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Dizzying: An Introduction

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In 2022, after decades of labor, University at Buffalo Distinguished Professor (Law) John Henry Schlegel published a book: *While Waiting for Rain: Community, Law and Economy in a Time of Change* (WFR). As academic tradition would have it, the Baldy Center for Law and Social Policy and the Del Cotto Professorship sponsored a conference on April 28, 2023. The *Buffalo Law Review* here publishes a Symposium comprising short papers written for and in dialogue with the book and conference. As convenor of the conference, I have the obligation and honor of writing this Introduction. All very proper, even expected, superficially.

Schlegel¹ may well be the longest serving faculty member in the Law School's history. I started to look it up, but the [fact] would be misleading. Nor am I going to recapitulate Schlegel's intellectual career or his many services to the Law School or to countless students or to his colleagues, certainly me. We have talked, taught, and written together for many years, but this is not a *Festschrift*. It is time itself that is important here.

Schlegel was old when I arrived, or so I thought as a young father. He is older now that I am a grandfather. I say

† Louis A. Del Cotto Professor, University at Buffalo School of Law. My thanks to Jack and the participants in the Waiting for Rain conference and this symposium. My mistakes, ah, my mistakes.

1. He uses his legal name as a *nom de plume*, and for little else.

this because in engaging WFR, and in the papers that follow, it is important to understand that Schlegel is somehow beyond academic discourse, though he of course is a professor, as are many of his friends. As Pierre Schlag points out below,² academic discourse is shaped, constrained, informed by its disciplines, the conceptual grammars that place a text on that shelf, in that class, on that graduate reading list and not some other, and its author on some tenure or appointments committees and not on others. Publishers, too, need to know what to write on the back of the paperback, “law” or “sociology” or what have you. Which is to say that academic texts presume this or that career, the figure of the student who evolves into a scholarly authority, thereby instantiating, exemplifying, and propagating the discipline. And in the last word to this Symposium, Schlegel himself speaks of “causation” as differently seen by historians, economists, and so forth, all and none of which fit the text at hand.

What happens if it no longer suffices to think in terms of our careers as legal academics, in this case, and do not choose to “retire,” to use the elegant image? Suppose we refuse the *Festschrift*? More generally, what happens when a discipline runs out, no longer serves as a narrative frame that make the professional account seem reasonable enough? Then how do we engage as lawyers, historians, sociologists, whatever? Write? It’s dizzying.

Errol Meidinger and Jim Gardner have done fine jobs of summarizing the plan of WFR, or as fine as one could reasonably ask, given the book’s complexity. As Schlag notes, “[WFR] defies theorization . . . and does not deserve to be summarized.”³ While I have no desire to replicate the efforts of Messrs. Meidinger and Gardner, I do need to provide some sense of what Schlegel said, of what my colleagues are talking about. So, rather than recapitulate the book’s outline, let me try something different. Schlegel’s account is presented as history, in time; let me introduce it with geography, in space. In its narrowest compass, WFR is an economic history of Buffalo, the city, and to lesser extent its

2. Pierre Schlag, *Consider Buffalo*, 71 BUFF. L. REV. 949, 956–57 (2023).

3. *Id.* at 953.

environs, Erie and Niagara Counties. “Economic history” is too narrow. Policy and so law, and politics—and the culture (or sociology?) that give rise to politics—play explicit roles. Memoir and remarkable facts play roles, too.

The story of Buffalo is also a story of transport. First the Erie Canal, the lake boats that brought Midwestern grain to the hulking silos, and of course trains, and later, the interstates. Buffalo connected regions through most of its history. Buffalo’s fortunes declined when other connections were found, when the nation literally moved on, although there were other reasons, too. So WFR is perforce a history of regions, if in somewhat shadowy fashion.

Broadening the inquiry still further, the markets that Buffalo served are at least national in scope. Thus, Schlegel tells an economic history of the United States, especially from the end of the Civil War to about 1970 or so. Only with such an account can we understand what Buffalo’s economy did, the markets it served, for a host of products ranging from cereals to chemicals to automobiles. More subtly, and a point to which we shall return, only with a sense of the nation can we understand how Buffalo saw itself, first as an important place, and later as a place that declined, leaving a sense of loss.⁴

As insular as the United States sometimes is, the nation participates in international markets and foreign wars. The pulse of events far away has always affected the fortunes of the city, most obviously in the demand for young men, aerospace, and armaments. The World Wars both developed American prowess across a number of industrial domains and eliminated a great deal of competition for U.S. industry in general, and Buffalo’s heavy industry in particular. The gradual development of capacity elsewhere placed many Buffalo industries under competitive strain, often fatal. So “the international” becomes the book’s fourth domain, albeit discussed only derivatively.

