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Normativity and Objectivity in Historical Writing (My Dinner with Schlegel)

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Dear friends do not provide the best material for reflection. One's nearness to them interferes in ways that are usually undetectable until too late. Peculiar friends, in contrast, require a labor of constant reflection. *Why on earth does he act that way?* This Essay is for my dear and peculiar friend, Jack Schlegel. It grows out of some readings we did together before the pandemic and before the unrest that followed the killing of George Floyd, a time that now feels like an age ago. The subject was historiography and our syllabus included Acton, Beard, Butterfield, Bloch, Carr, a packaged introduction to the philosophy of history by R. F. Atkinson, and a survey of modern historiography by Georg Iggers.¹ Collingwood was not assigned, but seemed to loiter

†Professor, University at Buffalo School of Law, State University of New York. I am grateful to Jack Schlegel for a decade of friendship and mentoring here at Buffalo. Thanks to Bert Westbrook for setting up this conference and for inviting me to participate. For help with the Essay, thanks to Charles Barzun, Dan Farbman, Fred Konefsky, Dan Priel, and Justin Simard.

1. *See generally* LORD ACTON, *ESSAYS IN THE LIBERAL INTERPRETATION OF HISTORY: SELECTED PAPERS* (William H. McNeil ed., 1967); Charles A. Beard, *That Noble Dream*, 41 *AM. HIST. REV.* 74 (1935); HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (G. Bell & Sons 1963) (1931); MARC BLOCH, *THE HISTORIAN'S CRAFT* (1953); EDWARD HALLETT CARR, *WHAT IS HISTORY?* (1961); R. F. ATKINSON, *KNOWLEDGE AND EXPLANATION IN HISTORY: AN INTRODUCTION TO THE*

in the background.² Admittedly, the choice of readings was pedestrian, and it answered no overarching plan or theory (the Atkinson I discovered while browsing a used book store), but for me the interactions with Schlegel were generative, and anyway, setting down the outcome gives me the last word. My subject will be objectivity. Rather than unpack what Acton and our other sources said about objectivity, my focus will be on Schlegel's efforts to engage with the issue, in light of their writings, and with my own efforts to engage with Schlegel.

Let me begin with a sketch of my friend, of his scholarly penchants and the particular historical outlook they seem to me to embody. This will set up an intellectual problem I want to consider. Schlegel's most basic intellectual impulse is contrarian. He works best by combing through a writing and tugging on a strand, pulling it loose for all to see. He has a heterodox way of describing what he's found that is baffling but often quite compelling, if you have the will to make some sense of it. He will begin his comments in the faculty workshop with a shaggy-dog story, or some other impenetrable remark, but then suddenly use it to explicate the discussion's motifs. Sometimes the comments are sharp, even dismissive; sometimes they are humorous or self-consciously ironic. Apparently, an exasperated member of Yale's faculty once blurted out, "Are you serious, or is this a joke?"³ Schlegel is drawn in particular to biographical explanations: explanations that connect ideas to friendships, annoyances, uncaredful remarks, household budgets, and professional ambition and alienation. I am thinking of a recent essay on Wesley Hohfeld that graciously spares us yet

PHILOSOPHY OF HISTORY (1978); GEORG G. IGGERS, HISTORIOGRAPHY IN THE TWENTIETH CENTURY: FROM SCIENTIFIC OBJECTIVITY TO THE POSTMODERN CHALLENGE (1997).

2. See generally R. G. COLLINGWOOD, THE IDEA OF HISTORY (1st ed. 1946).

3. Charles Barzun and I both heard this story and included it in our first drafts for this conference. Charles retained the precise language better, and I have adopted his version here. As Charles recalled, Schlegel reportedly responded, "Both."

