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With Thanks and a Note on Causation

JOHN HENRY SCHLEGEL†

I suppose that it always is a pleasure for an author to learn that some people find that a project that took many, many years seems helpful . . . or at least provides an occasion for thinking. Experiencing such usefulness reduces a bit the writer's sense that the enterprise was mostly self-indulgent. Such was the case for me with respect to the gathering that was held to discuss my book, *While Waiting for Rain: Community, Economy and Law in a Time of Change*,¹ and so I wish to thank the participants for their efforts.

Having thus reduced my authorial embarrassment, I leave to our readers the job of evaluating the short papers emerging from our little confab, some designed to both stimulate and focus discussion, some written thereafter. Each stands on its own and so, having received the compliment of their having been written, I have no reason to discuss any of them. Instead, I wish to speak briefly about something that the discussion demonstrated to me: I had made a mistake in not explicitly treating the much-vexed topic of causation.²

Mixing history, economic theory, and political economy as I have done probably invites confusion. History often, though not always, is concerned with causal relations that can be discerned from a good, though never complete, record

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1. JOHN HENRY SCHLEGEL, *WHILE WAITING FOR RAIN: COMMUNITY, ECONOMY, AND LAW IN A TIME OF CHANGE* (2022).

2. I spent some time on this topic in *If the Music Hadn't Stopped, or Reflections on the Great Kerfuffle: Historicism's Continuing Grasp for Truth*, 31 *YALE J. OF L. & HUMAN.* 276, 276–96 (2021).

of what happened. It tells its story after having considered that record as seen in an unclear, often distorted, rear-view mirror and implies care and concern for varying measures of relevance. Traditionally, history distains concern with a future as yet unknown. In contrast, economic theory ties past to future based on a naked assertion that it can explain both because it is a science. Less grandly, political economy extrapolates from an only partially known past to a possible preferred future and asserts that certain actions, taken or foresworn or both, will bring a change in politically organized society, an exercise that is underpinned by varying, unstated causal suppositions. Any notion that causation means the same thing in all these "fields" is implausible. At best they are cousins, though first, second, or third and how far "removed" is not clear.

All of this confusion was made worse by the use of "law" in my subtitle. I attempted to define that usage: "The many and variable actions undertaken by lawyers and other government officials, the formal and effective norms originating from the practices of these individuals, and the systemic presuppositions shared among them."³ However, I would not be surprised were there places where I failed to stick to this stipulated meaning, but instead slipped into meanings such as "rule," "doctrine," "judicial decision/opinion," "legislation," or even "custom." From time to time I even noted the "silent work" done through civil relations, commercial and otherwise. My slipperiness was aided by academic legal thought. Causation in law is treated as if the only relevant question is the singularity or multiplicity of causes. Once that narrow question is decided, the causal efficacy of law is pretty much assumed.

I suppose I might have tried to clear up at least the legal mess, but I didn't. Instead, I blithely ignored it, and the scholarship it has brought, and went on to deny law's assumption of causal efficacy by baldly asserting that law was not particularly efficacious in managing an economy, or any other part of society. Law's impact is generally over-estimated. Doing so challenges the plausibility of almost all academic legal scholarship today, what Pierre Schlag calls

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

“Normative Legal Thought.” Such scholarship is implicitly based on the assumption that law is efficacious: that if the law discussed by a scholar were changed as advocated, something in the world would change, and for the better. My assertion reduced such academic writing to the status of pointless chatter, except when engaged in as part of the procurement of tenure or, less nobly, academic preference.

I’m pretty sure that I could have demonstrated that evidence for this proposition could pretty easily be found. All of the scholarship about law in the books and law in action, that is, a great portion of the law and society work of the past fifty or so years, and ultimately derived from Roscoe Pound, stands witness to such a proposition. But, I didn’t. Instead, my discussion proceeded in a way that was clearly based on my understanding that law follows culture and, if not, culture modifies law, and so, that in some circumstances it should be expected that law will not be efficacious.

And again, I’m pretty sure that I could have demonstrated that evidence for this proposition could easily be found. The long, long story of the slow progress and limited change brought about by the various Civil Rights statutes and judicial pronouncements rendered in constitutional litigation could be assembled in support of this understanding. But again, I didn’t. The weakness of thought about causation in law, as well as in other fields, seemed obvious to me, and besides my manuscript was already frighteningly long.

I probably shouldn’t have proceeded in this way. My readers deserved better. And so, at the gathering to celebrate the book’s publication, Duncan Kennedy called me out for one piece of my omitted discussions, my naked assertion that law was not particularly efficacious.⁴ His example was the impact of right to work statutes and the growth of economic development agencies on the migration of Northern manufacturing to Southern states in the Seventies, Eighties and Nineties. This causal assertion is a classic example of the claim made in support of understandings of law as a tool

4. I suspect that he would largely, if reluctantly, agree with my observation about the effect of culture on law, though he might object to my use of “culture” rather than “ideology.”

of political economy and so common among law professors. Though no longer common enough, for it is not wrong. Both Duncan and I agree that looking at whose ox is gored and whose goose is fattened tells one a lot about why something legal happened. So, his example merits analysis, offered as it was in rebuttal of my historian's assertion as that, a matter of causation, the effect of law is often quite indeterminate.

Consider two things. First, that the greatest growth of right to work statutes dates primarily to the late 1940s and mid-1950s. And second, that state and local economic development agencies date back to legislation in Mississippi in 1936, though most date to the 1960s. All were designed to support rural areas that had seen their agricultural base decline. It is clear that both kinds of legislation were responding to (and were caused by) local desires—a fear of the loss of local control over a dependent workforce in the former case and a desire not to be left behind in the second.⁵ Both have questions of race relations near the surface.