As this Symposium richly illustrates, as one reads on, it becomes less and less clear what WFR is *really* about, even if all the sentences and even the paragraphs make sense. To

4. See generally, VERLYN KLINKENBORG, *THE LAST FINE TIME* (1991).

start, however, WFR uses the interpenetrating histories sketched above to engage a question: what possibility does policy, concretized as law, have to promote economic development? Concretely, why have none of the myriad things done at municipal, state, and even national level to arrest Buffalo's decline worked?

Simply stating the question raises a host of problems; what had seemed to be "a question" turns out to be a field of questions. What do we mean by law? By economic development? What is the relationship between law and markets? What are the conditions for growth? The obstacles? Can such conditions be brought about, such obstacles overcome, through political will? If so, would that mean we can somehow link economic and political history, in our minds at least? Would such understanding come only after the fact, as history? Or could the future be similarly understood, to inform policy? How should we feel about all of this? And so forth. WFR is not intellectual history, but a fifth domain is the world of ideas. But not just ideas—also the shifting terrain of beliefs, sentiments, hopes . . . What do we use to think when we consider Buffalo, what happened and what might be done, conditions permitting?

Schlegel addresses such problems in colloquy with another rogue thinker, Jane Jacobs. Drawing on both Jacobs and the tradition of humanist skepticism expressed, in law, as old school Critical Legal Studies, Schlegel argues that we really do not know what causes what in any reliable sense. What we do know is that policy and so law mean many things in practice, mostly unintended. Economic development is thus unpredictable, a gift. Jacobs says "grace." For those unfamiliar with Protestant theology, Schlegel writes that we are like farmers, waiting for rain, and powerless to do anything but hope. In one way or another, all the contributors both accept and wrestle with this idea of a politics that rests on grace.⁵

5. As Schlegel appreciates, something somewhat similar might be said economically, when we lose faith that markets are particularly rational. See John Henry Schlegel, *With Thanks and A Note on Causation*, 71 BUFF. L. REV. 1043 (2023).

The last few paragraphs may have given the misleading impression that the book is terribly abstract. But WFR is replete with facts, if anything too many facts, or at least they seem to be facts in the sense of something known, with a stable meaning. But the facts here are not so simple. Their meanings are unclear, often multiple, and they intersect with other facts, and change, and the meanings are affected by the intersections and the changes . . . our good old facts emerge as something far more beautiful, maybe, or terrible, but certainly not reliable, what Pierre Schlag calls a “mutating shimmering network.” This does not seem to be a promising basis for a sensible development policy.

In “Consider Buffalo,” Schlag discusses many of the ways in which our expert discourses fail, cannot but fail, to deliver on their promise of reliably formulating wise or even effective policies. We simply cannot know, and even if a savant were somehow to understand, such understanding cannot be shared, simultaneously held by enough people, to form something resembling a democratic and enlightened policy in which power was exercised in accordance with reason. Which is not to say that there will not be reasons, and power will not be exercised. There will be and it will be. Maybe we will be blessed, maybe not, and the details and consequences in time will almost certainly remain unclear.

At least two relevant things follow from the decoupling of social action from rationality that Schlag diagnoses in both Schlegel and Jacobs, and that he himself espouses. First, “the expert” here is not just the urban planner or economic policy wonk. We academics, we symbol manipulators, are all caught in such shimmering networks. If we give up on knowing, then whether to write, what to write, and how to write become difficult problems. As Weber may have said to Karl Jaspers, are we scholars merely to see how long we can stand it? Or, to return to where I started, after the discipline, can one continue, as Schlegel has?

