If the Music Hadn't Stopped, or Reflections on the Great Kerfuffle: Historicism's Continuing Grasp for Truth

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I was pretty indifferent to my undergraduate education, but I hated law school because it was full of things one couldn't do. One couldn't use a statute analogically, couldn't take into account *realpolitik* when analyzing cases, couldn't rethink legal education from the bottom up, and it was pretty much "out there" to count votes when predicting case outcomes. Six years later, when in 1973 I came to teach at Buffalo, I experienced a quite different world; there were all sorts of possibilities. The great intellectual kerfuffle that went by many names—structuralism, post-structuralism, post-modernism, even Marxism and Critical Legal Studies (CLS)—burned brightly in at least some of the law schools and much of the humanities. Everyone knew that knowledge was constructed, whether one got it from fancy French Theory or merely good old American Philosophy. All knowledge was situated and apparently all judgment as well. It need not be epistemologically grounded in either timeless verities or methodological assumptions. My experience of intellectual life was much like Olivier Messiaen's of hearing music in the cacophony of bird song in spring. All sorts of new things might be thought about in new ways and in many fields.

And then, soon, spring was over. Somehow, from somewhere, Archimedes, the ancient Greek mathematician, had reappeared. He had repeated his aphorism, something like "Give me a lever (a bar to dislodge heavy objects) and a place to stand (a grounding) and I will move the world," but no one seemed to catch the irony. Everyone forgot about methodological possibilities. Grounding reappeared in all sorts of places—race, gender, sexual orientation, class. Truth was possible, at least for the subaltern, the colonial, the outsiders of all sorts, just not for upper-middle

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class white males. The Amusement Park, or maybe just the Merry-Go-Round, that I experienced in those early years abruptly shut down. The music stopped.

I wish to explore how and why the music stopped by looking at my little piece of the historical world—legal history—as well as to suggest why stopping the music was a bad idea for the growth of history generally and why historians might nevertheless be seriously worried about doing anything else. However, in order to supply some necessary context, I feel obliged to start this essay—this attempt to help others to think about a hard problem of understanding what it is that historians do—with a well-known history of history more generally.

It is important to remember that history and theory were joined at the hip in the late-eighteenth and early-nineteenth centuries, tied as they both were to "science," understood as an exercise of "reason." However, later in the nineteenth century "science" came to be less identified with reason and more with "empiricism," seen as more verifiable than mere knowledge, and so commonly Truth.[1] Soon, the longstanding claim of history to be a science came to be seen as increasingly dubious, as was the similar claim of law. History saved itself by latching on to the proposition that it aspired to Truth by relying on the centrality of archival work to its practice and by a creative misunderstanding of Leopold von Ranke's *wie es eigentlich gewesen*. Law decided to stick with the study of reported cases and normative reason and so put up with varieties of empiricists nipping at its heels.

Such was the world when faculty in American higher education, both private (often denominational) and public, began to professionalize and so to form recognizable academic disciplines—anthropology, economics, history, political science, psychology, and sociology. As Dorothy Ross has

1. In the interest of clarity, I think it best to specify my usage of several words. I use "true" as in opposition to "false," and "knowledge" as in opposition to "belief." Such parasitic oppositional word pairs in which each word derives part of its meaning from its opposite are a common linguistic structure in English. These two pairs seem to me to be nested evaluations of plausibility of the conclusions of thought such that a "true" conclusion is more secure than one that is "known," a "known" conclusion is more secure than one "believed" and one "believed" is more secure that one that is "false." "Objective" and "subjective" have a similar pair structure. More importantly, in such a parasitic paired structure the negation of one member of the pair negates the other. "Objectivity" and "Truth" are functionally attempts to avoid the results of destroying one member of a parasitic structure by affirming the positive member of the pair and asserting that the resulting concept is capable of being understood as having escaped from that paired structure by becoming a matter of process, of more or less.

Separately, I have chosen to treat "understanding," which might otherwise be seen as in opposition to "misunderstanding" or perhaps "belief," as outside or perhaps skew to this set of paired opposites. I do this not just out of intentional perversity, but also because the post-modern rejection of "Truth" or "Objectivity" seems to allow that there be a word that denotes a "space" or "area" for thought without firm poles of opposition, not a "line" of nested oppositions. "Understanding" is thus the place where plausibility is always and ever a matter of complex relationships and not just of "more" or "less."

shown,[2] the histories of these disciplines taken together disclose a largely coherent pattern to the *how* professionalization was done and suggest a reasonably plausible *why* it was successful. In each field a small group of scholars began by staking out part of the intellectual world as its "turf," adopting a particular way of looking at that turf, a method as it were, and moving to cut out the "amateurs" who formerly had a claim to that turf. Finally, the group justified those activities by pointing to the "mission" of the discipline. This process was a common objective for a part of the middle- and upper-middle classes of the late-nineteenth and early-twentieth centuries as they tried to maintain distinction in the face of the great broadening of those classes. Peter Novick's great and very big book *That Noble Dream*[3] begins in these years. What follows is a brief and necessarily partial summary of his wonderfully detailed story.

