He would then explain what prompted the phone call, and then it would become apparent why he wanted to share the experience, insight, or information. But just as I became fully locked into the conversation, he was gone. I mean gone in a flash, just abruptly hanging up, usually not even saying good-bye, often again in midsentence just as he had entered. Having accomplished his goal, his business with me was done and he simply moved on, as in disappeared. The first time this happened I said to myself, "Well, that was rude," or weird. But I just got used to it, and when I checked around, I realized the pattern occurred with nearly everybody. All he wanted to do was to share something with you that he thought might interest you or that he had learned. He was engaging in an act of intellectual community and kinship. At his core, Schlegel is an old-fashioned gentleman. He wasn't being rude; it was just Schlegel being Schlegel.

This brings me to the story of how these phone calls began, which in retrospect I realize has everything to do with Schlegel's work. We started talking on the phone regularly in the late 1970s when we both realized that one evening a week we both sat down with our kids in our respective homes to watch *The Muppet Show*. For the children, the Muppets were this wonderful mashup of antic and manic characters

dressed in odd garb, doing wild things, gesturing in overly expressive ways, making fun of each other, finding themselves in improbable situations with improbable guests, or having fun in constant and loud motion. It all had a certain innocent and harmless charm about it for kids. But let's face it. The show was really for adults, though its ability easily to bridge the generations was part of the attraction. The jokes and funny lines, however, were for grownups, incorporating some really serious political and cultural satire, with a tone of irreverence, and trenchant, if not subversive, commentary on and observations about the world we occupied.

Precisely one minute after the show ended each week, the phone would ring and what became our ritual would start. It was Schlegel asking, "What did you think?" And so the serious process of deconstruction would begin as we walked through the show again. What did we like or not like? What worked or did not work? And invariably we focused on two characters. Not Oscar the Grouch (as one might expect from Schlegel) or the Count (who found his way into a title of a Schlegel article<sup>1</sup>). They were Sesame Street characters anyway. But Statler and Waldorf, the two elderly curmudgeons seated in a theater box overlooking the stage, who spewed totally dismissive comments about what they were watching. They were nothing but critical of what they saw, throwing off one-liners eviscerating what they were witnessing on the show though they never left and kept watching, endlessly entertained and contemptuous. They would occasionally ask each other why they continued to observe the show, and they could be critical of themselves for not fleeing. We both found a natural affinity for them.

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1. John Henry Schlegel, *Drawing Back from the Abyss, or Lessons Learned from Count von Count*, 1 THE CRIT 16 (2008). I suppose here is as good a place as any to say it, but Schlegel consistently leads the league with the most arresting article titles in the business. (I'm not sure he really works on them; they just seem to trip naturally off his tongue.) And as a bonus every once in a while, they tip you off as to what the article is actually about.

Now here is the interesting twist to Statler and Waldorf. Jim Henson, the creator of the Muppets, in fact played the character of Waldorf. Henson was one of the extraordinary cultural geniuses of late twentieth-century America, but consider for a moment his stance as he inhabited the heckling character of Waldorf. Henson was actually participating in an active critique of what he had just created and to which he was fully committed and in which he was entrenched. And Henson as Waldorf is sort of emblematic of Schlegel's role as a legal educator and a legal historian, offering up his critical intelligence in a system of thought in which he is embedded after having invested some creative capital in the enterprise. Schlegel, a contrarian by nature like Waldorf, has a kind of roving commission as a critic at large, almost a literary critic. But like Waldorf, what he really wants to know is what in the show works or how it works, what doesn't work, or how do things function. In that sense, in addition to being a critic of sorts, Schlegel is also a kind of mechanical engineer with his eye on the design of various moving parts in law and history, and who then attempts to determine whether those parts operate as designed, though there is nothing at all mechanical about Schlegel.

At this point, it's a fair question to ask so how does this relate to Schlegel's actual work and method? I want to divide the discussion into two parts, one focused on his teaching and one on his scholarship, though most of what I will have to say about his written work will center on something that most people have probably not read, his long and remarkable book manuscript on the economic history of the city of Buffalo and the role of law therein.

## I.

Beginning in the early 1980s, Schlegel began requiring his corporations students to obtain a student subscription to

the *Wall Street Journal*.<sup>2</sup> Among other historical moments and actors, these were the heady junk bond days of Michael Milken and the corporate raiding and greenmail time of Boone Pickens. And Schlegel would begin each and every class with the same simple question: “What’s in today’s paper?” Before his students encountered law (if they were ever to encounter law), they had to answer the question: what happened today or yesterday in the real world? Kind of a risky strategy in a law school when you think about it.

Why did he start class that way? First, the move was an expression of and adaptation to Schlegel’s deep antipathy to many of the corporations casebooks of the time, with their emphasis on legal doctrine, and his own thorough skepticism about the efficacy of legal rules. Schlegel did not think the place to start was law. Second, he thought instead that students needed to know what corporate behavior looked like, including an examination of what corporations were trying to accomplish, how they went about achieving their purposes or goals, how they structured transactions, what the pieces of paper they drafted and issued looked like, and how they responded to the needs and demands of their clients. In a way, Schlegel was trying to inculcate Karl Llewellyn’s “situation sense”<sup>3</sup> in law students at an early stage (and not just in judges), “to root discussion and observations in the soil of practice, of common knowledge,”<sup>4</sup> and “to indicate the type-facts in their context.”<sup>5</sup> Llewellyn had warned that “delving into books rather than into life to find situation-reason or rule-reason must, of course, when the books are narrow, constrict the trove.”<sup>6</sup> So in a sense, Schlegel’s pedagogical strategy was an extension of some

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2. The following account is based on conversations with Schlegel and, in some ways, my interpretation of his rendering of his practice.

3. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121–57 (1960).

4. *Id.* at 59.

5. *Id.* at 60.

6. *Id.* at 166.

corners of the legal realist agenda, and it had two organizing principles capturing two interrelated and potentially contradictory reasons.