another exposition of the “table of fundamental conceptions,” exploring instead Hohfeld’s fascinating and rather desperate efforts to construct an academic career as a “law professor.”⁴ At times, this interest in individuals subsumes everything else, so that large-scale, historical forces are miniaturized and inscribed on the surface of individual lives. Reviewing a monograph he much admired on the legal realists at Yale, Schlegel begins by flatly asserting, “Intellectual history is the history of intellectuals.”⁵ What legal realism was, what it came to as a theory, depended on who was hanging around the school, “so that if the people change, the meaning may change also.”⁶ But these accounts, as interesting as they are, have a way of uprooting themselves, because Schlegel tends to subject them to the same historicizing and contextualizing treatment. After urging in the same review that text requires context to be understood and that “texts are not self-defining,” he adds in an aside, “(nor are contexts for that matter)” —and then characteristically lets the matter drop.⁷ One comes to the end of a detailed discussion of the “intimate” origins of the critical legal studies (CLS) movement expecting a conclusion, but Schlegel just shrugs his shoulders.⁸ In this respect, at least, his critical attitude is egalitarian. And when he looks around and finds no one at the annual conference who will acknowledge the threat of regress, he grows “bored,” or maybe frustrated, and he moves

4. John Henry Schlegel, *Wesley Newcomb Hohfeld: On the Difficulty of Becoming a Law Professor*, in *THE LEGACY OF WESLEY HOHFELD: EDITED MAJOR WORKS, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES* (Shyam Balganeshe et al. eds.) (forthcoming).

5. John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 *STAN. L. REV.* 435, 435 (1989) [hereinafter Schlegel, *Ten Thousand Dollar Question*] (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

6. *Id.* at 442.

7. *Id.* at 459.

8. See John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 *STAN. L. REV.* 391, 401 (1984) (“Exactly what should be concluded about the organization and its members from all of this is by no means clear.”).

on.⁹ He seeks out people at the periphery who see the problem. He finds a distraction. It is possible to avoid studies that irritatingly refuse to acknowledge their own political and moral commitments, but one ends up having to skip most of the conference panels.

On a recent occasion I found myself playing hooky from the annual meeting of legal historians at a pub down the street from our hotel, tagging along while Schlegel met with a group interested in foundational questions about history. A number of different issues came up during the conversation, but here I want to pursue one which we might frame in the following way. Today we conventionally assume that aspects of our identity like class, race, gender, and sexual orientation influence how we see and understand the world. We capture the particular kind of influence we mean by using a metaphor. Identity, we say, forms a kind of “perspective,” so that the world presents itself to each individual somewhat differently, on analogy to the effect of physical position and orientation on visual perception. We say, *Look, there are things that only someone like me can understand!* In this way, we attribute our judgments to our perspective. When philosophers theorize about these ways of speaking, the ideas they use most often are “objectivity” and “subjectivity.” Identity is a source of basic empirical concepts with which we make sense of the world, and, insofar as these concepts are not widely shared, the judgments generated by applying the concepts are “subjective.”¹⁰ Judgments can also be subjective because a concept is indexical, like the expressions “here,” “now,” “I,” and the demonstrative “this”:

9. See John Henry Schlegel, *Sez Who? Critical Legal History Without a Privileged Position*, in *THE OXFORD HANDBOOK OF LEGAL HISTORY* 561–62 (Markus D. Dubber & Christopher Tomlins eds., 2018) [hereinafter Schlegel, *Sez Who?*]; John Henry Schlegel, *Saying Thanks with Some Self-Reflection*, 69 *BUFF. L. REV.* 207, 208 (2021) [hereinafter Schlegel, *Saying Thanks with Some Self-Reflection*].

10. See generally A.W. MOORE, *POINTS OF VIEW* (1997); THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986); BERNARD WILLIAMS, *DESCARTES: THE PROJECT OF PURE ENQUIRY* (1978); BARRY STROUD, *THE QUEST FOR REALITY: SUBJECTIVISM AND THE METAPHYSICS OF COLOUR* (2000).

whether one speaks a truth when uttering one of these expressions will depend on context—on where a person physically is when she says, for example, “*Here* is where I found the weapon.” Extending this idea, what it takes to speak a truth about, say, whether an experience was *frightening* will depend metaphorically on “where one is,” that is, on how things appear from the particular perspective of the speaker, in a sense of “perspective” that includes aspects of the speaker’s identity, such as race, gender, and life experience. *That was really frightening*, we might say, and mean: *for a person like me*.