The professionalization of historical scholarship in the United States is often told starting with Herbert Baxter Adams in his seminar room at Johns Hopkins in 1880. In fact the professionalization of history is really rather a bit messier. Established in 1884, the American Historical Association (AHA) was the first of the national associations in what became the social sciences. However, though starting first, history only vaguely fits the more general pattern. History had long been the preserve of the independently wealthy scholar, and it is a group of these "amateurs" that helped establish the AHA and dominated its ranks until World War I. In 1890 only about twenty-five percent of its members were college teachers and none of those had an American Ph.D. degree, as the first of such degrees was not awarded until 1892. Moreover, the European Ph.D. was decidedly not rigorous as it was but one of the scholarly hurdles required to become a professor. All of the presidents of the association were "amateurs" until 1907, when J. Franklin Jameson, that first Ph.D., took office, and it was twenty more years before American-Ph.D.-carrying historians became the regular occupants. Pushing the "amateurs" out was really not an option.

Similarly difficult was the question of "method." At a time when almost all history was political or constitutional, when the Civil War was of recent memory, and when all publishers needed "an angle" to pump sales, partisanship in the writing of history was to be expected, even on the part of the very best historians. What seems to have been generally agreed was that "professional" history should be written "scientifically," a clean invocation of the norms dominating natural science, and so with "objectivity," a nebulous term that called for careful attention to original sources. For the younger historians with college appointments in a world where university presidents, even at state universities, often chose who

2. DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991).

3. PETER NOVAK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988).

would be hired, tenured, or fired, "objectivity" also implied attention to orthodox political opinion. The professional hope was that with sufficient attention to a narrow topic rigorously investigated, slow accumulation of the details of the past would bring convergence on a "true" understanding of the past, perhaps a slightly weaker claim than Truth.

Criticism of this norm, and it is appropriate to see it as such, could be found toward the end of the years before World War I, but did not become shrill until afterwards. This dispute was framed as one about "relativism."[4] The major players were called the New Historians, all reasonably familiar to American historians today—Charles Beard, Carl Becker and James Henry Robinson. They advocated the "New History," a move away from political and constitutional history toward social, economic and intellectual history, and each in his own way emphasized the impossibility for an historian to escape from the circumstances, both personal and social, in which the writing of any history takes place. They did not deny that historians might get factual details right or wrong, but instead maintained that the crucial part of any history was not those details, but matters of meaning, of what to emphasize and what to leave in the background, and so that political considerations were inevitably an important part of the writing of history.

As was the case with the founders of the discipline, for whom the caché of the development of the natural sciences mixed with the older meaning of science as reason or organized learning, the New Historians drew on analogies to science. However, in this case it was the "relativity" of time and space in Einstein's cosmology, the indeterminacy of Heisenberg's particle physics, and the cultural relativism of Boas' anthropology. Equally important were William James' pragmatism, with its emphasis on the logic of inquiry to be found in the objectives of the inquirer, and the thought of those American Legal Realists who were not empiricists.

There was, of course, a serious blowback from scholars for whom the professionalization project turned on the norm of objectivity, but who nevertheless had to hear two New Historians—Beard and Becker, when presidents of the AHA—denigrate that norm in their speeches at the Annual Meeting of the Association. Still, exactly why that blowback was necessary seems to me a bit of a mystery since it is rather doubtful that many historians shared the anti-objectivist heresy. Perhaps it was the assertion of the political dimension to the writing of history that detractors often derided as "presentist," and therefore not properly "historical." Perhaps it was that the possibility of a politicized history suggested that the convergence of historical writing on a "true" understanding of the past was impossible and thus the notion that history was a science and dignified as such, was

4. Echoes of this dispute can be heard later when Robert W. Gordon inserts the word when discussing the ideas that became known as Critical Legal History. *See infra* note 17.

impossible and the professionalization project a failure. In the end it did not matter since, as Novick shows, the New Historical cause disappeared into World War II, just as did American Legal Realism.

On the other side of that war, it was as if the interwar years had not taken place. The wartime idea that the unified forces of freedom had fought to liberate peoples from an identified totalitarianism of the Axis Powers was easily shifted to the Soviet Union in the aftermath of communist takeovers of Eastern European countries, as well as of what became East Germany. At the same time, the unity of the forces of freedom was comfortably transferred into history as a matter of an observed "consensus" that was trumpeted as part of the "end of ideology" among Americans and buoyed by the success of "science," really engineering, in producing a cornucopia of consumer durables and travel marvels that seemed to do anything but undermine American values, much less norms of behavior.

These years were the heyday of the professionalization of history within the colleges and universities. The great expansion of attendance in higher education, at least among the middle and upper-middle classes, was accompanied with a hands-off view of appointments and tenure on the part of university administrations, at least so long as no claim of communist allegiance was made. History departments geared up to produce Ph.D. degrees, the holders of which were gobbled up by the growing educational institutions. A new orthodoxy set in that somewhat admitted historical scholarship could not wholly be value-free, and so in that sense objective. Nonetheless, a communitarian or consensus understanding of events guaranteed a comforting equivalent to objectivity, that is, until all hell broke loose. It was the Sixties.