Drawing also on early law and society literature, Schlegel first wanted students to see law in action. If you want to see law in action, read the *Journal*. But second, and the real purpose, was that he wanted students to understand that, from his perspective, corporate behavior had little or nothing to do with law, or in other words how little corporate law mattered. Rules did not reflect what was really going on. Markets might help to answer that question. It was almost as if corporations and their officers decided what they wanted to do, and then they looked around for the law that would allow them to do it or justify their behavior, or they shaped the law to help them accomplish their goals. In other words, there might be a conflict between wanting students to see the law in action, but at the same time presenting them with evidence that law was not much in action.

Schlegel occasionally coupled the daily *Wall Street Journal* reading exercise with a set of his own selected cases culled from the Delaware Supreme Court. The dozen or so cases in a sense supplemented the daily foray into the news. They tended to focus on director and officer obligations and liabilities and corporate transactions, and in Schlegel's view they captured the attitudes of an important court in the world of corporate law that was not hostile to but suspicious of corporate behavior. In the aggregate, the question was what did the cases say about what we would now call corporate responsibility. The organizing premise was disarmingly simple. We are going to explore how things work in reality in order to better prepare you to practice law. In the process you might learn a little law to help you navigate the system of corporate behavior.

## II.

I would argue that similar themes and concerns animate Schlegel's enormously diverse scholarship. From legal

realism<sup>7</sup> to critical legal studies (his Stanford article on an “intimate, opinionated, and affectionate history” of CLS<sup>8</sup> seems to me to be a very good example of Statler and Waldorf in action, bringing the critical gaze and observations from both off stage and simultaneously embedded, except that it was far too “affectionate” for Waldorf’s taste), to legal education (including the institutions themselves,<sup>9</sup> what passes for past and current theories of legal education,<sup>10</sup> the professional identity of legal academics,<sup>11</sup> and the relationship or dance between them all), to his constant exploration and criticism of the parameters and foundational principles of intellectual history and the art and challenge of doing history,<sup>12</sup> to legal theory and legal scholarship,<sup>13</sup> to his

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7. See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995) [hereinafter SCHLEGEL, *AMERICAN LEGAL REALISM*].

8. John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984).

9. Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833 (1982).

10. See John Henry Schlegel, *Those Weren’t “The Good Old Days,” Just the Old Days: Laura Kalman on Yale Law School in the Sixties*, 32 LAW & SOC. INQ. 841 (2007) (review of LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* (2005)); see also John Henry Schlegel & David M. Trubek, *Charles E. Clark and the Reform of Legal Education*, in JUDGE CHARLES EDWARD CLARK 81 (Peninah Petruck ed., 1991); John Henry Schlegel, *Langdell’s Legacy Or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517 (1984) (reviewing ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983) and CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW, *LAW AND LEARNING: REPORT TO THE SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA* (1983)).

11. John Henry Schlegel, *Between the Harvard Founders and the Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985).

12. John Henry Schlegel, *Does Duncan Kennedy Wear Briefs or Boxers? Does Richard Posner Ever Sleep? Writing About Jurisprudence, High Culture and the History of Intellectuals*, 45 BUFF. L. REV. 277 (1997) (review of NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995)).

13. John Henry Schlegel, *American Legal Theory and American Legal Education: A Snake Swallowing Its Tail?*, in *CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE* 49 (Christian Joerges & David Trubek eds., 1989).



objections to the constraining power of the tyranny of the lines drawn between academic disciplines (both within and outside of law) as an inhibiting force in obtaining real knowledge that mattered,<sup>14</sup> to economic change and its history and its connection to law.<sup>15</sup> Schlegel is pretty insistent and consistent in trying to parse out how things work, function, and operate. He is also somewhat unsparing in his evaluation and critique of the success of those institutions and ideas and people associated with them, glad to point to what their failures may be, and he tells us so in his introductory notes to this conference.<sup>16</sup>

I want to focus, however, on just one of Schlegel's scholarly contributions, one that is a major accomplishment though as yet unpublished, and which I think illustrates his method of doing history and the incorporation of his attitudes about the craft. The book, entitled "While Waiting for Rain: Community, Economy and Law in a Time of Change,"<sup>17</sup> is a long meditation on the forces of economic change in late nineteenth- and twentieth-century America that ultimately focuses on the impact of those forces on the City of Buffalo and leads to a searching interrogation in painstaking detail of the reasons for the city's decline over time. The book contains speculation about the nature of economic development, the role of law in the process of economic change, Buffalo's place in the path of that development and

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14. See John Henry Schlegel, *From High in the Paper Tower, An Essay on von Humboldt's University*, 52 BUFF. L. REV. 865 (2004).

15. See John Henry Schlegel, *Law and Economic Change During the Short Twentieth Century*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 563 (Michael Grossberg & Christopher Tomlins eds., 2008) [hereinafter Schlegel, *Law and Economic Change*].

16. I have to say that I was pretty struck by his own summary of the organizing premises of his work. I had already started to work on this Essay before I first read his "Notes," and I had already told him about what I was thinking of writing. He said to me: "Yes, that's it." I don't know if I felt better or worse.

17. John Henry Schlegel, *While Waiting for Rain: Community, Economy and Law in a Time of Change 1* (2017) [hereinafter Schlegel, *While Waiting for Rain*] (unpublished manuscript) (on file with the Buffalo Law Review).

change, and what the future might hold. In places it is deeply informed by the work and urban theory of Jane Jacobs, particularly *The Death and Life of Great American Cities* (1961), *The Economy of Cities* (1969), and *Cities and the Wealth of Nations* (1984). Jacobs wanted to know how cities work and how cities fail. So does Schlegel; it is easy to see why he would have been attracted to her writing on the subject and why Buffalo became his case study.

Schlegel's book is divided into five parts, the first three of which I want to discuss. Part I is a broad, sweeping description of law and economic change in America, beginning with a brief sketch of economic life before the Civil War, but primarily devoting attention to the late nineteenth century and particularly the twentieth century. He had rehearsed some of his themes in his discussion of the twentieth century in his essay on law and economic change in *The Cambridge History of Law in America*.<sup>18</sup> Part II switches to a parallel account of "community and economic change in America: Buffalo,"<sup>19</sup> more or less lining up Buffalo with the corresponding decades and events in the greater American economy. And Part III on "thinking about economic development"<sup>20</sup> seeks to apply the insights of Jacobs's work to the Buffalo experience. So the thick description of the history of the Buffalo economic story is in effect placed between the bookends of two types of context, the greater American experience and the theoretical work of Jacobs on what animates the success and failure of economic life and community in urban environments.<sup>21</sup>

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18. Schlegel, *Law and Economic Change*, *supra* note 15.