Historians have long wrestled with the question of objectivity as well.¹¹ For historians, as well as for philosophers, one of the key questions is whether judgments about the past can be sufficiently objective, that is, from a shared perspective of some kind (even if not universal), rather than the perspective of a particular historian. Schlegel is interested in this question as well, but in contrast to most of the writing on the topic, he has approached the issue by distinguishing two notions of *truth*: (little-t) truth and (big-T) Truth. Little-t truth, says Schlegel, is something we attribute to a “conclusion[] of thought” to express our “evaluation[] of its plausibility.”¹² To say a conclusion is “true” on Schlegel’s usage is to say we are “secure” in thinking it—a description that seems to imply the existence of a sound argument for the conclusion, or at least good reasons in support. Since Schlegel accepts the conventional wisdom that attributes our judgments to our perspective, he accepts that different persons grasp different little-t truths, although he sometimes expresses this idea by speaking of

11. See generally PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* (1988).

12. John Henry Schlegel, *If the Music Hadn’t Stopped, or Reflections on the Great Kerfuffle: Historicism’s Continuing Grasp for Truth*, 2 n.1 (Aug. 14, 2020) (unpublished manuscript) (on file with author) [hereinafter Schlegel, *If the Music Hadn’t Stopped*].

different “understandings.”¹³

Little-t truths can be truths of perspective, and truths of perspective can of course be non-exclusive. In contrast, for Schlegel, big-T Truth is the way the world actually and determinately is, apart from anyone’s perspective on it. It always appears in the singular; since there is one world, there is only one way it actually is apart from me or anyone else, and there is one True account of it. Something like this can be expressed by using a definite article and writing of “*the* Truth.” One of the fundamental intellectual challenges to history in the twentieth century has been substantiating its relationship to the Truth.¹⁴ If a historian’s judgments are the product of her perspective (just as any person’s are), then how can she tell us the Truth about what happened in the past? Which of the competing narratives tells us the Truth, and how do we know?

In recent years, at least, Schlegel has tried to answer these kinds of questions by staking out a middle ground. He accepts that our judgments about the world are a product of our perspective on it. Schlegel takes this as a necessary feature of making judgments about the world; there is no getting away from one’s perspective, at least in history.¹⁵ This means history cannot tell us about big-T Truth. Its role is to enrich our understanding of the world, primarily by telling narratives full of the little-t truths that emerge from a close study of historical texts. We ought to give up our worries about Truth, says Schlegel, and focus on telling stories. The public will embrace this role for history: “Better narratives, ones admitting their positionality and so their

13. In a footnote, Schlegel declines to endorse the “possibility of multiple ‘truths,’” because he doubts speaking that way will have an effect on “academic discourse,” which treats truth as singular. *Id.* at 12 n.25. Whether or not he wants to endorse the idea of “multiple truths,” his use of little-t truth does support the idea, which Schlegel captures using other terms.

14. See IGGERS, *supra* note 1, at 118–33; ATKINSON, *supra* note 1, at 69–94; NOVICK, *supra* note 11, at 469–521.

15. Schlegel, *Sez Who?*, *supra* note 9, at 16.

partiality, ones claiming not to unveil a long suppressed Truth, but to offer a different understanding of an interesting, perhaps even relevant past, might showcase what academic historians can do”¹⁶ One senses a core value here: that good histories provide us with interesting, challenging, richly detailed, and well-researched stories, whose telling frees us from the intellectual domination of Truth. Legal histories may destabilize efforts to rationalize the law, but this is no cause for “resignation”—a label proposed by Schlegel’s friend and former colleague, Bob Gordon—but for contentedness, and for hope, since destabilizing frees us from the intellectual domination of a system.¹⁷ What of the worries of the CLS movement, whose historians aimed to unmask legal systems by revealing the Truth—that those systems worked to advance the interests of those in power, to the great injury of others? Their ambitions, Schlegel thinks, ought to be more modest.¹⁸ There is no getting at Truth, because there is no way of making judgments about the world apart from one’s perspective on it. Indeed, Schlegel’s aversion for totalizing accounts—explanations that appeal to exceptionless rules or laws—would seem to apply to critical histories as much as to the textbook narratives they aim to displace.¹⁹

Here is the intellectual problem I think this sketch leads to: On Schlegel’s account of little-t truth, it is difficult to make sense of how historical narratives can enrich our “understanding” of the past without recourse to a notion like

16. Schlegel, *If the Music Hadn’t Stopped*, *supra* note 12, at 17.

17. See Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1036–37 (1981). Gordon writes, “[T]he resigned admit that legal institutions, like all human works, are naturally imperfect, are always, because of historical contingency, out-of-date, and are inevitably, because of social complexity, problematic in their effects; but that’s life.” *Id.* at 1036. I can imagine these exact words coming out of Schlegel’s mouth, accompanied by a shrug and a “Sounds fine to me!”