There are probably as many ways of explaining the Sixties as there are people who have tried to do so, but all of these ways recognize the collapse of a consensus about the meaning of American life as politics split both left and right and the center was attacked from both sides. If one is looking for a reason for this discontent, try Novick who emphasizes the importance of a growing distrust of official institutions that continued even after the end of the Vietnam War and led to a certain cynicism about truth and objectivity on the part of journalists and some scholars. While some historians responded to this cynicism by entering into the political fray and some students pushed for more relevant teaching, other historians turned their backs on these disputes and even extolled the irrelevance of their teaching and scholarship.

The loss of a "vital center" meant that the historical associations got dragged into disputes that were evidence of an inability even to agree on what might comprise Truth. At the same time, the great influx of first Jews and then African Americans and women into the profession only made clear that previous assertions about the universalist nature of the discipline's

norms were no longer possible and so led to the development of bodies of scholarship that emphasized the positionality of its author. Positionality seemed to lead to divided loyalties between the various developing sub-fields and the historical profession as a whole, as well as disputes over the cognitive style appropriate in such fields.

It is important to note that neither science nor engineering played a significant role in this turn in academic understanding of what it is to do history. Rather it was Thomas Kuhn's understanding that science changes abruptly, not because of an accumulation of inexplicable results of ordinary research work, but because the group of scientists in a field come to understand the field differently, an event that he called a paradigm shift; Clifford Geertz's emphasis on the importance of an anthropologist's need for a deep understanding of cultural meaning by participation in cultural practices; and Michel Foucault's emphasis on the way that language gives meaning to practice, as well as distributes power among participants. These strains of thought seem to have had the most impact on many historians, though, here, Novick particularly identifies CLS historians as important examples. Concomitantly, such thought brought great resistance from other historians, particularly, but in no way uniformly, from the right of the political spectrum.

Most reviewers recognized *That Noble Dream* as a marvelous book of history and then proceeded to quibble. Some of the quibbles were about its treatment of particular controversies or the treatment of particular fields of interest.[5] The rest were engaged in a somewhat strange enterprise. They focused on the last, and most contemporary, chapter of the book and refused to accept Novick's assertion in his introduction that he was not carrying water for any particular understanding of his story even as he admitted that as a personal matter he found the notion of "objectivity" to be incoherent. In response, these reviewers tried to maintain either that he was really carrying water for some understanding of the writing of history or that he should have accepted their understanding of "objectivity" as making really good sense.[6] This latter group mostly consisted of intellectual historians and very good ones. Novick did not think much of any of these objections and the discussion quickly played itself out.[7]

Why this was so, can best be understood by picking up Novick's story where it gives out. By the Nineties, after the children of the Baby Boom

5. *See* Linda Gordon, *Comments on* That Noble Dream, 96 AM. HIST. REV. 683 (1991); J.H. Hexter, *Carl Becker, Professor Novick, and Me: Or Cheer Up Professor N.*, 96 AM. HIST. REV. 675 (1991); Carl Degler, Book Review, 76 J. AM. HIST. 892 (1989).

6. Thomas L. Haskell, *Objectivity Is not Neutrality: Rhetoric vs. Practice in Peter Novick's That Noble Dream*, 29 HIST. & THEORY 129 (1990); David A. Hollinger, *Postmodernist Theory and Wissenschaftliche Practice*, 96 AM. HIST. REV. 688 (1991); James T. Kloppenberg, *Objectivity and Historicism: A Century of American Historical Writing*, 94 AM. HIST. REV. 1011 (1989).

7. Peter Novick, *My Correct Views on Everything*, 96 AM. HIST. REV. 699 (1991).

finally pushed their way out of higher education, the ferment in history departments began to subside. As university enrollments declined, departments began to shrink. Ph.D. programs shrunk too as teaching jobs became harder to find. A new normal settled in place. Disputes over politics and positionality subsided as African-American History, Feminist History, and variously denominated histories of sexuality hived off into separate specialties; the same was true for intellectual history. Questions about the American economy were quarantined into either of the long-standing separate specialties that were Economic History or Business History. What was left of American history, now a small part of a history department full of specialists focusing their attention on other parts of the globe, became apoliticized, severed from questions of social class and more often than not, displaying a resigned acceptance of the inevitability of the market as a given in American economic life. *That Noble Dream* may not have been realized, but the point of the historian's dream, the protection of the professionalization project, could continue even in its diminished state.[8]

What might Novick's story look like from inside a single field of history? Well, the easiest way for me to answer that question is to examine the work on the historiography of legal history of my friend and former colleague Robert W. Gordon. Bob's[9] early works are a wonderful place to revisit, even after all these years. His piece on Willard Hurst's work begins with a captivating diagram of the law box, a box containing "distinctively legal" things.[10] This was the place where late-nineteenth and early-twentieth century legal historians focused their work, primarily on judge-made common law legal doctrine, with a dollop of the law of corporations. Bob called this world internalist legal history. Consistent with this internalist perspective, the rough and tumble world outside of the law courts, the world of constitutional history and bits of federal regulatory law, were remitted to the nascent political science departments in the University.

