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It has been a stimulating and exhausting task to reread much of John Henry Schlegel's efforts, over several decades, to work out his approach to doing history generally and intellectual history in particular.[1] That topic by no means captures all of Schlegel's scholarly pursuits—he has written an astonishing amount on a variety of subjects since entering the legal academy in the 1970s[2]—but I believe it to be central to his search for a scholarly identity. All of us in the academy engage in such searches, and among the goals of the searches is figuring out one's strengths and weaknesses as a scholar and matching them up with topics whose pursuit serves to maximize strengths. So I have tried to follow Schlegel along as he came to the conclusion that he was "better at narrative

1. I am indebted to Fred Konefsky for pointing me in the direction of some of those sources. Thanks to Fred and to Neil Duxbury for comments on an earlier draft of this Article.

2. *See* John Henry Schlegel, *Cirriculum Vita*, UNIVERSITY AT BUFFALO SCHOOL OF LAW (2020) at 2, http://www.law.buffalo.edu/content/dam/law/restricted-assets/pdf/faculty/cv/schlegel_john_cv.pdf.

than analytic history."[3] Sometimes I found following him inspiring, and sometimes mentally tiring, and those reactions were often connected.

I am seeking to pursue two inquiries in this meditation on Schlegel. One is to try to figure out why he settled, fairly soon after concluding that he was attracted to legal history, on a particular conception of history in general, and of intellectual history in particular, that he continued to defend after others pointed out obvious difficulties with it. The other is to analyze one of Schlegel's most successful applications, in my view, of his methodology, his 1984 article on the formation of the Critical Legal Studies movement in the late 1970s.[4] After pursuing those inquiries, I will close with some general observations about Schlegel's contributions as a scholar.

I

Schlegel graduated from the University of Chicago Law School in 1967 (a native of Mattoon, Illinois, he received a B.A. three years earlier from Northwestern) and spent the next year as a Teaching Fellow at Stanford.[5] He had done well in law school and perhaps had been inclined to immediately seek an academic position, but in 1968 he took a job as an attorney with the Legal Aid Society of Chicago, where he remained until 1973, when he joined the Buffalo faculty.[6] I have not been able to find, among the numerous comments Schlegel has made about his career decisions, any indication of when and how he first got interested in doing

3. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 13 (1995).

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

5. SCHLEGEL, *supra* note 2, at 1.

6. *Id.*

scholarship in legal history.[7] He had no graduate training in history, and was not part of an expanding circle of persons in the early 1970s who had connections to a faculty-student legal history workshop at Harvard, several of whose members were hired as legal historians by law schools in the 1970s.[8] As far as I can determine, his course offerings at Buffalo during the 47 years in which he has been a member of the faculty have centered almost exclusively in the commercial arena: Contracts, Commercial Law, Corporations, and Corporate Finance.

But as early as 1979, Schlegel had produced the first of two articles,[9] which were eventually incorporated into a book, on Legal Realism and empirical social science. The articles made it clear that he had become deeply immersed in a particular version of legal history. Both of those articles sought to answer two historical questions Schlegel thought to be interconnected. The first was "[w]hy did law not become

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7. Even Schlegel's "notes" for the conference for which this Essay was prepared, although they purported to give an "easy" answer to the question why "[m]ost of what I have written . . . has been an effort to use history, including contemporary history . . . as tools to understand why legal education and educators, legal theory and legal practices are so strange," didn't give anything like an answer, let alone an easy one. Jack Schlegel, *Having Serious Fun – History/Ideas/Law: Notes by Jack Schlegel*, UNIVERSITY AT BUFFALO: THE BALDY CENTER FOR LAW & SOCIAL POLICY (2021), http://www.buffalo.edu/baldycenter/events/conferences/Schlegel.html. All Schlegel said on the matter was that he had been bored in law school because the doctrines he was taught didn't seem to have anything to do with the way law actually functioned; that he began to learn about Legal Realism as a law student, "mainly on my own," which reinforced an interest in "how law operated"; and that that interest was reinforced by exposure to the law and society movement, the first of the "law and" movements in the legal academy in the late 1960s. *Id.* But the law and society scholars at the time were doing law and sociology, not legal history.

8. For more detail on that cohort of American legal historians, whose entry into the legal academy in the 1970s signaled a renaissance in legal history on law school faculties, see G. Edward White, *The Origins of Modern American Legal History, in* 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY AND METHODS 48, 48 (Daniel W. Hamilton & Alfred L. Brophy, eds., 2010).