Probably equally important, a third consideration is the development of the Interstate Highway system in the 1960s which, along with the development of large tractor-trailers, remedied the erratic north-south railroad connections that were a remnant of pre- and post-Civil War patterns of railroad expansion. That pattern had tended to isolate Southern manufacturers from Northeastern markets. As a fourth consideration, the development of air conditioning that made denser urban life tolerable throughout the South should never be forgotten.

The combination of the first two legal changes quite clearly aided the disappearance of largescale manufacturing from Northern states, though this is less a story of capitalism driving a change in law and more of poor states hoping to make their areas attractive by issuing invitations. Exactly who drove the Interstate Highway system is not clear. To me it seems as if it was a combination of military preparedness coming years too late, the strength of the road construction lobby, and rural desires for better access to the big cities. I doubt that Northern manufacturers wanting to move to right

5. One can see the same kind of behavior in the rural Midwest as farms grow ever larger, and towns, ever smaller.

to work states played much of a part. Indeed, all four components that turned out to be helpful for this movement of industrial employment were put together in the way that capitalism often does—seeing an opportunity, capital took it.

Here there also is example of another difficulty with seemingly obvious causation—the problem of not getting what was being asked of law. In most Southern states, manufacturing avoided the rural areas that state politics saw as needing help, unless those areas were close to Interstate Highway routes. Eventually, the concentration of economic development near existing big cities brought an increase in college-educated, middle-class managers and adjacent purveyors of services, a change that, together with federal level equal opportunity law, resulted in the growth of a proportionally larger black middle class. Law here made a difference, but not one white southerners wanted, for together these changes led to the exacerbation of urban/rural antagonism and so upset long-standing political relationships, as has become increasingly clear in recent years.

I have not focused on this commonplace of causal arguments about law and economy for the joy of arguing with Duncan.⁶ Rather, I like his example because of what it says about law and economy. Even when looking in the rearview mirror, the surest method for working on causation when thinking about law, causation is really difficult to establish.

It is clear that Northern manufacturers took advantage of Southern legal institutions as a way of escaping from what was perceived by them to be expensive union contract labor. However, there is a lot of space between reason and cause. I know this first-hand because my family left Chicago for Central Illinois when the firm my father worked for believed that in such a place it could secure cheaper, non-union labor. Amusingly, the union followed; Central Illinois was not far enough. But, more important was the difficulty that the firm had in securing that supposedly cheaper labor. There were plenty of individuals with the mechanical skills that come from working with farm machinery, but few such people

6. If that were my object, I would have chosen to talk about the continuing emphasis on the teaching of legal doctrine in law schools.

wanted to work an eight-hour, five-day-a-week, year-long job. After six months, attrition was surprisingly high, as management discovered. Most factory employees did not show up on the first day of deer hunting season.

Taking advantage of an attractive set of circumstances is not the same as causing that set of circumstances to appear. In fact, part of my reason for eschewing causal—if you do this then this good thing will happen—prescriptions for economic development in *While Waiting for Rain* is the complexity of causation even seen in the rearview mirror. The Erie Canal, a state funded project, was a really good, profitable idea . . . for about twenty years, until the railroads began to eat away at its traffic. Imitators in New York and other states seldom made money.

Similarly, much of what is generally called economic development today seems of limited value. When not delivered by foregoing otherwise expected taxes, such projects consist largely of “spending” government funds on projects in urban neighborhoods. There is very little evidence that such targeted “investments” make a difference in urban economic life, though they may well make urban living better. Such may also be true of many projects, especially for housing, that regularly come with—whether they really need is another question—tax abatements.

Now, does the limited success of such projects, whether justified as economic development or the amelioration of urban circumstances, mean that such projects should never be undertaken? That, though regularly heard from “free market” fundamentalists, would be a silly proposition. Most projects work somewhat for some people for some amount of time. In the short run, the building trades need work and people need housing, a quickly depreciating asset if not scrupulously maintained. Other kinds of workers need jobs too, even if they have to move to secure such in new factory or office buildings usually reached via new or recently improved highways. These governmental expenditures and people’s needs can have a reasonable amount of overlap. They can even work to create communities, though not always to everyone’s desire.

Aid for new or substantially new communities, however, is not what I am talking about in *While Waiting for Rain*.

While causation is best understood in the rearview mirror, I am talking, not as an historian, but as a political economist, about the present and the hoped-for future of communities that have had their economy disappear, whether as a consequence of technological change, buyer substitution of cheaper goods, resource depletion, or what have you. Here, I assert an unwelcome proposition: it is really hard to identify causation because to do so is to ask about the future, and what we collectively, through law, may do to bring about a preferred future. But the effectiveness of law in the past or even today is hard to discern, and it is therefore that much harder to predict what the future impact of some law will be.

Still, I wish to reassert the conclusion I asserted in my book. Economically vibrant communities have large and vibrant middle classes. Middle classes want lots of government services—streets, sewers, garbage pickup, strong schools, and a minimum of governmental delay. Maybe, using governmental resources to deliver these “goods” will bring middle-class entrepreneurs to settle in a place bringing jobs with them. Maybe not. Maybe such “goods” will make it easy for the existing middle classes to stay. Maybe not. More likely than either alternative, the absence of such “goods” will make it easy for middle classes to leave. And most likely, while citizens wait to find out what will happen, the lives of the less-than-middle-class individuals in urban areas will be made better. They will find life modestly less depressing, less shabby because—a causal claim—the delivery of such “goods” is a modest sign of respect for these present residents.