19. Schlegel, *While Waiting for Rain*, *supra* note 17, at 101.

20. *Id.* at 189.

21. Parts IV and V of the book manuscript offer Schlegel's speculations about what the future holds both for Buffalo and the United States, based on his understanding of what has passed before in the economic experiences of each. Though interesting, they are somewhat tangential to my concerns here. *See generally id.* at 225–323.

In each of these three parts, Schlegel maintains a certain integrity of methodological inquiry. In Part I, by exploring law's relationship to economic change, he emphasizes how law works or does not work. He repeatedly asks about the process of economic change, "What's law got to do with it?" In Part II, he describes what drove economic change in Buffalo, what dynamic elements were introduced that led to growth and decline, and how did they function individually and in interaction with each other; in other words how did they arise and how did they work. In Part III, he uses the models developed by Jacobs to forge a theory of sorts about how economic change and community function, in order to explain or make some sense of the Buffalo experience. Each of the three parts explores law, economic change, and community, and the themes in each part occasionally overlap.

## II. A.

Schlegel begins his interrogation of law and economic change in Part I with two questions of definition, economy and law. Economy means "*a persistent market structure that is the fusion of an understanding of economic life with the patterns of behavior within the economic, political, and social institutions that enact that understanding.*"<sup>22</sup> In Schlegel's rendering, the economy is a kind of capitalist machine that would go of itself, or to mix metaphors, a sort of system of feedback loops. Law is defined as "*the many and variable actions undertaken by lawyers and other governmental officials, the formal and effective norms originating from the practices of these individuals, and the systematic presuppositions shared among them.*"<sup>23</sup> Norms, practices, and presuppositions all seem related to the legal realist agenda that occupied Schlegel in the earlier portion of his

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22. *Id.* at 19.

23. *Id.* at 19–20.

scholarly career,<sup>24</sup> and speak in some ways to the work of Willard Hurst.<sup>25</sup> As Schlegel traverses the terrain of two hundred years of American economic life leading to the twenty-first century, he finds the steady unfolding of economic innovation coupled with Schumpeter's creative destruction,<sup>26</sup> from the "archipelago of agricultural/trading economies,"<sup>27</sup> to the rise of competition, the efforts to tame competition, the associationalist ideal and how it worked, the unraveling of the late twentieth-century economy and norms, and the attempts to restore them. Along the way, one encounters financial panics, depressions, wars, patterns of economic growth and decline, and learns about a dizzying array of economic activities, organizations, and actors.

From time to time, Schlegel pauses after describing economic behavior in particular decades or an era and asks in a very skeptical voice, "What's law got to do with it?"<sup>28</sup> Depending on the situation (and the distinctive moments of economic development and change, the devil is in the details), the answer is, "[e]verything and often nothing."<sup>29</sup> "Everything" includes

the great, mostly silent work of law constantly refining understandings of mine and thine, of property and contract, and also of the institutional structures within which all of life is lived. These refinements are most often marginal changes in law, though sometime over a long period of time what was first marginal may cumulatively turn out to be something close to transformative[.]<sup>30</sup>

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24. SCHLEGEL, AMERICAN LEGAL REALISM, *supra* note 7.

25. See JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950).

26. John Henry Schlegel, *On the Many Flavors of Capitalism or Reflections on Schumpeter's Ghost*, 56 BUFF. L. REV. 965 (2009).

27. Schlegel, *While Waiting for Rain*, *supra* note 17, at 21–26.

28. *Id.* at 24.

29. *Id.*

30. *Id.*

like married women's property rights or the law of master and servant. Most of the refinements are "matters of state law,"<sup>31</sup> often positive law. In the economic realm before the Civil War, Schlegel sees the "silent work" of law "going on."<sup>32</sup> There are exceptions, "[b]ut most of it [law] passes silently, noticed only in retrospect as patterns become clear, the law as a vast janitorial organization cleaning up after life."<sup>33</sup> And, of course, in Schlegel's retelling, pre-Civil War, "[o]ne might easily claim that law did nothing during these years"<sup>34</sup> or at least was "very close" to fitting into "being a part of the great silent background of law."<sup>35</sup> (Examples include the tariff, the federal budget, the postal service, post roads, ports and navigable waterways and their maintenance in the federal domain, and, on the state and local level, building canals and investing in early railroads.)

Schlegel recurs to the question after his description of the 1870s and 1880s:

Again, the question "What's law got to do with it?" comes to mind. Even after noting the work in establishing a national paper currency, that of facilitating the expansion of railroads and populating the lands west of the Mississippi, and that of beginning railroad regulation, this question persists. The answer, of course, depends on what "it" is.<sup>36</sup>

But that "is not to say that there was no law around. When there is trouble[,] . . . at least American people go to law."<sup>37</sup> As to problems of competition, and pools, cartels, trusts, and monopolies during this period, however,

[g]oing to law was not by any means a wholly successful strategy for any actor in these or any other years. Law sometimes helps, but

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 31.

37. *Id.* at 33.

often does not . . . . And when law helps it sometimes supplies just what was asked for, but often supplies something quite different. And whether it delivers what was asked for or something different, what it delivers may have the intended results, but often does not. Indeed, perversely, sometimes law's help makes things worse.<sup>38</sup>

So “[n]either the Interstate Commerce Act nor the Sherman Antitrust Act turned out to work exactly as their supporters wanted or their opponents feared. Law is, after all is said and done, an ambiguous tool in the hands of citizens.”<sup>39</sup>

The hallmarks of Schlegel's work are prevalent: a core examination of how things actually work (law and/or economy) or, if they work as designed, skepticism about legal rules and their efficacy. He places law more or less firmly at the margins (at least of economic life), where private law rules reside primarily in the background, more or less silently controlling the ebb and flow of economic activity. Legislators create law to supplement the basic underlying legal rules of social and economic organization in order to either facilitate or restrain change.