9. John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979); John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980).

a scientific study, in the twentieth-century sense of science as an empirical inquiry into a world 'out there,' as did all the other disciplines in American academic life that formed in the late nineteenth and early twentieth centuries?"[10] The second was why American Legal Realism "as a coherent intellectual force in American legal thought [ ] simply ran itself into the sand."[11]

Schlegel later said that he started thinking about those questions when, in the spring of 1974, he "chanced on some old files that once belonged to Charles E. Clark," a professor at and subsequently Dean of Yale Law School, and "discovered a story worth telling."[12] The story was about Clark's and his colleague William O. Douglas's efforts to use techniques of empirical social science to reform legal doctrines in the 1920s and early 1930s. By the time Schlegel encountered Clark's files, he had read some books on Realism,[13] and he believed that Clark's files could help him capture a dimension of Realism that those works had not emphasized, namely the persistent interest in some scholars associated with the Realist movement in conceiving law as a social science featuring empiricist methodologies.[14] Eventually Schlegel's pursuit of that dimension of Realism would result in his engaging in close studies, based largely on archival research, of the work of not only Clark and Douglas but Underhill Moore, Walter Wheeler Cook, Herman Oliphant, Leon Marshal, and Hessel Yntema.

Schlegel's archival work not only sought to show what individual Realist scholars were seeking to *do* in launching

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10. SCHLEGEL, *supra* note 3, at 1.

11. *Id.* at 2. Versions of Schlegel's 1979 and 1980 Buffalo Law Review articles became chapters in this book.

12. *Id.* at 1.

13. *Id.* at 5–6 (noting WILFRED E. RUMBLE, JR., AMERICAN LEGAL REALISM (1968); EDWARD PURCELL, THE CRISIS OF DEMOCRATIC THEORY (1973); and WILLIAM L. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973)).

14. SCHLEGEL, *supra* note 3, at 8.

their projects—the data they were attempting to gather, the uses to which they sought to put that data, and the overall purposes of their academic endeavors—but who those scholars *were*—their professional contacts, friendships, and animosities, their relationships with colleagues and institutions, even, when allegedly relevant, incidents from their personal lives. Schlegel's experiences doing archival work on Realist scholars convinced him of two things about their ideas. One was that those ideas could not be understood independently of the "context" in which they were situated. By "context" Schlegel meant, essentially, everything that was going on around the Realist scholars as they worked on their projects: the economic climate of legal institutions in the 1920s (flush) and the 1930s (depressed); the politics of the law schools with which they were affiliated and their competitor schools; incidents in their personal lives; and their own idiosyncratic personalities. American Legal Realism, for Schlegel, ended up being the aggregate of what "Realist" scholars did and who they were. And the eventual running of the Realist movement into the sand came when the promise of its empiricist methodologies failed to produce work that the legal academy or legal profession generally found useful, a failure that was as much a product of the human limitations of Realist scholars as it was of methodological weaknesses.

Schlegel emerged from his immersion in archival sources with a conviction that understanding legal ideas required an understanding of the persons who articulated those ideas and the connections of those persons to other persons, institutions, and the larger culture in which they lived and worked. That meant, for him, that "intellectual history" could not be merely "the history of ideas," because ideas always had contexts, and contexts mattered.[15] The result, in Schlegel's 1979 and 1980 Buffalo Law Review articles and the book on which they were based, were narratives of the

15. *Id.* at 4–5.

relationship of Realism to empirical social science in which, as Schlegel's longtime colleague Alfred Konefsky once put it, "ideas and people" were "hopelessly intermingled." [16]

Schlegel might have chosen to treat his conception of intellectual history as only based on the largely uncontroversial assumption that ideas are invariably situated in contexts, so that understanding them requires attention to those contexts. Absent some unreconstructed disciples of Leo Strauss,[17] I doubt most contemporary academic theorists would maintain that ideas are timeless, being handed down over generations in a great chain of being. But Schlegel has taken a more aggressive position on intellectual history, characterizing it as "not the history of ideas" but "the history of the intellectuals or other thinkers and writers who made those cultural products we call 'thought.'"[18] Elsewhere he has suggested that "intellectual history, as traditionally understood as a history of ideas embodied in texts, is an essentially empty exercise."[19]

For reasons I will subsequently set forth, I think that the characterization of intellectual history Schlegel advances cannot sensibly be maintained. But before detailing those reasons I want to take up two additional features of Schlegel's characterization. One is that it rests on a distinctive conception not just of intellectual history, but of history itself. The other, which requires a more extended discussion, involves Schlegel's successive efforts to refine his characterization in response to alternative conceptions of

16. *Id.* at 12. Schlegel's response to Konefsky's comment was "I do this because, in my experience, ideas and people are usually hopelessly intermingled." *Id.* He went further in the "Afterword" stating that "[i]t is time that we consider giving up the history of ideas, giving up intellectual history as a history of the ideas of humans set apart from the rest of their lived experience, and to begin to write the history of intellectuals." *Id.* at 260.

17. *See* LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953) (illustrating Strauss's view of the relationship of ideas to history).

18. SCHLEGEL, *supra* note 3, at 12.

19. *Id.* at 4.

intellectual history, efforts I find, as I previously indicated, simultaneously inspiring and exhausting.