Second, decoupling social action from rationality puts day-to-day politics, not to say grander policies designed to transform an entire economy, in a parlous state. Philosophically phrased, Schlegel seems to have given up on the Enlightened idea of a rational politics; we see politics in terms of blessings, rain. James Gardner reminds us that

Machiavelli called this *Fortuna*, and just as *Fortuna* will sooner or later turn against us as individuals, it will sooner or later turn against the polity. Republics, like individuals, are finite, mortal.⁶ Similarly, Schlag: “[W]e are all nearly at the end of the line in our understandings and hold on law, politics, the economy, culture.”⁷

Quiescence, perhaps even a contemplative monasticism, would seem to be a sensible response.⁸ “The cross is steady while the world turns,” as the Carthusians have it. Schlegel, however, is unwilling to say, “do nothing.” In fact, none of the contributors say “do nothing,” which would just mean that the structures and dynamics currently in place will continue to evolve, for good or ill. So, Schlegel and the contributors all say in different ways, maybe we should do something, something modest, prepare the ground in case the rain does come. Of course, modest efforts are subject to the same criticisms that WFR has leveled against grand projects, just at a smaller scale. Why should we think this (modest) action will in fact help (a little)? It is most unsatisfying, as Schlegel acknowledges.⁹

Need we be unsatisfied? Need we accept the proposition that politics is inescapably insufficiently rational for us to have confidence in our actions? In “On Preparing the Soil for Rain,” Errol Meidinger pushes back.¹⁰ With admirable fairness and detail, Meidinger summarizes Schlegel’s argument, which he suspects is largely right with regard to Buffalo. Like Schlegel, Meidinger has lived in Buffalo for decades. But suspicion is not knowledge. As sociologists are

6. James Gardner, *While Waiting for Virtue: Comments on Schlegel’s While Waiting for Rain*, 71 BUFF. L. REV. 1025, 1027 (2023).

7. Schlag, *supra* note 2, at 966.

8. At first glance, a thorough-going hedonism might also seem to be a logical response to political despair, or at least a popular one. Even in popular discussion, however, the story of Buffalo is told vis-à-vis transcendent concerns, framed largely in terms of History, Community, Hope and so forth. Perhaps it is simpler to say, with Aristotle somewhere, that “the city” cannot be understood as “the individual.”

9. Schlag, *supra* note 2, at 957. Schlag is surprised that Schlegel even tries to conclude with a bit of advice. *Id.*

10. Errol Meidinger, *On Preparing the Soil for Rail*, 71 BUFF. L. REV. 967 (2023).

wont to do, Meidinger calls for more research, with an eye to putting Schlegel's claims on a sounder footing.

Meidinger argues that many of Buffalo's problems stem from, well, Buffalo. Meidinger discusses three constraints on economic development identified by Schlegel: economic dependency, political fragmentation, and perverse local culture. Let us take the third as illustrative of Meidinger's form of argument. Schlegel argues that many efforts at economic development were stymied by small-minded politics. Such politics arose from the various subcultures that comprise the city; Buffalo has a hard time coming together to get things done. One might say similar things about cultures of innovation, which Jacobs views as central to a city's development.

The good news, however, is that cultures can change, and more cooperative or innovative cultures may emerge. To quip, collective sociology can provide remedies for history's ills. Meidinger therefore calls for conferences to discuss, with some particularity, constraints on Buffalo's growth, and to begin articulating responses. How can existing constraints be ameliorated? How can new cultural formations overcome what is now seen as an insurmountable obstacle? Even Silicon Valley, which Meidinger discusses, had a beginning.

If Meidinger pushes back to a sort of California Durkheim, Matthew Dimick resorts to Marx, who is revealed to be Schlegel's cousin, historically minded and skeptical of claims of necessity.¹¹ Dimick maintains that Buffalo's particular economic history could better be understood through a Marxian lens. Doing so, however, requires first a reconception (or a truer notion) of Marx's notion of capital, which Dimick articulates. "Capital" properly understood, one might move to understanding some polities as "capitalist," that is, ruled by capital, as opposed to some other form of political organization: Greek *polis*, feudalism, etc. Buffalo's periods of rise and fall, then, are various stages in the life of a historically and geographically capitalist city. Dimick closes by asking why one would want to live under such a regime.