For the 1890s through the entry of the United States in World War I, Schlegel tells us “[t]hat law has something to do with this part of my story of an extraordinary period of industrial expansion followed by one of industrial concentration is relatively obvious. What is not obvious is the answer.”<sup>40</sup> The 1920s and 1930s brought further transformations and deep shocks to economic systems, which challenged assumed faiths and coincided with the emergence of new industries and technology (the widening spread of electrical power, automobiles, air travel, radios, etc.).

For the 1920s and 1930s, Schlegel spells out the core ideas governing much of economic thought, the associationalist ideal. He defines the ideal as

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38. *Id.* at 33–34.

39. *Id.* at 34.

40. *Id.* at 39.

essentially a Main Street, though not therefore a small town, theory. It hoped to maintain high wages through the high prices that would support the small, local retail or wholesale businesses that were being undercut by the growth of so-called “discounters,” large regional or national retailers, as well as the more competitive sectors of the producer economy. . . . [Its] design . . . was for an economy of uniform, high prices, such as that found in more oligopolistic markets . . . .<sup>41</sup>

It was, however, “[n]ot laissez-faire in a different guise” for it “assumed some level of governmental involvement in the economy.”<sup>42</sup>

As to law, “[t]he Twenties and Thirties further sharpen[ed] questions about the relationship between law and economic change.”<sup>43</sup> The New Deal legislation, in response to economic turmoil “in agriculture, banking, communications, labor, securities, and transportation . . . also exemplif[ed] the way that law is regularly mobilized in times of trouble. All were significant changes in the doctrinal matrix that is the law at a time and place.”<sup>44</sup> But at the end of the day, Schlegel tells us “the role that these statutes played in economic change remains unclear.”<sup>45</sup> And “[l]aw changes lots of things in the details of economic life for the participants without bringing about a transformation of the economy from one enacted understanding of economic life to another.”<sup>46</sup>

So too was associationalism at work in the 1940s and 1950s. “The continued authority of the Associationalist ideal of managed, rather than ruinous, competition seemingly protected retail business owners, though here the development of new national chains . . . ought to have given

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41. *Id.* at 46.

42. *Id.* at 47.

43. *Id.* at 49.

44. *Id.* at 49–50.

45. *Id.* at 50.

46. *Id.* at 51.

careful observers pause.”<sup>47</sup> What emerged “in retrospect was a hot-house economy, insulated from competition abroad and limited in competitive pressures at home,” and it produced “a dramatic increase in the size of the middle class, both white collar and blue.”<sup>48</sup> It was “built on three things: reasonably high wages[,] low housing costs, . . . and the extension of college education.”<sup>49</sup>

As the economy hummed along in the 1940s and 1950s, law was “quite silent as well.”<sup>50</sup> The only major pieces of economic legislation were the Taft-Hartley Act of 1947 and the Interstate Highway Act of 1957. But according to Schlegel, “[t]he relative silence of law is, of course, misleading. Narrowly conceived as the formal and effective norms originating from governmental entities, especially the law of property, contract and theft, . . . law is always there, the modest hum of a faithful dynamo.”<sup>51</sup>

One might say that Schlegel is ambivalent about law, however he defines it (including actions undertaken by government officials, which presumably includes making law through legislation). I do not think he is agnostic about law; he has a stance (law is at best marginal). Though I think it is closer to the truth to describe him as profoundly skeptical about law and its influence on matters of economic change, sort of legal realism amplified by critical legal studies. Law’s impact may be differentially measured in long-term economic changes (incremental at best, though occasionally transformative) as opposed to short-term economic changes (perhaps more influential when specifically targeted and focused). And when law is invoked as an example of the formal intention to make changes economically, it almost always is in the realm of legislation or positive law. (It is also

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47. *Id.* at 55.

48. *Id.* at 57.

49. *Id.*

50. *Id.* at 61.

51. *Id.*



quite possible, of course, to argue that some examples of social legislation mattered, including economically even in the face of resistance, like the Civil Rights Act of 1964.)

The specter of Schlegel as a positivist is more than a little unnerving, until one understands that he does not think that, in other than a few instances, legislation or “law” mattered much anyway or at all. He might concede that sometimes margins matter. So he constantly refers to law as doing nothing, being silent, or engaging in silent work, or the silent background of law, amounting to only marginal change around the edges, sometimes helpful and sometimes making things worse (when you go to law), generally being around, or occupying an unclear or ambiguous role. At the very least, he seems to be calling for a kind of Hippocratic oath for law: do no harm. In the process, he sort of elides the methodological quicksand, flirting with functionalism (except that his solution conveniently is that law does not matter a good deal of the time), and winking at problems of causation as they glide by (he offers no speculation about how or why “the great silent background of law” was constituted). In the parts of his book that discuss first, Buffalo, and then, Jane Jacobs, law is barely mentioned at all, in effect dropping out, hovering as an indifferent ghost observing the chaos below.

## II. B.

How Buffalo rose and fell is the subject of Part II of Schlegel’s book where he spells out in granular detail what composed the Buffalo economy and how it functioned. Beginning his recounting of Buffalo’s long economic journey with the decision to build the Erie Canal and have it terminate at Buffalo Creek, Schlegel notes that

[h]ere the lake boats and the canal boats would exchange their differing cargos at a harbor that, like much of the canal, was frozen over anywhere from two to five months a year. Here Buffalo Creek

would be deepened and widened until that sluggish stream was transformed into the equally sluggish Buffalo River. The entrepôt at the east end of Lake Erie would be Buffalo.<sup>52</sup>

The goal was to open up a western water route for the ports of New York to facilitate the movement of commerce and people rather than force that transshipment of goods and relocation of persons to take place over traditional overland routes.

Buffalo's economy was partially forged by geographic fortune. Its location was "a partner in economic destiny."<sup>53</sup> For "[g]eography meant that, wherever the Erie Canal would terminate, the economy of the city that would grow up at that terminus initially would be founded on trade and transport."<sup>54</sup> And, as Schlegel reminds us,

[i]ndeed, Buffalo's status as a trading place, an entrepôt, was soon confirmed when in 1843 the most western of the rail lines that would later comprise the New York Central Railroad followed the canal builder's identification of the flattest route from New York City and so allowed trains from Albany to reach Buffalo.<sup>55</sup>

Buffalo then became "a major grain storage center, . . . develop[ing] the first steam driven mechanical device for unloading the [grain] boats [from the Midwest], as well as the first grain elevator."<sup>56</sup> Both the canal and the railroad spurred the arrival of immigrants, some on their way further west, but some who stayed.<sup>57</sup> "Foundries and other metal shaping businesses grew in Buffalo starting in the 1840[s]."<sup>58</sup>

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52. *Id.* at 102.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 103.