In the twenties and thirties, one of the American Legal Realists, Walter

8. I have been cautioned that I risk a misunderstanding in my reference to development of various separate subfields of history here and earlier. I do not wish to be seen as casting aspersions on any of these sub-fields. Like history generally, the work done in these areas seems to me to range between "majestic" and "well, ok." And, as an occupant of a somewhat older sub-field, an aphorism about stones and glass houses is clearly appropriate. Rather, I wish only to observe that the establishment of a sub-field (including my own) necessarily involves an assertion of a separate grounding because others "do not understand" and that I doubt such grounding has, in the end, been more essential to the work in that area than it seems to be in the seeming parent of all history – political history.

9. I use his nickname because I have always called him that. It would be weird to call him "Prof. Gordon" and academic life is weird enough already.

10. Robert W. Gordon, *The Common Law Tradition in American Historiography*, 10 LAW & SOC'Y REV. 9 (1975).

Nelles, wrote a bit of work that tried to reach outside the law box;[11] no one followed his lead. Thus, it was not until Hurst published *The Growth of American Law*[12] in which he talked about legislators and administrators and lawyers in daily practice, and so "managed . . . to lower from inside the drawbridge over the moat isolating American legal from general historiography,"[13] that there was significant work that escaped the limits imposed by the continued focus on judges and the common law in the law box.

There is something wonderful about Bob's image. The law box has been turned into a castle, a structure designed to keep people safe from hostile marauders. No walls have been breached, no moat filled, and the legal historians who control the drawbridge get to admit or keep out whomever they choose. What exactly might the historians whose work Bob adverted to have been worried about?

Bob ignored this question almost entirely in his next piece of historiography, *Historicism in Legal Scholarship*.[14] Instead, he mostly talked about the possible impact of Hurst's variety of social history on traditional legal scholarship, which had begun to look outside the law box about the same time that legal history did,[15] though it surely had not reached the attention of most legal academics, much less most law students. Instead, after identifying the threat that historicism posed to traditional modes of legal scholarship, Bob spent most of his time on what he saw, rightly it turns out, as the likely ways that scholars devoted to such modes would resist this threat. The three major ones were the denial of the relevance of historical time and place for understanding law, the radical simplification of social context in order to limit what needed to be taken account of when understanding law, and the reliance on theories about the relationship between legal and social change that denied the possibility that law was not working to solve social problems and so meet social needs. This last way of resisting the threat of historicism Bob called "adaptation theory," though in his next work of historiography he called it "evolutionary functionalism," a phrase that sort of stuck.

The rest of the article attempted to respond to these varieties of resistance

11. Walter Nelles, *Commonwealth v. Hunt*. 32 COLUM. L. REV. 1151 (1932); Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165 (1932)

12. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950).

13. Gordon, *supra* note 10, at 10.

14. Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981).

15. A plausible chronology would start with *The Growth of American Law*, a work that was supported by the Rockefeller Foundation and published in 1950. Next came the American Bar Foundation, established in 1952. The Ford Foundation grant to Chicago for work that included the Jury Study came in 1955 and, in the next year, the Walter E. Meyer program of grants began. Then, in 1961, came the Russell Sage Foundation's grants to Berkeley, Denver, Wisconsin and Yale. Three years later the Law and Society Association was hived off from an interest group of the American Sociological Association. Russell Sage also provided the funds for establishing this group. Finally, in 1967, the National Science Foundation began its program in law.

to historicism. Scholars may differ about the effectiveness of these responses. To me, more significant were a pair of observations. Bob noted that much of the scholarship done in Hurst's wake "transgresses the principle ambition" of traditional scholarship, by denying that law makes sense or is effective or most difficultly does not lead to "an immediately useful policy proposal" and that this denial is a real barrier to acceptance of historicism in mainstream legal scholarship.[16] And so, in the end, he was not optimistic about the demise of the several ways of doing legal scholarship that recognize historicity while cabining it one way or another, even though such work "denies our responsibility for the ways in which legal ideas contribute to the construction and reproduction of society 'out there' and denies the social contingency in our thinking about law. . . ."[17]

There are two other things in this piece that bear comment. The first seems just peculiar. When talking about responses to the continuing denial of the historicity of law, all of a sudden comes this observation: "At this stage one listens for the accusation of 'Relativist!'. . . ."[18] Immediately Bob swats that accusation away. The second is the all but explicit sense that Bob believed that legal history is properly centered in the law schools and so that concern for the "principle ambition" of traditional scholarship was a serious matter. The caution inherent in the castle and drawbridge image seemed to be a serious thing for him.