11. Matthew Dimick, *While Waiting for Capital to Rain*, 71 BUFF. L. REV. 993 (2023).

In a short and poetic piece, “The Tragedy of the (Not So Much in) Common(s),” George Williams agrees with Schlegel that development cannot be legislated. So, what is to be done while we wait? Perhaps the ground can be prepared? WFR begins with the selfishness of so much Buffalo politics, the lack of communal vision that often makes politics impossible. But perhaps this is precisely where ground might be prepared? Williams analogizes this problem to the “tragedy of the commons,” canonically expressed by Garrett Hardin.¹² The classic example is a fish stock. In an effort to secure his own, individual fishermen take as many fish as they can, as soon as they can. The fish population is overfished, the fish are unable to breed sufficiently, and the stock collapses, to the detriment of all. While the logic is inexorable on its terms, in many instances law and regulation have solved the problem of the commons. Simply put, we protect fish stocks. Here, Williams echoes Meidinger, albeit in an economic key: we can improve our political culture, and be prepared to work together.

In microeconomic theory, one speaks of externalities, aspects of a transaction not captured by the property regime, and therefore not reflected in the price. The “commons” and “externalities” are corollary vocabularies, both describing that which is outside an economic transaction and yet of concern. As Williams acknowledges up front, economics—and so economic policy—miss much; much cannot be said within the “transactions” of economic policy discourse. By the same token, the commons at issue are not only the shared space of the city, but the shared uncertainties of the city’s governance. So unspoken, such uncertainties stand outside the ken of political actors, in economic terms, unpriced. Williams agrees with Schlegel that we should make our cities livable while we wait. And just sometimes, common understandings do arise. Again, we do sometimes regulate the fish stock, and the fish come back. Sometimes law works, the rain falls, and as Williams says, the desert blooms.

Jim Gardner confronts this question of hope, with which Williams closes, directly. At bottom, Gardner argues, WFR

12. George M. Williams, Jr., *The Tragedy of the (Not So Much in) Common(s)*, 71 BUFF. L. REV. 1021 (2023).

“is not so much economic as sociological: what should the inhabitants of a community do while waiting for rain? How should they cope with their misfortune? By what means should they indulge their hope for a better world in a desultory present?”¹³

If this is sociology, it is existential sociology. This sentiment may be part of the human condition, but as already suggested, it rings medieval: how do we comport ourselves in a transitory world, our situation in decline? Following the ancients, Machiavelli argued that republics could not endure indefinitely. The virtues on which republics depend would be dissipated inevitably. War was a temporary solution—war required virtue—but ultimately unavailing for reasons traceable from Thucydides to Afghanistan.

Madison, as any U.S. lawyer should know, sought to devise structures that enabled virtuous governors to enact good policies, and that limited the damage done by bad governance in harder times. The republic’s death might, Madison hoped, be “cheated” by constitutional design. But it cannot last forever. United States citizens are sadly nostalgic for a democratic republic that is already gone, much like Buffalonians miss an economy that no longer exists. So, what is to be done while we wait for some other dispensation to emerge? Gardner briefly considers a few possibilities. Resignation, accommodation, and the enjoyment of private pleasures, even meanings, in lieu of politics is probably necessary. (Gardner has in mind the late Soviet Union.) Armed revolt is almost certainly a bad idea. Perhaps we can learn to work together, at least a little. The theme repeats.

All of the contributions in this Symposium depend on some notion(s) of how thinking, our decisions about this or that course of action, can be realized in the world. That is, discussions of agency, hope, what is to be done, normative politics, policy and so forth entail some notion of how *A* “causes” *B*. In *WFR*, Schlegel discusses a number of high order concepts, like law, economy, growth, and the like. The concepts are not entirely distinct even analytically, and nothing like distinct in an actual city, say Buffalo, and

13. Gardner, *supra* note 6, at 1026.

Schlegel does not really try to keep them all that distinct in the book. But at least such concepts are discussed. The concept of causality, however, is not discussed, and during the conference, that seemed to be an omission. Surely law sometimes does cause bad things, Duncan Kennedy argued.¹⁴ So Schlegel has decided to rectify the omission with a discussion of various conceptions of causation, which has been a *bête noire* of historians since forever. Perhaps unsurprisingly, Schlegel does not solve the problem, and the discussion of causation does not resolve the predicaments of economic development, one might say Enlightenment politics writ large, with which we began. We are left with gestures, and good will, and maybe some hope we can get better at working together, to do modest things.