In a response to a critical review of *American Legal Realism and Empirical Social Science* in the Yale Journal of Law & Humanities, Schlegel made some general observations on history that I take to be driving his view of intellectual history. He said:

> We do ourselves ill by not recognizing the context in which we live and work and then measuring our lives by that context. To wish to measure ourselves by some context that we neither live in nor can recreate is that ultimate act of ahistoricity by an intellectual historian. . . .
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> . . . As best as I can tell there is no truth, only an absence of lies. Though there are dozens of ways to recount the story that reaches this conclusion, I would begin with the observation that the Reformation killed the truth of revelation mediated by the Church Universal. The Enlightenment killed the Reformation's understanding of truth as revelation directly accessible to the believer. And the horrors associated with World War II killed the Enlightenment's notion of truth as revelation accessible through reason alone. There is no longer (nor ever was there) a transcendental, transpersonal, transhistorical basis for our value judgments. We make them all up.
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> . . . My stories, my heroes, my valuable ideas are my attempt to suggest, in the only way I as an historian know how, what stories are important . . . which ideas are worth taking seriously. In aid of this activity I have nothing but verisimilitude, a range of experience hopefully shared with my readers, and the possibility that others share or can be persuaded to share my values.
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> . . . As an author I ask others to consider whether by their own lights . . . my stories are illuminating of a time past . . . the ideas I value were useful for something at a time past.[20]

The crucial point of that excerpt, for me, is that it negates a view of history as containing kernels of truth. Truth is not only not "transcendental," it is not "transpersonal." Humans "make up" truth in their value judgments. That can only mean that the role of the intellectual historian is not to

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20. John Henry Schlegel, *No Lever and No Place to Stand (A Response to Christopher Shannon)*, 8 YALE J.L. & HUMANS. 513, 514 (1996).

introduce readers to the "truth" of historical ideas, but to persuade them, by recreating their context so as to achieve "verisimilitude," that the ideas were useful to contemporaries in a past time. And that, for Schlegel, necessarily means a full recreation of the context of past ideas so that readers from a different time period get a sense of why they might have been thought to be useful and appealing. When one adds to that corollary from Schlegel's general view of truth in history his conviction that ideas are the products of the collective thought of people who happened to be "intellectuals or other thinkers and writers" at points in time, one can understand how he reached the conclusion that intellectual history cannot be equated with the history of ideas *per se*.

Beginning in the late 1980s, Schlegel began to advance his conception of intellectual history in a series of ambitious book reviews. All of those reviews were actually essays in which Schlegel dipped in and out of consideration of the book in question to explore a number of other topics and works. It is those digressions that I find both stimulating and exhausting. One sits by Schlegel as he traces his engagement with a variety of issues that attracted scholars on the intellectual left of the American legal academy in the 1970s and 1980s, particularly those who had connected in some fashion with Critical Legal Studies. I found myself impressed with the depth of Schlegel's grasp of the issues, and of the contributions of other scholars to understanding them. But I also repeatedly wished that Schlegel would summarize the point of his digressions and get back to addressing the book under review.[21]

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21. My impatience was accentuated by Schlegel's writing style. Schlegel is one of the gifted writers in the legal academy. When he chooses to, he can be delightfully pointed or funny, and his self-assessment that he is very good at telling stories is correct. But he also likes to remind his readers just how complicated, and often unresolvable, certain "big" issues are, and he often does that through conversations with himself on paper in which he drives deeper and deeper into a subject, spinning out arguments and counterarguments along the way. For just one illustration, see Schlegel's discussion of epistemology,

The books Schlegel reviewed, between 1989 and 1997, were three of the most prominent works in legal history to appear in that time period: Laura Kalman's *Legal Realism at Yale*, 1927-1960;[22] Morton Horwitz's *The Transformation of American Law, 1870-1960*;[23] and Neil Duxbury's *Patterns of American Jurisprudence*.[24] He made use of all of the reviews to set forth his conception of intellectual history. The Kalman review stressed "the importance of fully socializing intellectual history" by understanding that "changes in the cast of characters" articulating ideas "suggest that ideas had taken on new emphasis or meaning."[25] In the Horwitz review Schlegel asserted that the work of scholars "gains meaning for them in (and from) the web of social relations in which they find (and place) themselves. . . . [I]t is here that life is predominantly lived and so it is here, as a rule, historical inquiry ought to start."[26] And in the Duxbury review Schlegel noted that

> When one leaves the cloistered halls of intellectual history proper and examines biographies of participants in the high culture of the North Atlantic . . . one sees people doing things other than thinking

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linguistics, literary theory, and the "hermeneutic circle" in his review of LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960. John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 442–53 (1989). Although Schlegel began that discussion by claiming that it was a starting place for an argument "about doing intellectual history generally," *id.* at 442, and concluded it with the observation that "understanding fully the culture of other thinkers' doing and thinking, is the key to understanding an intellectual text," *id*. at 453, most of the discussion amounts to a very high-grade primer setting forth what Schlegel gleaned from investigating the contributions of philosophers, linguists, and literary theorists. And what Schlegel gleaned seemed to have simply reinforced his view about what intellectual history actually consisted of.

22. Schlegel, *supra* note 21.

23. John Henry Schlegel, *A Tasty Tidbit*, 41 BUFF. L. REV. 1045 (1993) (reviewing MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 (1992)).