57. *See id.*

58. *Id.*

And after the Civil War, “these four resources—water, rail, grain and metalworking—formed the basis for Buffalo’s economy.”<sup>59</sup>

The local geography was organized around water and rail. One street grid was “radial, from a point near the waterfront[;] . . . [t]he other [was] rectilinear, seemingly centered on the same spot, but in fact centered on a street, Main Street, two blocks to the east.”<sup>60</sup> The problem with the competing plans to organize the city was that they obviously did not contemplate the proliferation of railroads serving and traversing the streets of the city and attempting to get close to the canal and lake. “The rail routes ran east to west at street level all the way. They effectively cut the city in two, separating north from south,”<sup>61</sup> and eventually “the agglomeration of rail lines was noticeably misaligned with the original radial pattern of the streets.”<sup>62</sup> Not surprisingly, “[i]ndustrial employment followed neither the radial nor the gridded street plan, but instead the water—the lake, both rivers, and the canal system—as well as the railroads.”<sup>63</sup>

So what of the early life of “community” along with law and economic change?

The spatial configuration of employment in the context of the geography of the city meant that wherever one lived, getting to work was not easy, at least unless one worked in the neighborhood so that walking was possible. Thus the chaotic overlay of street plans, railroads and employment opportunities fostered the growth of strong, isolated neighborhoods. It was in these neighborhoods that the ethnic structure of Buffalo was formed.<sup>64</sup>

Members of these communities “observed an ancient pattern, living near to where they worked and shopping near to where

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59. *Id.* at 104.

60. *Id.*

61. *Id.* at 106.

62. *Id.* at 107.

63. *Id.* at 108.

64. *Id.*

they lived.”<sup>65</sup> They were tied together by ethnicity, language, religion, churches, employment, and separated by ethnicity, language, religion, churches, employment, race, and sometimes class.<sup>66</sup> They were simultaneously bound together and pulled apart.

Buffalo was growing, and its population “doubled in each of the three decades following the Canal’s completion.”<sup>67</sup> By 1860, it ranked 10th in population of cities in the United States.<sup>68</sup> And it had begun to move beyond its identity as solely a site of transshipment and trade, and it had started to diversify its economy, branching out into manufacturing, particularly factories organized around metalwork.<sup>69</sup>

#### The intermediate aftermath of the Civil War

[was] not particularly good for Buffalo. The City’s population continued growing, but at a substantially slower, forty-five percent rate. The reason was fairly simple; the original entrepôt economy was fading. By 1869, the combined freight leaving the City on the Erie and New York Central railroads exceeded that by canal boat. And by 1875 more grain was moving out of the City by rail than by canal boat, a proportion that continued to increase. And by the 1880s the greatest portion of the coal coming to Buffalo was for use there, not for transshipment.<sup>70</sup>

Railroad expansion rose dramatically in the nation and in Buffalo, as did manufacturing.<sup>71</sup> First, came basic iron production and then manufacturing of coupling devices for rail cars, storage batteries for railroad passenger cars, rail car axles, etc.<sup>72</sup> Buffalo became “a major manufacturing—metal casting and bending—town. Most manufacturing

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65. *Id.* at 109.

66. *See id.* at 108–12.

67. *Id.* at 113.

68. *Id.*

69. *See id.* at 112–13.

70. *Id.* at 115.

71. *See id.* at 116–19.

72. *Id.* at 118–19.

plants were small, serving niche markets.”<sup>73</sup> And not to be forgotten, there were nearly twenty active breweries.<sup>74</sup>

By the 1890s and into the Teens, Buffalo had become “a big city.” “If ever Buffalo’s economy [was] in full bloom, these were the years.”<sup>75</sup> In 1890, Buffalo was the 11th largest city in the country; by the 1900 census it was the 8th, larger than Cincinnati, New Orleans, and San Francisco.<sup>76</sup> “The Erie Canal was of little economic importance anymore,” but the railroads were still “to be found almost everywhere in the community.”<sup>77</sup> And Schlegel observes,

While the penetration of rail into the fabric of the City was important for its economy, it remained an impediment to community life because the greatest portion of the original lines into Buffalo had been laid at street level. Given the degree that these lines had divided the community into many small areas, passage from one area to another was both dangerous and haphazard, dependent as it was on whether train tracks blocked one’s way.<sup>78</sup>

Buffalo benefitted from advancing technology in the design and construction of concrete grain elevators with massive storage capacity; the building of the Lackawanna Steel plant and smaller plants as well; the production of motor vehicles (including Pierce Arrow and Ford), light trucks, automobile radiators, and windshield wipers; the early entrants into the aviation industry (without any roots in metal bending); and the development of electric power capacity.<sup>79</sup>

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73. *Id.* at 120.

74. *Id.*

75. *Id.* at 134.

76. *Id.* at 122.

77. *Id.*

78. *Id.* at 123. The City asked the State of New York for help, and a Grade Crossing Commission was established, which “labored and litigated for years,” and “[e]ventually, it managed to secure agreement on the part of the relevant lines to cooperate in the removal of most of the major crossings.” *Id.*

79. *Id.* at 124–32.