Two years later came Bob's famous *Critical Legal Histories* piece.[19] It is an extended defense of CLS historical scholarship, almost as if "Relativism" had sounded throughout the land, though it is at least as famous for his extended attack on evolutionary functionalism.[20] To understand the importance of that attack, one needs to remember that the castle of legal scholarship whose drawbridge Hurst let down previously had the ability to defend its academic respectability with the assertion that its subject was a scientific, if perhaps hermetic, enterprise, in the nineteenth-century sense of science as rational ordering. Once the drawbridge was down such a defense became harder. It became difficult to ignore the question of the relationship between law inside the castle and society outside, a still troublesome question, etched as it is into the name of a well-known academic society. But it was clear, at least to those of us of the leftish persuasion, that the dominant understanding of this relationship—evolutionary functionalism—had yielded many extremely dubious ideas

16. Gordon, *supra* note 14, at 1048.

17. *Id.* at 1057.

18. *Id.* at 1048.

19. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

20. Here again, a definition may be in order. Evolutionary functionalism is a theory about the relationship between legal and social change that posited that law was necessarily—by its nature—getting better and better as it addressed social problems and worked to meet social needs. *See generally id.*

about how law worked in society.

Bob turned the attack on evolutionary functionalism into a quite elegant art form. A cruder mind (like mine) would have quickly concluded that there were really only two possible arguments available to Bob. Either the relationship between law and society was not a necessary one, that there were multiple possible relationships, or that there were no distinct entities named "law" and "society" whose relationship needed to be identified. Bob pushed both possibilities at great length and did a first-rate job of it.

Unfortunately, if one were to argue that there was no necessary relationship between law and society then it would be difficult to make causal claims of the kind that many in CLS wanted to make,[21] for doing so left one open to the retort, "If I can't make causal claims, why can you!" not the best position to be in. Even worse, denying that there was a necessary relationship between law and society made it difficult to say that evolutionary functionalism was wrong as we all wanted to say. Here, the structural doctrinal work of certain CLS partisans had the advantage that it seemed to eschew causation. At least that was defensible. However, if one simply denied that society and law were distinct entities, all hell broke loose. Taken really seriously, one was essentially tearing down the castle, filling in the moat, and leaving the land to sheep and goats, but not academics, or at least no identifiable academics. Bob surely knew, as his long disquisition on *Historicism in Legal Scholarship* made clear, that if tearing down the separateness of law were going to be the price that social/general historians would extract as a condition for entering the castle, then that old drawbridge would come back up far faster than it took Hurst to lower it.

Here then, as so often is the case, an absence speaks loudly. During the years in which these three pieces of Bob's were written there was an enormous ruckus in academic life generally that in retrospect might best be just called post-modernism, even though to a philosopher/legal theorist it might be better if many different "ism's" were recognized. Much of it was imported from France and included names such as Barthes, Derrida, Foucault, and Lyotard, but there were Anglophone names too—Kuhn, Fish and Rorty. These names littered the star notes in the publications of many CLS scholars. But not Bob's. Both Kuhn and Foucault were treated by Bob as historians of science and prisons respectively.

I have a hard time thinking that this absence was inadvertent. Bob knew of the possibility of pushing Kuhn's arguments all the way to the proposition that Truth was impossible to know, and so all that was left was better or worse versions of "Because I say so," for both Bob and I had been

21. A good example of that fight can be seen from a conversation between Bob and Fred Konefsky over Fred's suggested conclusion to the piece, a conclusion that Bob rejected. In the name of throwing fuel on an old fire, I have chosen to reproduce Fred's alternative conclusion in an Appendix.

in a seminar at Buffalo where such a possibility was pushed. But the cost to be paid from an acceptance of that proposition was going to be high. Those on the left for whom the ability to know something approximate to Truth was politically important would surely push away from CLS and no support would be forthcoming from those in the legal academy whose voices were yelling "Relativist!" already. Even worse, support would at best be coming grudgingly from the rest of academic history, as the ruckus that followed the publication of Hayden White's *Metahistory*[22] some ten years earlier made clear. What legal history needed was a comfortable space where good work could be done.

It is here where a wonderful insight by John Fabian Witt is helpful. At a gathering called to celebrate publication of *Taming the Past,* a book of Bob's essays, Witt emphasized how Bob's thought "promised to connect power and law without abandoning either in the historical analysis" by his assertions that law was "constitutive in history" and that "history is contingent."[23] It seems to me that constitutiveness and contingency can be understood to mark off a comfortable space within which much of the best legal history has been written by individuals who might be identified either as, or influenced by, *Critical Legal History*.

Which is not to say that I believe that Witt thought he was engaged in identifying such a space, much less that I believe that doing so was Bob's intention ever so many years ago. Rather, this is what I heard and read. The space between constitutiveness and contingency, two concepts that Bob had talked so eloquently about since the early CLS days, described a substantive position that could do the work that several of Novick's reviewers had tried to do, by offering alternative understandings of "objectivity." These understandings offered the possibility of holding at bay the unsettling questions about what it meant to do history that Peter Novick identified in *That Noble Dream*. Each would allow a favorite variety of history, both the small and the big, to continue to flourish and may have been attractive for just that reason. Each permitted the assertion that a work of history was grounded. Each had offered a possible way to answer the snotty question, "Sez who?"