24. John Henry Schlegel, *Does Duncan Kennedy Wear Briefs or Boxers?*, 45 BUFF. L. REV. 277 (1997) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)).

25. Schlegel, *supra* note 21, at 464–65.

26. Schlegel, *supra* note 23, at 1057–58.

> or writing. One sees them falling in love, coping with families, fighting with institutions or colleagues, enjoying friends, teaching, moving about; in other words they can be found living and dying. . . . Yet [biography] falls by the wayside when it comes to the generic category "intellectuals" . . . Why do intellectual historians persist in seeing the world in this way?[27]

In Duxbury's account of "patterns" in late nineteenth- and twentieth-century American jurisprudence, Schlegel complained, "plenty of names" are mentioned, but "there are no people, no places and no institutions described," and thus "no reasons for anyone to say what they are saying."[28] In short, no "context" in Schlegelian terms: Duxbury's account was a history of ideas rather than a history of intellectuals.

By the appearance of Schlegel's review of Duxbury, *American Legal Realism and Empirical Social Science* had been published, and Duxbury had reviewed it.[29] A correspondence between Duxbury and Schlegel followed, and Duxbury urged Schlegel to use the occasion of reviewing *Patterns of American Jurisprudence* to clarify his views on the practice of intellectual history.[30] Duxbury's review had criticized Schlegel for failing sufficiently to meet what Schlegel apparently believed was the central goal of intellectual history: "the need to place . . . ideas . . . in their full personal, social, and intellectual context."[31] The failure had two dimensions. One was that Schlegel's conception of "context" was seemingly so broad that "[i]ntellectual historians . . . must take everything into account—even, it seems, that which is unaccountable."[32] Duxbury particularized:

> The writing of history requires that certain facts be considered more important than others and that some things be treated as

27. Schlegel, *supra* note 24, at 279–80.

28. *Id.* at 292.

29. Neil Duxbury, *Legal Realism for Legal Realists*, 9 RATIO JURIS 198 (1996).

30. Schlegel, *supra* note 24, at 280 n.10.

31. Duxbury, *supra* note 29, at 201.

32. *Id.* at 203.

> irrelevant. Even if it were possible to place ideas "in their full personal, social, and intellectual context"—and I do not believe for one moment this is possible—the result, I suspect, would be rather laborious and indiscriminate story-telling.[33]

Only Schlegel's narrative gifts, Duxbury concluded, had resulted in *American Legal Realism and Empirical Social Science* being a book that was "anything but dull."[34]

Duxbury's second concern with Schlegel's approach was arguably even more telling. Schlegel's version of intellectual history, he suggested, did not "connect context with ideas."[35] Schlegel claimed that intellectual history needed to be "the history of intellectuals, people who do things with ideas."[36] But in Duxbury's view intellectual history needed to be "more than that: It needs to account for what those people actually attempt to achieve with their ideas; it ought also to take account of how those ideas affect others."[37] But "ideas hardly feature throughout Schlegel's book."[38] For Duxbury, Schlegel's particular method of contextualizing ideas had the effect of reducing the ideas to insignificance. That consequence seemed notably ironic when Schlegel had defined his project as an effort to connect up two "ideas" that at one point occupied a prominent place in American legal history, "Realism" as a jurisprudential approach and "empirical social science" as a methodology.[39] How could one adequately explore that connection without making some effort to understand what the ideas meant to persons enthusiastic about them and what was the source of their enthusiasm? But, as Duxbury notes, when Schlegel "discusses what certain realists actually thought about law—

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33. *Id.* (citation omitted).

34. *Id.*

35. *Id.* at 201.

36. *Id.* (citation omitted).

37. *Id.* at 201–02.

38. *Id.* at 202.

39. SCHLEGEL, *supra* note 3, at 1–2.

as opposed to how they tended to fill their days—he seems peculiarly ill at ease with, even disinterested in his subject matter."[40]

It is intriguing to me that, in the face of Duxbury's criticism, which other reviewers of *American Legal Realism and Empirical Social Science* had made as well,[41] Schlegel simply chose to double down on his view of how intellectual history ought to be practiced. He insisted, in the Duxbury review, on the same proposition about intellectual history that he had advanced in the Kalman and Horwitz reviews, that intellectual history as "the history of ideas" was an "essentially empty exercise" because people, places, and institutions were left out of that history.[42] It strikes me as rather bizarre that the same person who is clearly inclined to delve deep into texts in an effort to make sense of the ideas expressed in them—a practice of Schlegel that can readily be seen in his lengthy, detailed digressions to consider a variety of texts in the Kalman, Horwitz, and Duxbury reviews—would then assert that texts containing ideas are meaningless without being placed in their "full context." What was the point of Schlegel's reading the texts in the first place? Surely he was not treating Richard Rorty's *Philosophy and the Mirror of Nature* as interchangeable with an instruction manual for a washer/dryer.