Schlegel believes that “[i]n retrospect, however, there were at least three troubling developments in these years.”<sup>80</sup> First, was a reflection of the “meaning for Buffalo’s position as the second [largest] rail hub in the United States.”<sup>81</sup> The city had once been an entrepôt, “first moving goods and people from water to water,” and then “between water and rail.”<sup>82</sup> Now, “it increasingly became more dependent on rail for the movement of resources in and goods out.”<sup>83</sup> Second, was “the disappearance of locally owned companies into larger companies that were either owned elsewhere or publicly owned and headquartered elsewhere.”<sup>84</sup> And finally, was “the establishment of Buffalo branches of firms located elsewhere.”<sup>85</sup>

“Buffalo recovered quickly from the sharp, brief recession that followed the end of World War I.”<sup>86</sup> But there were signs of decline. Though the major train terminal was built in the 1920s, passenger traffic decreased.<sup>87</sup> Why? The automobile had arrived and with it the transformation of transportation. Various steel plants were sold to out-of-town corporations, including Lackawanna’s sale to Bethlehem. Aircraft manufacturing suffered initially, as “Curtiss Aeronautical, which was the largest aircraft manufacturer in the world, saw its wartime contracts vanish in an instant,” and after its reorganization, its founder, Glenn Curtiss, “cash[ed] out his interest.”<sup>88</sup>

Some Buffalo firms failed during the Depression, but no major banks in Buffalo closed. Federal money flowed to

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80. *Id.* at 134.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 135.

86. *Id.*

87. *Id.* at 136.

88. *Id.* at 138.

building projects, and the downtown development of the 1920s survived. The waterfront was showing signs of wear and tear and decay, as traffic and factories shifted. But the trajectory was unmistakable.

In 1910, the city had slipped from the 8th largest city in the United States to the 10th, then 11th in 1920, 13th in 1930 and 14th in 1940 . . . . While the City's population grew 13 percent between 1920 and 1930, suburban growth was 40 percent. Similarly, while the City's population grew less than one percent between 1930 and 1940, suburban growth was almost 20 percent.<sup>89</sup>

The population movement threatened to recalibrate the core of the regional economy.

Schlegel talks about the impact World War II had on shaping the "post-war world economy" and on spurring "the shift from an American economy focused on the Great Lakes and the Northeastern corridor toward a more national economy."<sup>90</sup> But for Buffalo, the war "turned out to have been more of an interlude."<sup>91</sup> During the war years, "the area's war plants received contracts in a dollar amount that made it the fifth largest defense-contracting site in the country," though it was the fourteenth largest city,<sup>92</sup> and "[w]ar work necessitated that the Federal Government build several new plants," including Bell Aviation and Curtiss-Wright.<sup>93</sup> Many of the city's manufacturing firms began converting and engaging in wartime production "seemingly disconnected from [their] previous products."<sup>94</sup> "And then," as Schlegel puts it, "it all was over."<sup>95</sup>

What was left in its wake? A relatively robust labor movement with a unionized work force, collective bargaining

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89. *Id.* at 142.

90. *Id.* at 144.

91. *Id.*

92. *Id.* at 145.

93. *Id.*

94. *Id.*

95. *Id.* at 146.

agreements, some strikes and turmoil, and higher wages and a growing demand for housing, slowly pushing residential development further out from the city.<sup>96</sup> And “[c]oincidentally, but not wholly coincidentally, the geographic structure of the region began to change.”<sup>97</sup> The change was to accommodate the automobile and other vehicular traffic feeding housing, and it arrived in the shape of the New York State Thruway and other road building projects, in order to enhance economic investment and growth. “[F]irst the Erie Canal had structured Buffalo[,] and then the railroads had restructured Buffalo, eventually the motor vehicle was going to restructure Buffalo.”<sup>98</sup>

But as to the traditional order that organized and shaped Buffalo’s economic identity, “water, rail, steel, metal bending, other manufacturing, banking [eventually], power and Downtown,”<sup>99</sup> some elements prospered, others sputtered. Grain shipment and transshipment on the waterfront were still thriving, railroad trackage continued its decline, as did freight and passenger service in the face of automobile and truck traffic.<sup>100</sup> Steel did better, the shape of auto manufacturing changed, and “[p]arts manufacturing for export to assembly plants located elsewhere seemed to be Buffalo’s niche.”<sup>101</sup> The aircraft industry postwar had mixed success, but there were pockets of “a certain optimism.”<sup>102</sup> The airport was expanded in 1955, defense contracting increased, some new firms stirred to life, and some old firms “expanded the range of their products.”<sup>103</sup> “[B]anks prospered during these years, and affiliated lawyers with

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96. *Id.* at 146–47.

97. *Id.* at 147.

98. *Id.* at 148.

99. *Id.*

100. *Id.* at 148–50.

101. *Id.* at 150–51.

102. *Id.* at 151–52.

103. *Id.* at 152–53.



them . . . .”<sup>104</sup> Downtown was holding its own, though increasingly threatened by the building of suburban shopping centers.<sup>105</sup>

The 1950s Buffalo economy, therefore, became a victim of two changes. The normal explanation places blame on the diversion of traffic and business from Buffalo as a result of the combined effects of the opening of the St. Lawrence Seaway and the interstate highway system beginning in the late 1950s. Schlegel thinks that explanation is faulty. First, postwar European grain markets were slow to recover, and “[t]he completion of the lock and dam system on the Upper Mississippi River permitted the development of a very economical all-barge route down that river to a revived port in Louisiana, a port that could easily serve South America as well as the Pacific basin through the Panama Canal.”<sup>106</sup> The Buffalo transshipment route to the rail connections to Atlantic ports just became more expensive than the water route down the Mississippi, even before the Seaway opened, and the railroads seemed uninterested in adjusting their rail rates and costs to help out Buffalo.<sup>107</sup> And, second, “the decline in railroad trackage antedates World War I,”<sup>108</sup> well before the interstate highway system came to fruition. The preconditions for decline had already been established.

The 1960s and 1970s continued the unraveling of Buffalo’s economic verities. The transshipment trade and the waterfront “became much quieter, though hardly silent,”<sup>109</sup> particularly in grain. “The steel mills still needed deliveries of iron ore and limestone, in fact, as the Vietnam War heated up such picked up. But after American participation in that war ceased[,] steel production began to decline and so [did]

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104. *Id.* at 153.

105. *Id.* at 153–54.

106. *Id.* at 156.

107. *Id.* at 156–57.

108. *Id.* at 157.