18. See Schlegel, *Sez Who?*, *supra* note 9, at 15; Schlegel, *Ten Thousand Dollar Question*, *supra* note 5, at 448–49.

19. Schlegel, *Saying Thanks with Some Self-Reflection*, *supra* note 9, at 210.

big-T Truth. Schlegel wants to hold on to the idea that history can contain errors and that we can identify these errors and correct them.²⁰ And he wants to hold on to the importance of archival work for producing the kind of innovative narratives that enhance our understanding of the past. These advancements rest on amassing little-t truths. But, of course, not every historical study does correct error and enhance understanding; and so those that do must differ somehow from those that do not. We surely are able to express these differences, to analyze them and say what they amount to. Book reviews would be much easier to write if all one could say on the topic were, “This book enriches our understanding of the origins of the federal Constitution.” But something else must be said to justify the judgment. What more must be said? Well, Schlegel’s notion of little-t truth concerns whether we can be secure in drawing a certain conclusion of thought. So what more must be said seems to come to this: showing *how we can be sure* a previous history got the past wrong by adducing historical sources to show something about the past *apart from the writing*. To say a new history enriches our understanding of the past requires showing how we can be secure in accepting its conclusions, which would seem again to require adducing historical sources that establish this “security” by revealing something about the past as it stands outside the writing. In this way, our ordinary evaluations of historical studies as being better or worse, as being erroneous or (little-t) truthful, as enriching our understanding or not, seem to involve recourse to the world as it stands apart from our perspective on it, that is, to big-T Truth. They press outward to the very notion Schlegel wants to avoid.

There is a second, related intellectual problem waiting here as well. Our understanding of the past is not a heap of unrelated narratives about different subjects, like the pile of magazine back issues one finds at the dentist. Histories

20. Schlegel, *If the Music Hadn't Stopped*, *supra* note 12, at 15–16.

relate to one another in important ways that an account of history-writing ought to explain. That relation does not consist *solely* in historians shuffling between various schools; there's more to intellectual history than just a history of intellectuals. Academic works of history in particular refer to one another, implicitly and explicitly: they are always "in conversation" with other histories, addressing interpretive questions raised by earlier writings (or dismissing them), engaging with prior histories' selection and interpretation of source material, and so on. Historiography is the study of history-writing itself, and conventionally we approach it by identifying different schools. And although historiography is sometimes described as if different schools just followed one another arbitrarily (a historiographical version of "one damn thing after another"), this is not always the case. Sometimes the conversation has a direction to it, and this direction can be reconstructed in a way that reflects historians' attachment to certain norms, values, and perceptions, which embody a kind of rationality. After all, historians have formed schools by systematically criticizing earlier bodies of written work, just as book reviews do. A particularly damning book review can end a school of thought and launch its successor.²¹

I think there is a way to preserve the conventional attribution of one's judgments to one's perspective while answering these two problems. Let us assume, with Schlegel, that there are at least some elements of our perspective that we cannot leave behind or "transcend," even intellectually.²² What we need is a way of thinking about the relationship between different authors' perspectives that does not involve transcending those perspectives by reference to Truth.²³ Put

21. The paradigmatic example is Noam Chomsky's review of B.F. Skinner's work, "Verbal Behavior." See Kenneth MacCorquodale, *On Chomsky's Review of Skinner's Verbal Behavior*, 13 J. EXPERIMENTAL ANALYSIS BEHAV. 83, 83 (1970).

22. For arguments to this end, see Fred D'Agostino, *Transcendence and Conversation: Two Conceptions of Objectivity*, 30 AM. PHIL. Q. 87, 95 (1993).