Now it is time to return to the appearance of Archimedes with his lever and a place to stand. The implied limit to groundedness identified at the outset of this piece was fine with me. I had been an upper-middle class male all my life and never had any sense of doing other than the best I could with

22. HAYDEN WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE (1973).

23. John Fabian Witt, *For Bob Gordon*, 70 STAN. L. REV. 1681 (2018).

the tools I had. Still, I was left bewildered. It was not obvious what had led people, including my CLS friends, to continue with the project of critique and, at the same time, seemingly slide away from the general constructedness of knowledge. What was so wrong with a world of everyone just doing the best possible with tools at hand in whatever situation one occupied? To me, it felt as if somehow most everyone, my CLS friends and historian friends too, were afraid of something out there and never bothered to tell me.

It took a long time for me to come to understand their shared fear of the abyss ahead in the road. It was, and still is, epistemological—post-modernism and its supposed undermining of the politics of critique. The importance of the politics of critique is rather easy to explain. Critique is an unmasking, the use of reason to "drive through" given structures of experience in order to arrive at least at knowledge, if not Truth, of a set of underlying fundamental relationships. Its related politics is of the fill-in-the-blanks variety, in the CLS case with a representative statement of the author's preferred normative position. The importance of the post-modernism part of this epistemological fear is not so easy to explain.

What do I mean by post-modernism? Well, there are as many post-modernisms as there are post-modernists and so I see no point to the activity of carefully distinguishing the various possibilities. Instead, I simply wish to postulate one. What is generally understood as "truth, knowledge, belief or error," is always constructed, in some way or other and to some degree or other, and so, there is no "god's-eye" perspective, as some cosmologists put it, no "outside" place from which we may observe some "inside" space of our lives together. We all view our world and the things in it from our own perspective, but that perspective, be it based on class, ethnicity, gender, ideology, race, sexuality, or white Anglo-Saxon Protestant maleness, and more likely some mix of these, is no more grounded, no more privileged, provides no better lever or place to stand, than any other perspective . . . including the post-modern one I would presume.[24] Any exercise of reason yields not Truth, a matter of "yes" or "no," or knowledge or belief, a matter of "more" or "less." It yields some other thing that I like to call "understanding," a matter of "mine" or "yours."[25]

Post-modernism thus offers the ultimate critique, even as it is a snake that swallows its tail. It implies that critique is a tool for everyone. No politics is entailed as the basis of any critique. The practitioners of critique bring their politics with them and smuggle, as it were, that politics into the

24. I know that "privilege" is most commonly used with a pejorative connotation. I am not adverse to that connotation, but at the same time am intentionally suggesting that it need not to be so understood.

25. Some readers might wonder why, if I feel comfortable with at least some version of post-modernism, I do not embrace the possibility of multiple "truths." The answer is simple. Truth is a mace that is far too often used as a bludgeon in academic discourse. I have a hard time believing that a shift to the lowercase plural will change such behavior.

enterprise of creating meaning. And so the product of critique is entirely a question of argument and thus understanding, if you please, which may or may not be based on shared criteria, but is not a matter of more or less and even more surely not the yes or no of Truth.[26]

For my CLS doctrinalist friends and their many supposed allies in the party of the left, the political consequences of post-modernism—the alleged defanging of critique—was the most threatening. Doubling down on the assertion of the privileged nature of positionality (sometimes construed as identity alone) was a perfectly sensible response to a critique that undermined that claim of privilege. For my CLS historian friends the consequences of accepting the post-modern critique were more complicated. These consequences mostly turned on the question of necessity, seen first as important for combating evolutionary functionalism, second as implicit in claims about causation in law, and third as part of establishing the relationship between historical evidence and the stories that might be told using that evidence. I will discuss these three topics in just that order and then suggest the possibility that their rejection might allow resurgence of the importance of narrative in the doing of history.

First, the job of combating evolutionary functionalism consisted of the patient refutation of its Panglossian notion that that law was necessarily—by its nature—getting better and better all the time as it addressed social problems and worked to meet social needs.[27] Here CLS historians worked with the difficulty of identifying social needs, the constitutive nature of both law and society, and the contingency of the relationship between changes in either law or society with the effect of one on the other. The product of this critique is great work. However, it seemed to assume that functionality implied/required that the legal tool chosen to address a social problem be

26. Art Leff, put it slightly differently, but it still rhymes:

All I can say is this: it looks as if we are all we have. Given what we know about ourselves, and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us "good," and worse than that, there is no reason why any thing should. Only if ethics were something unspeakable by us could law be unnatural, and therefore unchallengeable. As things stand now, everything is up for grabs. Nevertheless:

Napalming babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved.

Those who stood up and died resisting Adolf Hitler, Joseph Stalin, Idi Amin, and Pol Pot —and General Custer too— have earned salvation.

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.