* * *

These Symposium contributions are strikingly consonant with WFR and with each other, and for that matter, with much that is commonplace in Buffalo. Broadly speaking, the narrative of decline is uncontested, although what, if anything, might be done is endlessly discussed. Given how hard it is for Americans to agree, a total stranger to the region might find this consensus rather surprising. As Schlegel tirelessly demonstrates, Buffalonians do not agree on much, which is part of the problem with the city. To make matters more curious still, there is a great deal to like in Buffalo and environs. At the conference, and in a subsequent colloquy, Provost and Law School professor emeritus Tom Headrick presented a slew of numbers to suggest that life in Buffalo today was no worse than it had been during the Golden Era, and was in many ways better.¹⁵ In fact, life in Buffalo was pretty good in many respects in comparison to life in other places in the United States.¹⁶ Lies, damn lies,

14. Schlegel, *supra* note 5, at 1045.

15. Unfortunately, I could not persuade Tom to write.

16. One could also do similar things with the United States as a whole, which, for example, still produces around a quarter of global output, as it has for decades. *The Economist* does this sort of thing regularly.

and statistics, of course, but Headrick's numbers got me to thinking about Buffalo's narrative of decline.¹⁷

Schlegel and I have taught together off and on for decades, and it was a pleasure to teach WFR with him in the Finance Colloquium this fall semester. Two new, to me at any rate, ideas emerged from the discussion. First, Buffalo's understanding of itself as in decline is a relative understanding, as any tale of "decline" must be. Relative to what? As suggested at the beginning of this Essay, Buffalo's markets, and so its conception of itself, must be understood in larger, essentially national, contexts. Unemployment rates or college degrees or other locally measurable things are relevant, but they do not explain the narrative of massive decline. But nor do they disprove the narrative, even insofar as such narratives are falsifiable.

And relative to when? By common consensus, the highwater mark for Buffalo was "the fifties." The decade is idealized, of course. Schlegel would argue an earlier decade should be idealized, that Buffalo's structural problems were masked by this and that. As a matter of social fact, however, Buffalonians long for the fifties.¹⁸ In 1950, the heart of the putative Golden Age, the U.S. Census was 158,904,396. In 2023, the U.S. population is estimated to be 339,996,563. The nation's population has more than doubled in the post war era. Such growth is unevenly distributed. Population growth, and so economic growth, has overwhelmingly been elsewhere. As WFR repeatedly documents, in [early date] Buffalo was [one of largest cities]. In [later date] Buffalo was [relatively smaller]. Buffalo simply lost importance, in terms of the economy of the nation, over the years. Denizens of a sports-mad town should well understand that Buffalo's decline is essentially comparative, a matter of standings.

As our students pointed out, however, something else happened. Buffalo became, if not a "culture" in the round sense used by classical anthropology, at least a "thing" in the sense used by kids today, a locus of shared meanings. Buffalo has become something like the Ireland of U.S. cities, a place

17. Schlegel long has had a quote from E.L. Doctorow on his door: "There is no fact; there is no fiction; there is only narrative."

18. See KLINKENBORG, *supra* note 4.

where people hail from. Better opportunities elsewhere (“the Carolinas” is the generic reference) cause people to leave. Over the same period, Buffalo went from being regarded as a gem, a prideful place, to the butt of jokes, many of them unkind. Resentment arose, of the kind familiar from country music, in references to “flyover states” and the like, places not taken seriously, and if you are from such places you must not have made it?¹⁹ Such resentment, however, may also bond underdogs to each other. There are Buffalo bars across the country. People get together to eat chicken wings, drink Canadian beer, watch sports, yell about the Bills Mafia and if of a certain age “wide right.” Lake effect snow is a reference point for the country. On a fall Sunday afternoon, “Buffalo”—the “thing” not the place—is a welcoming, working class, at least in demeanor, usually somewhat inebriated and overfed community, almost anywhere in America, and community is hard to come by.

The analogy is only half serious—Ireland is much bigger and older than Buffalo, a “culture” not a “thing”—but there is something in it. Here as there, divisions that bedevil local politics come to seem less significant from away, outside, and what matters is the best and especially warmest version of the associations, images, and emotions evoked by “Buffalo” or “Ireland.” Buffalo is in modest but not insignificant ways shared nationally, and not every town can say that. And from this perspective, WFR emerges as a dizzying Joycean effort, through the waves of erudition, the confusions, the uncertainties and passions, to write the place.

19. DAVID A. WESTBROOK, *WELCOME TO NEW COUNTRY: MUSIC FOR TODAY'S AMERICA* (2017). It would be very un-Buffalo to discuss Nietzsche at this juncture.