23. See *id.* at 89–96.

another way, what we need is a way of making sense of how histories are answerable to the past without supposing a big-T Truth that serves as a shared standard to correct them. Our interest is in what can be called the *normativity* of history: the rightness or wrongness of judgments about the past. I suggest that we treat the normativity of history not as a function of a relationship between our judgments and the past as it was on its own, independent of our perspective (the relation Schlegel calls “Truth”), but as the result of certain *social attitudes* within the community of historians. To my eye, nothing Schlegel has written is inconsistent with this suggestion. Indeed, some things he has said are quite close to the account I shall sketch here.²⁴ It should be possible for me to persuade Schlegel on this point, then, without asking him to give up his basic commitments. So what is there to recommend a social account of the possibility of normativity in judgments about the past?

Here is the core intuition. Writing history is a social undertaking. It is a form of associating with a community, principally the community of historians. When someone writes a history, she undertakes a commitment to justify her claims about the past, and recognizes that the community of historians will hold her responsible. They will form their own views as to whether she satisfies this commitment. I’m writing of “commitment” here in the singular, but of course it’s multifaceted and one could easily use “commitments” plural. Think of all the ways in which the success or failure of a writing depends on the judgment of the community: what

24. See, e.g., Schlegel, *Saying Thanks with Some Self-Reflection*, *supra* note 9, at 213 (arguing that law is “a practice, an activity of humans exercising judgment in a time and place when trying both to secure actions deemed by them to be beneficial to themselves or detrimental to others,” and that “[l]aw enacts the dominant culture”); Schlegel, *Ten Thousand Dollar Question*, *supra* note 5, at 449 (“Things are because some group of people say they are Understandings of the world change . . . because the individuals who do the picturing either find a new understanding more conducive to their work or are in the thrall of others who find that new understanding conducive to their interest, or both.”).

it takes to prove a claim about the past; what counts as evidence in support of such a claim; how sources of historical evidence ought to be identified, interpreted, and related to one another; how the archive and its physical contents ought to be understood and used; what is the range of permissible questions to pose about the past; and what is the range of permissible answers to offer to those questions. There is no way to write a history without acknowledging the norms that relate to these subjects, as well as the authority of the community to make a judgment on the matter.²⁵ We could also speak of “communities” plural. While these judgments belong principally to the community of historians, other communities are also involved. Discussing the legal archive, Paul Halliday observed that legal “authority . . . is made by a community of actors,” whose study requires formulating “a collective biography and a set of practices of a community whose members created and mastered the archive out of which authority was, is, and must continue to be made.”²⁶ It wasn’t only judges who invested prior cases with the authority of “precedent,” thought Halliday; it was also the clerks who created, managed, and used the legal archive. And, of course, communities—real human communities—are constantly in the process of fracturing and being reshaped, sometimes by members themselves, sometimes by outside actors or institutions. We will come to this in a moment. For now, the core idea, the intuition, comes to this: that we can explain how history is made answerable to the past by appealing to a human social practice, namely, a practice in which the author undertakes to justify her claims to the satisfaction of a community whose judgment she recognizes

25. As Collingwood suggested, history concerns not the past in itself, but how the past relates to historians’ thoughts. Collingwood probably meant the individual historian, but we can reconstruct his account to refer to the community of historians. See CARR, *supra* note 1, at 23–24.

26. Paul D. Halliday, *Authority in the Archives*, 1 CRITICAL ANALYSIS L. 110, 112 (2014); see also Ann Laura Stoler, *Colonial Archives and the Arts of Governance*, 2 ARCHIVAL SCI. 87, 87, 90–91, 93 (2002) (describing archives as “sites of . . . knowledge production” and “the production of history”).

as being authoritative.

This is an intuition, but it is clearly a trained intuition, in my case trained by a long (some would say unfortunate) engagement with Hegel scholars during graduate school.²⁷ Connections could be drawn to the Frankfurt School as well (Habermas in particular), or to pragmatism. We can also see connections with the body of psychological research suggesting that the primary function of human reasoning is to produce arguments persuasive to the community.²⁸ But perhaps it is artificial to let ourselves be guided by any of these theories. What benefits are there to consciously adopting an intellectual framework when thinking about history? More pointedly, what benefits are there to posing stuffy, systematic Hegel as some kind of “friendly amendment” to our independent troublemaker, Schlegel?