[All together now:] Sez who?

God help us.

See Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249.

27. It is difficult to understand how Willard Hurst's work came to be associated with the notion that law was always getting better. The self-contained, often understated, ironic stories about law that he offered emphasized the role, not of reason, but of the "bastard pragmatism" of "drift and default" in the operation of law.

not just vaguely appropriate for the task, but designed for it, and also that the legal tool be necessary and sufficient, in a causal sense, to have brought about the change attributed to it.

I regularly ragged on my CLS friends for the assumption that any functionalism required necessity in the design of reform.[28] So, I shall limit discussion to my usual example. As I have occasionally demonstrated to the horror of family members, a crescent wrench may not have been designed to pound in a nail, but it can be used to do so with varying results—some fairly good, others quite bad. The same is true of law. Law has many tools that might be used to make things happen, though often not very easily and often yielding other than the results hoped for. There is thus no particular reason to resist treating law as a functional response to perceived problems. It is just that the identification of those problems and the estimation of the likelihood that law will work as hoped for are both pretty tricky activities, ones that are regularly ignored in the evolutionary functionalist pursuit of reform.

Second, the CLS historians' critique of evolutionary functionalism's implicit claims about causation in law, based as it was on the proposition that a causal relationship implies/requires the specification of necessary and sufficient antecedents, seems to me either just strange or deliberately chosen for the impossibility of its satisfaction, given the limitations in the effectiveness of legal tools—now pretty well established through years of research by law and society scholars.[29] As I hope the relevant scholars are still my friends, I prefer to consider their critique strange, for I have never understood why a generation or two of critique seems to have denied to the writers of history a certain freedom of thought, and so practice, but instead left behind the great bugaboo that is "causation."

It is possible that necessary and sufficient is a leftover from the days of history as science,[30] but, if so, modern scientific practice seems far looser. Though physical and social science seem to be founded on this definition, the statistical methods that permeate most of these fields are all designed to ignore the specification of all necessary antecedents to an identified effect. Most science thus recognizes that causation is more probabilistic than linear. Strong relationships can be found that cover lots of cases, but nowhere near all. It seems odd that history should be held to a stricter

28. I never have been able to decide whether the early functionalists, the American Legal Realists whose work I know well, believed that functionalism had to be necessary. My guess is that they did not advert to the question.

29. Given the significant overlap between scholars making evolutionary functionalist claims about law and scholars involved in the Law and Society movement, one must recognize that part of the reason for this argument is a matter of academic positioning. CLS wanted to see itself as in some sense the anti-Law and Society movement.

30. And even then, taking Newtonian physics as the model was a dubious, though understandable, choice. "Cause" has just too many shades of meaning to sensibly lump them together, as is all too often done.

measure of causation than the so-called hard, health, or social sciences.

If one treats legal history as a special case, it is important to recognize that the left in general, and CLS in particular, has regularly used causation as a cudgel when battling with standard evolutionary functionalist historical claims about law in society. Admittedly, that activity is both fun and important. Still, it is reasonably difficult to maintain that strong causal relationships are necessary for law to function. "Drift and default," to steal from Willard Hurst, surely have enough stickiness to keep the legal entity lurching along, and sloth and apathy might be helpful too.

Moreover, law has many understandings of causation. Whole books have been written about the various ways in which causation is understood in law.[31] By eliminating the necessary part of causation, the part that in more contemporary debates is called materialism, even a "New Materialism," all of a sudden all that need be asserted to make a causal claim is that something is sufficient to have been causal to some degree. Such a change shifts the discussion of causation to the relative importance of various factors that impact on an event. This is a much more engaging topic. It opens up many possibilities for including something as contributing to an event.

Third, explanation of the CLS historians' concern (here "critique of" is too strong a phrase) that were causation a matter of more or less the relationship between the historical evidence and the stories that might be told using that evidence would somehow become problematical also requires attention to the old CLS days. When we in CLS talked about the possibility of telling other stories, we, like many other adherents to the party of the left, were following Lyotard and so mostly talking about telling the stories of the losers, the also rans, those who could not even start—the workers as well as the managers, the criminals as well as the cops, the unknown dead as well as the heroes. Some called these stories "counter-narratives," ways of undermining the grand narrative that was evolutionary functionalism. Unfortunately, this move implicitly reinstated the old claim that the objective of historical practice was recovering Truth.

Though I have a certain passion for getting the historical details "right," I have never understood the historian's fascination with Truth seen as the specification of necessary and sufficient conditions. The possibility of recognizing Error in the writing of history is fairly easy to defend, but Truth is an entirely different matter. Though at times I have suspected that the fascination with Truth hides a wish to be taken seriously by scientists for the presumed rigor of history, more often it seems to me to be an attachment to the freshman logic course. But the notion of Truth in the logic course is sort of odd in the hands of a lawyer, and an increasing number of legal historians these days are in fact trained as lawyers. Lawyers ought to have

31. The classic cite is H.L.A. HART & A.M. HONRÉ, CAUSATION IN THE LAW (1959). LEON GREEN, RATIONALE OF PROXIMATE CAUSE (1927), is still worth reading.

understood some of the law of evidence, if only for a bar exam. The lawyer's notion of proof has a limited relationship to Truth. As expounded in the evidence course, proof requires that it be supported with evidence proffered as "relevant" to the proposition to be proven. It would be a clean mistake to confuse proof, even under the criminal law standard of beyond a reasonable doubt, as requiring the establishment of Truth.