109. *Id.* at 158.

shipping to the mills.”<sup>110</sup> Changes to railroads “were less a result of a narrow combination of law and geographic possibilities, than of the legacy of such. The Northeast simply came to have too much railroad trackage for the economic activity that needed railroad service.”<sup>111</sup> Only two passenger trains a day served Buffalo by the mid-1960s.<sup>112</sup> Mergers followed, then bankruptcies, then Amtrak, and the Middle East oil price shock.<sup>113</sup> “Buffalo’s days as a major rail hub were over, as abandoned tracks and empty yards now testified.”<sup>114</sup> Steel also suffered after the Vietnam War from cost competition from foreign steel makers utilizing new technology.<sup>115</sup> And “[t]he auto industry followed the same path as steel with growth in the Sixties and trouble with both quality and imports in the Seventies . . . .”<sup>116</sup>

Schlegel refers to the 1980s and 1990s as “bottoming out.”<sup>117</sup> Whatever industry there was, was failing. Bethlehem, Republic, and Roblin Steel all closed, as did a number of oil refineries and local manufacturers.<sup>118</sup> “Autos did better, but not well.”<sup>119</sup> Some plants closed or moved or were divested by the large auto manufacturers and left to go it alone. A slight revival occurred in railroading under new ownership, which brought back two railroads to Buffalo, just as in the 1850s.<sup>120</sup> And downtown stores continued to close. Buffalo had become a region playing catch-up, and whatever planning or public intervention that occurred was a species

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110. *Id.*

111. *Id.* at 159.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 160.

116. *Id.*

117. *Id.* at 163.

118. *Id.* at 164.

119. *Id.*

120. *Id.* at 165.

of slow-motion emergency measures, accompanied by the tentative movement to refocus the economy on higher education, health care, and high-tech innovation.

What about the “community” promised in the title of the book? Schlegel has news for us:

Buffalo never was a community. The combination of . . . [the] radial street plan; the further fragmentation of the city that the railroads brought; an ethnic immigrant population that wanted to live together as a defense against those people it could not trust, on one hand because they spoke a language that could barely be understood and on the other because they were dumb, dirty and worshipped in the wrong church, a variety of racism that would only increase as later immigrant populations, especially Black, but also Hispanic, found this to be a better place to live than the one before.

The only community that the City and eventually the area had was the community of class.<sup>121</sup>

What are we left to gather from Buffalo’s experience of economic decline? It depended very much on the idiosyncrasies upon which the city was built. As Schlegel observes,

For an entrepôt, a change in transportation patterns is key; for a manufacturing economy, it is changes in technology, transportation costs or what people want. In either case, it is an alteration in the underlying competitive position that a particular locality possesses. Moreover, for a city that combines these two economic models, the two can interact if changes in transportation patterns reduce locational positional advantage.<sup>122</sup>

Schlegel dates the beginning of Buffalo’s decline to about one hundred years ago. To put it another way, the city peaked somewhere in the neighborhood of 1900 to 1920, when it “slid from the nation’s 8th, to its 11th, most populous city.”<sup>123</sup> But for Schlegel the more telling statistic is from 1916, “the year that America’s railroad system began its decline by registering the first decrease in active trackage

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121. *Id.* at 166–67.

122. *Id.* at 171–72.

123. *Id.* at 172.

since 1830.”<sup>124</sup> The “two World Wars masked the decline of the railroads as did the Depression.”<sup>125</sup> Freight shippers slowly abandoned the railroads for trucks, tractor-trailers, airplanes, and pipelines, while passenger travel increasingly took place in automobiles and airplanes.

The various wars and their emphasis on war production also hid the steel industry problems from view. In contrast, “European and Asian steel makers who rebuilt after WWII, rebuilt with the latest technology. As installed American capacity wore out, the industry simply contracted. Eventually mills were closed . . . .”<sup>126</sup> At the end of the day, Buffalo preferred an economy of entrenched localism, looking inward and to the past as a guiding light.

## II. C.

Schlegel next turned in Part III of the book to the work of Jane Jacobs to find a theory that might explain how Buffalo at first succeeded and then declined. He is insistent in searching for an applicable theory on framing the right questions. And they do not begin with the word “why.” Schlegel writes,

After having listened for years to discussion about why an economy has changed, I have become convinced that the why question is in fact a proxy for a different set of questions. How can we stop change? How can we make things change back? How can we restart growth, preferably in the way I want it to occur? Or in desperation, how can we restart growth, any growth?<sup>127</sup>

“How,” in Schlegel’s accounting, tells us more than “why.” He wants to know how things work.

Schlegel finds Jacobs’s work organized around “three assertions. The first is that cities are the basic units of

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124. *Id.*

125. *Id.*

126. *Id.* at 173.

127. *Id.* at 189.

economic life and the source of economic growth, . . . by nature economically vibrant and the only real problems with city life are the economic or political actions that sap that vitality . . . .”<sup>128</sup> Second,

[c]ities grow as they do two things . . . . Initially, local entrepreneurs learn how to produce goods that the city has regularly imported . . . . These goods both replace the previous imports and can be used as exports in trade with other, similarly situated cities. The funds freed by the substitution of lower cost, locally produced goods for higher cost imports and earned from the newly created exports can then be used to purchase new, possibly more sophisticated, imports.<sup>129</sup>

“[A]nd the cycle repeats itself again and again.”<sup>130</sup> Third, “[a]s part of the import substitution process, groups of producers . . . begin to improve on production processes and out of these improvements create both better versions of old products, as well as new and different products.”<sup>131</sup> Economic growth results.

In Schlegel’s telling, Jacobs “identifies the ‘five great economic forces of expansion,’”<sup>132</sup> and it is hard not to think of the economic history of Buffalo when examining them, both for their presence and absence. For Schlegel, the list provides a template for how successful cities work:

1. City growth provides expanded opportunities within the city for new and different imports from its region.
2. The technology developed in the city makes for increasing agricultural productivity.
3. While such increased productivity usually leads to diminished job opportunities in agricultural areas, city growth opens jobs for those so displaced.
4. As cities become congested, it becomes cost effective

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128. *Id.* at 191.

129. *Id.*

130. *Id.* at 192.

131. *Id.*

132. *Id.* at 193 (quoting JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE* 47 (1984)).

to move city industrial facilities to nearby areas in the region.  
 5. Doing so increases the stock of capital in those areas, both from the increase of land values and from the profits earned from the goods and services provided by local residents to transplanted facilities.<sup>133</sup>

If all these components occur more or less at the same time, cities grow and “develop their own sub-regional import replacing/export creating economies.”<sup>134</sup> If those five factors are not kept in balance, however, “cities will shape ‘stunted and bizarre economies in distant regions,’”<sup>135</sup> each in parallel to the five features.