Not all ideas are interchangeable; some ideas have been treated as "worth more" than others by communities over time. A history of those ideas, as Duxbury suggests, should investigate not only why those ideas were regarded as important at various times but *what they were*. That investigation seems central to what intellectual history is about: why would one even think of intellectual history as a viable subfield unless one believed that identifying and

40. Duxbury, *supra* note 29, at 202.

41. *See, e.g.*, James E. Herget, *Book Reviews*, 39 AM. J. LEGAL HIST. 396, 398 (1995).

42. *See* Schlegel, *supra* note 24.

analyzing influential ideas over time was a coherent and useful exercise? And why would Schlegel dismiss that exercise as a methodological practice when he engages in it himself?

I think the last question can partially be answered by noting Schlegel's self-description of himself as "pigheaded" and by his penchant for playing the role of a provocateur. It may be that when Schlegel first became attracted to intellectual history in connection with the project that eventually resulted in *American Legal Realism and Empirical Social Science*, he was put off by what he felt was the "idealist" character of much intellectual history scholarship, which may have appeared to him to be privileging the causal weight of ideas in history (as opposed to materialist causes) and devoting an insufficient attention to the sociological dimensions of knowledge. That reaction would have been consistent with someone attracted to leftist social theory and leftist politics in the late 1960s and early 1970s, when social historians were seeking to marginalize intellectual historians in American history departments. So it is possible that Schlegel began his work on the early twentieth-century connections between Realism and empirical social science as something of a social historian, determined to "contextualize" ideas he felt had been simultaneously treated in a vacuum and given too much causal power. Shifting his focus from the content of ideas to the people expressing them, and the places and institutions in which they were expressed, was a form of social historian strategy.

But having done that, Schlegel then chose to express that strategy in the form of a polemical statement that intellectual history was the "history or intellectuals" and nothing else, and, when confronted with the entirely intuitive rejoinder that one could hardly practice intellectual history without devoting at least some attention to the content and influence of certain ideas, to repeat his polemics. He may have taken some comfort in doing so from his belief,

previously quoted, that there is no epistemological "lever" or "place to stand" from which one derives one's methodological and philosophical convictions; one just "makes them up" from a sense that one is right.[43] If so, what others perceive as grave limitations on Schlegel's view of intellectual history does not provide a coherent reason for dismissing it. But it may also simply be that Schlegel has been aware that his polemics about intellectual history are bound to provoke, and rather enjoys that.

II

Suffice it to say that I am among the ranks of those inclined to treat Schlegel's polemical description of what intellectual history is and is not as "serious fun," meaning that he would enjoy defending it and critiquing "history of ideas" enthusiasts along the way, but that in the end he seems content to rest in the (possibly obfuscating) posture of liking stories and being better at narrative than analytic history. I now want to turn to one of the best-known illustrations of Schlegel's narrative history, one that draws heavily on the people, places, and institutions he thinks play a vital part in the "history of intellectuals." The illustration is Schlegel's 1984 article in a symposium on Critical Legal Studies in the *Stanford Law Review*.[44]

One can get a sense of Schlegel's "narrative history" perspective just from the title of the article. He called it "Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies." First, "notes toward," together with "intimate," suggesting that Schlegel's "history" consisted of impressions by a participant observer, not really a history at all.[45] Second, "opinionated

43. *See infra* note 20.

44. Schlegel, *supra* note 4.

45. A suggestion reinforced by Schlegel's writing, on the first page of the article, that "the notion of my writing the history of an organization now about seven years old . . . is clearly ridiculous." *Id.* at 391.

and affectionate," suggesting that although Schlegel's "history" was written from a reservoir of goodwill toward his subject, it was at bottom just those impressions, often reflecting his idiosyncratic concerns. Finally, a history not of Critical Legal Studies as a legal "movement," such as Realism, or as a set of ideas (by 1984 Schlegel had already staked out his aversion to histories of ideas), but of the *Conference* on Critical Legal Studies, which Schlegel characterized as a "legal organization."[46] An institutional history, perhaps, or a history of the people who formed and administered the Conference, or the places where the Conference was held, but very likely not a history of the ideas generated and discussed at Conferences.

The last point was reinforced quite early in the article, when, after a brief explanation of how the founding of the Conference arose out of a meeting between Duncan Kennedy and David Trubek in Cambridge in the 1976-77 academic year,[47] Schlegel turned to a commentary on the ideas discussed at the Conference's early meetings, the first of which took place in Madison, Wisconsin in the spring of 1977.[48] Kennedy, who had joined the Harvard faculty in 1971, was doing work in American intellectual history from a perspective Schlegel called "Critical Marxism," which emphasized "the indeterminacy of social circumstances, and thus the impossibility of deriving intelligible laws of historical change, economic or otherwise."[49] Trubek, on the Wisconsin faculty after having been denied tenure at Yale in 1973, had lost enthusiasm for the "law and development" movement, which sought to infuse third-world nations with "progressive" western legal values, and moved to a more chastened posture that retained enthusiasm for law and social science but eschewed what Schlegel called "Orthodox"

46. *Id.* at 392.

47. *Id.* at 392–95.

48. *Id.* at 398 n.25.