I do think it is helpful to be clear about the basic picture of normativity underlying this intuition. Normativity is a human addition to the world, a result of voluntary human actions of undertaking a responsibility and holding another person to one. The picture is characteristic of Enlightenment thinking, and in this regard, an account of history that bottoms here is friendly to Enlightenment social and political thought.²⁹ On the other hand, there are clearly diminishing

27. This is the school of Pinkard, Pippin, and Brandom, who have offered a non-metaphysical interpretation of Hegel's philosophy. Pinkard, as I told Schlegel, was a teacher of mine. He had come to the Northwestern Philosophy Department in part because his friend Pippin had an appointment at the University of Chicago. See, e.g., TERRY PINKARD, DOES HISTORY MAKE SENSE? HEGEL ON THE HISTORICAL SHAPES OF JUSTICE 39–47 (2017) [hereinafter PINKARD, HISTORY]; TERRY PINKARD, HEGEL'S PHENOMENOLOGY: THE SOCIALITY OF REASON (1996); ROBERT B. BRANDOM, *Some Pragmatist Themes in Hegel's Idealism*, in TALES OF THE MIGHTY DEAD 210, 216–22 (2002) [hereinafter BRANDOM, *Pragmatist Themes*]; ROBERT B. BRANDOM, MAKING IT EXPLICIT 39–64 (1994). For a recent review of Pippin's work that places his interpretation in the larger body of Hegel scholarship, see Charlotte Baumann, Book Review, 27 BRIT. J. FOR HIST. PHIL. 1256 (2019) (reviewing ROBERT PIPPIN, HEGEL'S REALM OF SHADOWS (2019)).

28. Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 BEHAV. & BRAIN SCI. 57, 60 (2011).

29. SEE BRANDOM, *Pragmatist Themes*, *supra* note 27, at 218.

returns, in this context, from continuing to refine the basic picture—certainly to the degree that an academic philosopher would ordinarily demand. Nor is my role here to attempt such a thing. But if we work from the core intuition that history is a kind of social undertaking, we can make sense of at least some of what we ordinarily say about writing history. We can discover some differences, too. Patterns of similarity and difference in the rational reconstruction of our ordinary ways of speaking and thinking are surely worth noting, if only to achieve a degree of awareness about our own practices; so let us see very briefly where the thought takes us.

First, we can preserve the conventional attribution of an individual's judgments to her perspective, mentioned above, as long as it is possible to reconstruct perspective as membership in a set of overlapping communities. On this approach, seeing the world from a particular point of view entails undertaking commitments to which we are held responsible by members of the various communities whose authority on those subjects we recognize. We tend to credit the judgments of humans in those communities because of what we share with them. To see the world like us is to be a member in a community with us, composed of individuals similar in some salient way. This allows us to think about perspective without being drawn into distinguishing little-t and big-T versions of truth. This is probably a good thing. All things being equal, we should prefer to say that there is one sense of "true," and to define the expression in its ordinary sense, as the property of being in accordance with reality; we can then employ a social account of normativity to explain how attributions of such a property function in the context of history-writing. Large-scale, global claims about the cause of a major event are commitments of the same sort as smaller, granular historical judgments, but the former are much harder to discharge to the satisfaction of the community of historians (potentially impossible). For similar reasons, we should want to say that we *know* things about history, in an

ordinary sense of “knowledge” that implies truth. This is especially important to professional history, and not simply to secure the department’s university budget. Denialism and fabrication about the past are popular political tools today, and professional history has an important role to play in checking those practices. It can do this only if historians speak sensibly about what we know about the past. Whether we do know what we say we know about the past is settled, of course, by the present attitudes of the larger community of historians, applying the prevailing norms of the historical method. Let me be clear that no particular philosophical theory of truth is on offer here, although the approach is friendly to “deflationist” and “internal” theories rather than classical, metaphysically robust accounts. Rather, what is on offer here is the core of a theory of how our claims to know things about the past, as a result of historical research, actually do answer to the past—of how a certain kind of normativity is possible.

Understanding history as a social practice also allows us to make sense of how history-writing changes. This was one of the intellectual problems we considered above. It, too, has a political aspect; it is not uncommon today to encounter pundits or even public intellectuals pointing to paradigm shifts as evidence that history does not answer to the past at all, but merely to intellectual fads or the moral anxieties of the present. Schlegel’s historical outlook, it must be said, does little to combat this reaction. A history that cannot contribute to the search for Truth, whose primary contribution to our intellectual life is to supply new, arresting stories, savors too much of the aesthetic and too little of the epistemic. Schlegel can certainly explain how new stories trigger changes in historians’ interests, but he cannot explain the rationality of those changes—how change responds to deficiencies in earlier accounts other than simple incompleteness.