In Jacobs’s catechism of growth, it is also imperative for cities pursuing strategies of economic expansion to avoid what she calls “transactions of decline.”<sup>136</sup> They come in three forms: “prolonged and unremitting military production; prolonged and unremitting subsidies to poor regions; heavy promotion of trade between advanced and backward economies.”<sup>137</sup> All of these transactions violate her basic model for urban economic growth.

Schlegel’s exposition of Buffalo’s economic history falls within Jacobs’s theory of economic dependency and transactions of decline. He finds that “[a]ll of the failed strategies for economic development that Jacobs identifies as such . . . are failed strategies advocated by planners and tried in Buffalo’s own economic history.”<sup>138</sup> First, as to “prolonged and unremitting military production,” he finds limited evidence in “the decline of Bell Aircraft, but also in the problems at Bethlehem Steel and many other manufacturers in finding new markets after wartime contracts were

133. *Id.* (discussing the “five great economic forces of expansion” listed in JACOBS, *supra* note 132, at 47).

134. *Id.*

135. *Id.* (quoting JACOBS, *supra* note 132, at 59).

136. *Id.* at 195 (quoting JACOBS, *supra* note 132, at 182).

137. JACOBS, *supra* note 132, at 183, *cited in* Schlegel, *While Waiting for Rain*, *supra* note 17, at 226.

138. Schlegel, *While Waiting for Rain*, *supra* note 17, at 198.

terminated.”<sup>139</sup> As to the second, “subsidies to poor regions,” he sees “the endless story of the . . . constant search for federal, but also state and county, money for urban renewal; roadway, subway, sewer and stadium construction; schools; and waterfront revival, not to mention various tax breaks offered to businesses enlarging, or newly establishing local facilities.”<sup>140</sup> And as for the third, “trade between advanced and backward economies,” the decline “starts as early as the great Lackawanna Steel works, its pride in, and the recruitment of, branch plants producing goods the profits from which flow elsewhere.”<sup>141</sup>

The transactions of decline violate Jacobs’s cardinal rules because they foster dependency. In the case of military production, “while exports are sometimes produced and paid for from profits earned elsewhere, only rarely does this work lead to innovations that might result in new work.”<sup>142</sup> In the instance of “subsidies to poor regions,” “no exports are even created; tax funds raised from the profits earned elsewhere, but also locally, are directed to benefit local life.”<sup>143</sup> And finally, as to “trade between advanced and backward economies,” “exports are produced, sometimes in great quantities, but the profits of those exports do not flow back to the community in a way that would permit the community to use those profits to purchase more and different imports. Instead, they flow elsewhere.”<sup>144</sup> In all these transactions, the city of Buffalo slowly lost control of its fate.

But Jacobs’s theory also helps Schlegel explain how Buffalo once worked:

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139. *Id.* at 226.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

The area started as a natural resources economy—after all a geographic locational advantage is not any less natural than a mineral deposit which would be useless were it impossible to reach the site or to move the ore to market. Then Buffalo seemed to build a diversified import replacing/export creating economy, only to slide, through no particular fault of its own, into being a transplant/branch plant region. Buffalo stopped being a hotbed of innovation and yet hid that fact by remaining an industrial monolith that provided good, if dirty and at times dangerous, jobs for large numbers, several generations, of immigrants and their families.<sup>145</sup>

The lesson is pretty clear. Avoid relationships (public and private) that create economic dependency and that send out false signals and hopes of prosperity. Prosperity is locally created and follows from diverse and mixed uses that encourage and lead to innovation. For a long time, Buffalo existed by the grace of geography and location, and it eventually suffered by dint of geography and location as, locked in place, it was literally bypassed when it could no longer capitalize on what was once its natural advantage. The economic world literally moved on as its pace, technology, organization, activity, and productivity accelerated. As Buffalo lost its capacity to participate meaningfully in the newly minted economic changes, it also lost its import replacement/export earning cycles.

Though Schlegel is occasionally critical of Jacobs's insights, it is basically in her work that he has found his muse. And in her world, the smaller-scale, diversified enterprises provided the economic engine for the city, rather than the monoliths that first took advantage of geography and location, until the smaller-scale enterprises were swallowed up and with them the city's vitality. The sense of community, by which Schlegel seems to mean the middle-class core, was also hollowed out. In other words, Jacobs and Schlegel in some ways prefer, for all its flaws, some version of the lost, perhaps anachronistic, associationalist ideal, a Main Street theory, focused on maintaining high wages

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145. *Id.* at 239.



through the high prices that would support the small, local retail or wholesale businesses, which were the backbone of the community. But these enterprises were increasingly threatened as renewed competitive forces replaced corporatist cooperation as the prevailing ethic of economic activity.

### III.

About eighty years ago, Karl Llewellyn observed, “Jurisprudence as a Philosophy of Law is too narrowly conceived” and “modern writers are conceiving it as a philosophy *not only* of Law, *but also* of Law’s Function, *and* of Law’s Operation, *and* of Legal Institutions: *i.e.*, of Law *and* Law’s Work.”<sup>146</sup> Schlegel has answered Llewellyn’s call in his attempts to explicate law’s function, and he has done so as well in his related pursuit of the legal historian’s craft. For as Schlegel has recently argued, “[t]he question of meaning is the heart of historical practice.”<sup>147</sup> He believes that historical craft resides in determining how people lead their lives and in telling stories and shaping narratives about what he has discovered. Asking how (he’s not totally opposed to asking why from time to time) gets you closer to the meaning found in lived experiences, and asking how things work gets you closer to the truth.<sup>148</sup>

After all these years, Schlegel is still watching.

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146. Karl Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 606 (1940).

147. John Henry Schlegel, *Philosophical Inquiry and Historical Practice*, 101 VA. L. REV. 1197, 1199 (2015).

148. On Schlegel and historical truth, see Matthew Steilen, *Normativity and Objectivity in Historical Writing*, 69 BUFF. L. REV. 133 (2021).