49. *Id.* at 393 n.9.

or "Scientific" Marxism and its focus on a "labor theory of value" and reform of "class-based ownership of the means of production."[50] Kennedy and Trubek had in common leftist politics, but more importantly, from Schlegel's perspective, the "seductiveness of a revivalist preacher" (Kennedy) and ability to "make[ ]and maintain[ ] alliances with consummate ease" (Trubek). [51] They were thus well suited to found a new organization of legal academics, as well as having migrated from a teacher/student relationship when Trubek had Kennedy in a class at Yale to a close friendship.[52]

Kennedy's and Trubek's formation of the Conference stemmed from their mutual interest in bringing together an existing group of legal academics identified with the law and society movement and a new group of leftist-leaning scholars who had entered the legal academy in the 1970s.[53] Their goals in bringing those two groups together were to signal the appreciation of the younger group for their elders' having deviated from traditional ways of legal scholarship and teaching to explore the gap between "law on the books" and "law in action," and at the same time to subject law and society scholars to critical assessments of their starting intellectual premises.[54] Initially Kennedy and Trubek seem to have contemplated a "neat binary form" to the Conference in which law and society types would engage with varieties of Critical Marxists.[55]

At this point in Schlegel's narrative one gets a clear sense of that narrative's priorities. He takes up, first, the actual groups which emerged at the early conferences, and, second, the principal perspectives exhibited by attendees in group discussions. The "binary form" of discussion

50. *Id.* at 393 & n.9.

51. *Id.* at 392.

52. *Id.* at 393.

53. *Id.* at 394–95.

54. *Id.* at 395.

55. *Id.* at 394–96.

anticipated by Kennedy and Trubek was immediately destroyed by two of Schlegel's core variables in the history of intellectuals: place and people.[56] Because the first Conference was at Madison, Wisconsin, Trubek was its principal organizer, and he recruited Mark Tushnet, at that time Associate Dean of the law faculty, who "had a secretary and easy access to duplicating facilities and other amenities without which organizing a large meeting is impossible."[57] It was Tushnet, in a January, 1977 letter inviting people to the first Conference, who indicated that the younger participants, while indebted to their law and social science colleagues, "had chosen a path quite different from that of their teachers."[58] But Tushnet, at the time he wrote the letter, was a "Scientific Marxist," ensuring that a third perspective would be voiced in Conference discussions.[59] It was fortuitous that the Conference was held at Wisconsin because Trubek was on the faculty; it was fortuitous that Tushnet became an organizer and participant in the Conference because he was Trubek's colleague and Associate Dean; and it was fortuitous that Tushnet's then ideological perspective was neither non-Marxist law and social science nor Critical Marxism.

Schlegel then describes the interplay between the three "leftist perspective[s]" which "achieved prominence" within the Conference. He characterizes that interplay as a "game" of "three-corner catch."[60] Most of the law and social science types attending the Conference were not sympathetic to Marxism as they understood it, and in that respect found allies in Critical Marxists, who were not interested in issues such as a labor theory of value and class ownership of the

56. *Id.* at 396.

57. *Id.*

58. *Id.* at 395.

59. *Id.* at 396.

60. *Id.* at 397.

means of production.[61] On the other hand, Scientific Marxists and law and social science enthusiasts shared a "great emphasis on material culture," as distinguished from the Critical Marxists' arguably "idealist" interest in ideas.[62] Finally, both Critical and Scientific Marxists believed that "*the* evil in the world is capitalism," and were thus dismissive of what they took to be the non-Marxist law and social science adherents' "apologetics" for a capitalist-based social and economic order in America.[63] And thus around the room the ball is tossed," Schlegel concluded.[64] Hardly a conclusion designed to attach any defining ideological identity to the Conference. Moreover, Schlegel made no effort to suggest where the ideas being tossed around in three-cornered catch had come from, or why they might have been attractive to the persons at the Conference who endorsed them. That is a point to which I will later return.

And yet there was a sense in which, from its origins, the Conference on Critical Legal Studies was ideological: certain types of legal academics were not invited to it. One was what Schlegel calls "doctrinaire Marxists referred to as 'Guild types'";[65] the other was "prominent liberals."[66] The first group was excluded because the Conference's organizers felt

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61. *See id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 399. The reference is to the National Lawyers' Guild, an organization of practitioners, many of them engaged in the representation of labor unions, that was founded in the 1920s as an alternative to the American Bar Association. Several members of the Lawyers' Guild were also members of the Communist Party of the United States in the 1930s. The group was investigated by the FBI and the House Un-American Activities Committee in the 1940s. The image of members of the National Lawyers' Guild, captured by Schlegel's description, was that they were doctrinaire ideologues whose primary interest was in determining whether others had the "right" political perspectives. *See id.* For more on the history of the National Lawyers' Guild, see HARVEY KLEHR, THE HEYDAY OF AMERICAN COMMUNISM (1984); ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998).