There is a significant variation within the community of historians in attitudes about proper historical subjects and

methods, even at a single point in time. We should be able to explain at least some of these differences by appeal to something other than differences in taste or “perspective.” In the late 1990s, the editor of the *Journal of American History*, David Thelen, engaged in a fascinating “experiment”: he published an unedited submission by an eminent historian on the subject of lynching, along with five signed referee reports evaluating the piece’s suitability for publication in the journal.³⁰ At the outset, Thelen noted that readers of *JAH* had repeatedly expressed interest in better understanding “how and why we practice” history. The submission, written by Joel Williamson, was well-suited to the subject. It was highly biographical: it explored the development of Williamson’s own historical understanding, as he moved from a childhood view of lynching as an episode in frontier justice to the realization, after a lengthy study of manuscript sources, that it was “an established institution in a whole and ongoing cultural complex shared by several million white southerners,” as those men and women attempted to solidify their political and social standing relative to freed blacks.³¹ Thelen thought the account pushed historians to “think about what we see and do not see, to reflect on what in our experience we avoid, erase, or deny, as well as what we focus on.”³² The referee reports cleaved along race lines. David Blight, a white professor of history and black studies then at Amherst College, thought the piece important because it showed “how American historians didn’t or couldn’t see lynching in their developing visions of the past.”³³ But Robin D. G. Kelley, a black historian then at NYU, thought the piece “sets us back a decade” by its casual and unexamined use of the word “we” in describing the

30. David Thelen, *What We See and Can’t See in the Past: An Introduction*, 83 *J. AM. HIST.* 1217, 1218 (1997).

31. Joel Williamson, *Wounds Not Scars: Lynching, the National Conscience, and the American Historian*, 83 *J. AM. HIST.* 1221, 1229, 1236 (1997).

32. Thelen, *supra* note 30, at 1219.

33. *Referees’ Reports*, 83 *J. AM. HIST.* 1254, 1256 (1997).

evolution of American historians, while at the same time overlooking the mass of early writing by African American and Jewish historians on lynching in the south. It was entrenching the exclusion of black historians on a subject that remained a live memory in some black communities.³⁴

The volume puts the entire process of creating normativity in historical writing on view. Here we have a leading historian reporting that his own judgment about what counted as a profitable subject of historical study reflected a set of attitudes nurtured by his early experiences and education; that the understanding of lynching had been erased in white communities in the wake of political transformations in the south after 1915, some ten years before the author's birth; and that he had as a result largely dismissed lynching and embraced segregation as the most pressing question of southern social and political development after the Civil War.³⁵ The Civil Rights movement further encouraged his study of segregation. It was only by accident, in the course of this study, that he came upon individual manuscript sources that he could not fit within the conceptual structure of southern history he had erected. The discovery was so powerful that, instead of dismissing the documents as outliers, Williamson rejected his entire framework and subject, and it was then that Williamson began to see how southern whites had constructed a racial ideology to justify their political use of lynching and torture against blacks.³⁶ Williamson's understanding of lynching had been moved by a realization that he could not make good on his earlier commitments, and in this respect a number of influential historians of the south followed him.

Not all historians developed along the same path; not everyone shared the same attitudes and the same

34. *Id.* at 1258, 1260.

35. Williamson, *supra* note 31, at 1227–35.

36. *Id.* at 1236–40.

understanding of what constituted an appropriate framework for studying the place of lynching in southern politics and society. The referees who advised rejecting the piece described a different set of intellectual influences. Those influences produced a historical sensibility in which lynching had a very different social and political meaning, and judged against these standards, Williamson's admissions were embarrassing, retrogressive, exclusionary, and "conceptually wrongheaded."³⁷ The simultaneous publication of the referee reports placed these judgments in conversation with one another, revealing the rational shape of the struggle between them about the place of lynching in American history and historiography.