66. Schlegel, *supra* note 4, at 399.

that their presence might spawn intellectual disagreements that would spill over into social ones and result in the Conference becoming fractious.[67] The second was excluded because it was thought that their presence would distract those singled out for invitation to the Conference in attacks on liberalism which would "inhibit development of the group's own distinctive approaches to law."[68] And while, after the first meeting, the Conference adopted an "open door" rather than an "invitation only" posture towards annual meetings,[69] the searching critiques launched at established law and social science scholars at the first meeting resulted in an estrangement of member of the Law and Society Association from the Conference and thus a "conspicuous failure" of the "rapprochement Trubek and Kennedy sought with the law and social science group."[70] Meanwhile "traditional liberals" tended to "avoid [the Conference] like the plague," and the organizers' instinct to avoid "Guild types" may have been confirmed when a paper presented at the second annual Conference, at Northeastern Law School in 1978, was "viciously . . . attacked for having nothing to do with 'the working class.'"[71]

Once again, in Schlegel's narrative, people and places are playing a central role, and ideas are secondary. It is less important for him who may have "won" debates between Critical Marxists and proponents of law and social science at the first meeting than the personal dimensions of those

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67. *Id.*

68. *Id.* Schlegel recounts an amusing incident in which Harry Wellington, then Dean of Yale Law School, protested to Duncan Kennedy about the exclusion of members of the Yale faculty, believing that the Conference organizers did not find their work sufficiently stimulating. *Id.* at 399–400. When Kennedy responded that the Yale faculty members were being excluded not because of their intellectual firepower but because of their politics, Wellington reportedly was "wholly satisfied," reassured that his faculty did not contain a bunch of crazy leftists. *Id.* at 400.

69. *Id.* at 400.

70. *Id.* at 408.

71. *Id.* at 399–400.

debates, which caused some members of the law and social science group to denounce their critics and others to feel that they were not "wanted" in the organization.[72] When ideology does seem to be central, as in the attack by a "Guild type" on a paper for being insufficiently attentive to class control of the means of production, Schlegel implies that sort of posture is counterproductive.

In the end people, and to a lesser extent places and institutions, seem to be what Schlegel believes the Conference is fundamentally about. We learn about Peter Gabel's "curly black locks and earnest, terminally tired eyes" as well as his "wonderfully dense and contorted prose."[73] We glimpse the "balding, almost elfin" Morton Horwitz as he "embarrassedly defend[s] his latest attempt to salvage his limited version of the socioeconomic determinism of legal ideas."[74] We witness members of the group, in successive annual meetings, "trading pictures of one's children" and "spotting a few old friends," after which "the hugs, kisses, and handshakes start."[75] We deplore the absence from a meeting of Alan Freeman, "whose manic energy and relentless optimism has surely infected everyone,"[76] or Karl Klare, "a wonderful combination of high seriousness and warm, open goodwill,"[77] or Rand Rosenblatt, "whose bald Lenin-like profile gives the impression of a fierceness that is simply nowhere to be found in his humane inside."[78] All this means, for Schlegel, that the Conference on Critical Legal Studies should be best understood as "a group of individuals providing each other with tremendous mutual support."[79] So

72. *Id.* at 408.

73. *Id.* at 402.

74. *Id.* at 402–03.

75. *Id.* at 409.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 411.

in the end the "history" of the Conference is another illustration of "ideas and people" being "hopelessly intermingled."

III

Part of the reason Schlegel's 1984 narrative about the Conference remains cited and anthologized over thirty years after it appeared is that it makes a strong case for Schlegel's view that intellectual history is the history of intellectuals, primarily affected by people, places, and institutions. Schlegel's narrative of the Conference represents a slight exception to his intellectual work as a whole in that the substance of ideas can occasionally be glimpsed behind the sketches of personalities discussing them and the social atmospheres in which they are discussed. Critical Marxism, Scientific Marxism, and non-Marxist law and social science are somewhat encapsulated, so when one imagines Mark Tushnet and Stewart Macaulay, still colleagues at Wisconsin in the mid-1980s, off in a corner debating whether American legal institutions can only profitably be understood as objects of a capitalist order, one has some inkling of the "Scientific Marxist" and law and social science perspectives informing that debate. But despite his occasional efforts to set forth the principal ideas being tossed around in the three-cornered game of catch being played at Conferences, one still has the sense that Schlegel thinks it more important that "the quite tentative, very cliquish, even conspiratorial beginning of the Conference seems to have passed,"[80] and "the group has become incredibly friendly, even clubby," with "annual meetings becom[ing] much like the gathering of a clan."[81] Schlegel wants his readers to conclude that that development is not only "good,"[82] but important, for the history of Critical Legal Studies will be, at bottom, the

80. *Id.* at 408.

81. *Id.* at 409.

82. *Id.*

history of the people in it.

I have a good deal of admiration for Schlegel's ability to provide telling details in the sketches of "intellectuals" whose history he recounts. Learning that Peter Gabel and Alan Freeman smoked "big black cigars" in a "secluded corner of David Trubek's yard" during the first Conference, or that Trubek and Roberto Unger, "seated in a peacock chair," talked "South American politics," either in Spanish or Portuguese, at the same event,[83] is perhaps a better way to grasp the atmosphere of the first Conference than noting that versions of Scientific Marxism, Critical Marxism, and non-Marxist law and social science were deployed by participants. But then one needs to recall, as part of the history of Critical Legal Studies, that sometime in the late 1980s the Critical Legal Studies movement did not actually run into the sand, but certainly ran out of steam in the legal academy, and the reason for that was not that Duncan Kennedy and David Trubek and Mark Tushnet and the movement's other founders became supporters of Ronald Reagan or retired to the Florida Gold Coast, but because two things happened to the central ideas of the movement.

One was that one of the principal methodological innovations of Critical Legal Studies—popularized as the "trashing" or "flipping" of established legal doctrines so as to show their internal contradictions and possibly their incoherence—was adopted by law teachers who did not share the group's political leanings. By using those techniques critical legal scholars had reinstituted the centrality of doctrinal analysis to law teaching, and "mainstream" legal academics piggy-backed on that emphasis, at the same time developing more sophisticated ways to unpack legal doctrine. Thus one of the major critical weapons of CLS scholars, deconstructing the doctrinal structure of "liberal" scholarship and teaching, was domesticated.[84]

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83. *Id.* at 408.

84. For more detail, see G. Edward White, *The Inevitability of Critical Legal*

Another innovation of critical scholars had been the "turn to history" in their work, mainly to show the contingency and time-boundedness of established doctrinal formulations. Other scholars began to participate in that historical turn, but with quite different normative agendas from those affiliated with CLS, so that "doing history" came to have a far less radical thrust within the legal academy, further contributing to the domestication of CLS methodologies.[85]

Alongside that domestication came an estrangement of many legal academics from the political goals of Critical Legal Studies. The relentlessly anti-hierarchical thrust of the movement seemed to point in the direction of challenges to any activities within the legal academy that seemed "authoritarian," even if they took the form of delegating some institutional decisions to committees or Deans. Confrontation, debate, and defiance of authority appeared to be goals of the CLS movement with respect to law school governance, and many legal academics found those goals tiresome or even exhausting. The CLS slogan that "Law Is Politics" may have seemed energizing to those attracted to the movement, but it seemed to invite an abandonment of the concept of "merit" which had played a decisive role in twentieth-century legal education. If one could not confidently say that some students were better than others, or some scholarship "worth more" than others, or even that law faculty deserved to be paid better than custodians, it seemed hard to imagine how law schools could effectively function. After an initial counter-move to oppose critically-inspired proposals and even purge some untenured critical scholars from law faculties, the legal academy, in the 1990s, settled into a posture in which CLS methodologies became widely adopted in scholarship and teaching and CLS political proposals were largely ignored or forgotten.

Studies, 36 STAN. L. REV. 649 (1984).

85. For more detail, see G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002).

That brief history suggests that the partial eclipse of CLS in the legal academy around the turn of the twentieth century was not primarily a function of people, places, or institutions. To be sure, there was a highly publicized interval of polarization on the Harvard law faculty, where opponents of CLS emerged and for a time tenure decisions and appointments were affected by open political divisions.[86] But in the end CLS was partially embraced, and partially rejected, by most American law faculties because of the ideas associated with the movement. Schlegel's effort to encourage us to understand the Conference on Critical Legal Studies as part of a "history of intellectuals" presents us, like much of his work, with riveting personal and institutional portraits, but ultimately one worries, in scholarship purporting to do intellectual history, where the ideas are. Put another way, Schlegel's emphasis on persons, places, and institutions has the effect of subsuming ideas in those topics, so that Schlegel's narrative history becomes not so much one of "ideas and people, hopelessly intermingled," but of ideas peeking around the portraits of people and places, mainly being lost from sight.[87]

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86. For more detail, see David Margolick, *Education Watch: The Split at Harvard Law Goes Down To Its Foundation*, N.Y. TIMES (Oct. 6, 1985).

87. For a more recent illustration of this tendency in Schlegel's work, see John Henry Schlegel, *Wesley Newcomb Hohfeld: On the Difficulty of Becoming a Law Professor*, *in* THE LEGACY OF WESLEY HOHFELD (Shayam Balganesh, Ted Sichelman & Henry Smith, eds., forthcoming). That essay is a compelling reconstruction of Hohfeld's career path from the time he first expressed interest in becoming a legal academic in the first decade of the twentieth century to his untimely death in 1918. One gets a very good sense of the activities and aspirations of American law professors in those years. But there is almost no substantive discussion of Hohfeld's scholarship, most particularly his article, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), which launched Hohfeld's visibility as a legal scholar and secured him an appointment to the Yale law faculty after Arthur Corbin read a draft of the article and was impressed by it. Given Schlegel's demonstration of how difficult a personality Hohfeld was, his rise throughout the hierarchy of American law schools between 1908 and 1914 was surely not a result of his personal charm, but of the perceived quality of his scholarship. Yet one does not get a sense, in Schlegel's narrative history of Hohfeld's career, of why his jurisprudential ideas were highly regarded, or even what they were.