I don't think we should explain this encounter simply by saying that Williamson and his interlocutors had different "perspectives" on lynching. Nor should we say that they were grasping different (little-t) "truths" or expressing different "understandings." The encounter showed more than mere difference. We should say, I think, that what the *JAH* experiment revealed was an ongoing shift in prevailing views of lynching in southern history, triggered by a change in historians themselves and in the community of historians. The change was not simply a change in personnel, a matter of old men retiring and being replaced by new men and women. Nor was the change definitional; there was no set of historical "givens"—no definitions or basic empirical concepts constitutive of doing "southern history"—that researchers simply abandoned.³⁸ Rather, particular sources and works of history exposed how the community's dominant attitudes about the proper subjects and methods of history were unsatisfactory. What we saw, in short, was what Hegelians have called a breakdown in the prevailing "order of thought," triggered by a failure to justify the response to

37. *Referees' Reports*, *supra* note 33, at 1259, 1261.

38. On this use of "given" in the context of constitutional history, see Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 *Am. U. L. Rev. F.* 183, 183–84 (2020).

an emerging body of historical evidence.³⁹ This is at once a process of determining what counts as a good work of written history and who is a historian. What might be called the political and social history of the discipline emerges as a complement to historiography itself, as a means of explaining the sense of the change in disciplinary norms.

One last point. The principal difference with ordinary ways of speaking about history that emerges from this framework concerns the place of moral evaluations in historical writing. Professional historians commonly speak of the importance of understanding the past on its own terms.⁴⁰ On some occasions, this is meant as nothing more than an endorsement of the importance of immersing oneself in the archive and generating the sort of intuitive understanding that this labor generates. On other occasions, however, something stronger is meant: Butterfield, for example, seemed to think the historian could by imagination understand a past world in which an actor had moved or an event taken place. The historical imagination is spoken of like a kind of mental faculty that allows the historian to access the past as it is apart from the historian's present-day perspective.⁴¹ Since moral judgments impose values and concepts from the present day on past actors, they do not grasp the past on its own terms. The most we can say about actors in the past, wrote Butterfield, is that they were "mak[ing] the best of it."⁴² Yet it seems fanciful to pretend that contemporary histories written by professional historians do not contain moral judgments. Indeed, many excellent works of history have a strong moral core—a commitment to a set of moral values that do not derive from historical sources—and part of what makes these writings vigorous and rich is this morality. Emphasizing the

39. See PINKARD, HISTORY, *supra* note 27, at 18–20, 40–41.

40. See CARR, *supra* note 1, at 5–6.

41. BUTTERFIELD, *supra* note 1, at 9.

42. *Id.* at 88.

importance of archival work cannot tilt into uncritical acceptance of what one finds in a written document.⁴³ Getting too close to the perspective of a past actor deprives us of something that counts as understanding of his conduct.⁴⁴ If what counts as good and bad history depends on the attitudes of the community of historians, we should anticipate this kind of moral skepticism about the past. Historians, like anyone else, hold moral and political views about the present and the past, and it would be odd to expect those views to exercise no influence on their attitudes about historical writings that touch on the same subject.⁴⁵ That normativity in history has its source in the attitudes of modern-day historians is the kernel of truth in presentism. And while those attitudes concern judgments about the past, they naturally draw on moral judgments about related matters in the present.

* * *

If what makes history answerable to the past is the attitudes of historians, then I owe a great deal to Jack Schlegel. For as our law school unraveled in the past few years, and most of its historians left, Schlegel stayed. And as difficult as he sometimes was—he was sometimes *unreasonably difficult*, I thought—he insisted on being my community. There I was, wandering blindly, nearly alone, fumbling with texts I could barely read, and he came by and prodded. The whole thing was modest. We were, in his words, “reasonably decent historians of the second or third order,”

43. See CARR, *supra* note 1, at 16.

44. See ACTON, *supra* note 1, at 351, 357 (“At every step we are met by arguments which go to excuse, to palliate, to confound right and wrong Beware of too much explaining, lest we end by too much excusing.”).

45. For a review of some of the current debate about presentism and the critical work of legal history, as well as an argument that history informs contemporary debates about morality, justice, and public policy, see Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 482–83 (2017).

but for including me in this distinction, I cannot thank him enough: for it implied that I was writing *history*.