"Relevance" is a rather capacious notion, at least in the hands of a good lawyer, and with the help of that concept possibilities quickly open up. Many historical stories might be told using the same body of evidence. Such capacious stories can be wonderfully insightful, though dubious if pushed too far. Take the standard Marxian one about the determinative force of the ownership of the means of production. As a generalization it seems doubtful, but it does a wonderful job of explaining the importance of cheap labor for the growth of mass production manufacturing. The other Marxian one about the inevitability of financial capitalism seems more plausible to the extent that it mimics the importance of finance in the European trading economy of the sixteenth, seventeenth and eighteenth centuries, though, of course, it has missed the importance of finance for the retirement planning of the upper-middle class. Fred Konefsky has a wonderful story that might suggest that manufacturing in New England owes more to the intermarriage among the children of manufacturers and financiers than it does to innovation.[32] Barry Cushman's story about the internal development of constitutional law in the Nineteenth and Twentieth Centuries[33] is just as interesting as Duncan Kennedy's quite different one.[34] Taken together they illuminate matters about the relationship between judicial decision-making and legal theory that would be quite hard to learn in any other way.

The possibility of writing, indeed shaping, different narratives is an opening that historians need. The graduate thesis advisor's structure—literature review, my research, conclusion—inhibits the development of any narrative arc and so consigns academic history to academic presses whose narrow disciplinary norms are pretty much defined by the question of at which annual meeting a book can be showcased. A possible escape from that structure might make possible a broader readership for historians' work. Embracing narrative might give critical history a better chance to capture reader's minds.

Moreover, it seems to me that the point of the critique of evolutionary functionalism all those many years ago was not to write better, more defensible academic prose. It was offered in the hope that the production of a better understanding of the past of law would lead to action. The action

32. Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119 (1988).
33. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).
34. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIECLE) (1997).

envisioned was different for different people. I suspect that mine was a real outlier, for I hoped that deeply contextualized theory would provide students with a better understanding of how law works and so make them better, more effective, lawyers. But I hope that I then knew that my target audience, one that might be moved to action by better theory, was rather small and not likely enchanted by academic prose. More people are moved to action by stories, good stories well told.

By now, my readers, should I still have any, will be wondering why I have subjected them to an attempt to both recover and critique my particular "ole time religion" and so will be tempted to label my efforts as another bit of nostalgia for a past that any good historian could demonstrate was anything but a golden age of promise cut short before reaching its potential. I've already written one of those stories; one is clearly enough.[35] But, my point is different. It is to suggest, by the indirection that comes with the essay form I admit, that the long past ruction that is post-modernism might be relevant to a world where in the middle class mind, the mind that supports academia, history is taken to be mostly doorstop biographies of famous people and similar sized books rehashing wars of some note. Better narratives, ones admitting their positionality and so their 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 and so might help displace the pall that hangs over such scholarship today.

Perhaps my objective is pointless. Some might say that teaching is pointless as well. I do not. However, honesty requires that I acknowledge that any shift to stories well told in a post-modern vein will be anything but costless. Academic historians may have reason to find unacceptable the potential costs associated with setting aside history's claim to be providing Truth and so to affirm the centrality of the long quest for "objectivity" that Peter Novick so patiently chronicled. It is to those costs that I now wish to turn, after briefly picking up a previous thread of my argument.

Writing better stories in the hope that readers may be moved to act after giving up worries about Truth, defined as a matter of necessary and sufficient causation, and instead recognizing that there is no lever or place to stand and so that positionality is impossible to avoid and thus always in need to be both explained and defended, might make academic working life easier. Consider the epithet that so bothered CLS when it was young. From a certain perspective "skeptic!" or "relativist!" or "ideology" and a whole bunch of other words are meaningless non-sequiturs, just as would be the

35. JOHN H. SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

criticism of a piece of historical scholarship for being "orange." Such epithets only have literal meaning when their users see their opponents as denying the possibility of Truth, knowledge, or even belief.[36] These epithets also might evidence an unwillingness of the speaker to confront the work for fear of what it seems to imply or even revulsion at the point made. But the most plausible response to such epithets, setting aside the possibility of some therapeutic intervention, would be to suggest that, if the speaker finds the scholarship unpersuasive with respect to the meaning ascribed to the materials used to understand the events in question, that person should argue for a different interpretation of the evidence. This is, of course, the precise situation that historians are in at present—however much they talk about historical theory and write history. [37]

At the same time, the understanding that there is no lever and no place to stand and that the partiality of positionality can neither be avoided nor be sufficient to establish Truth does make academic life more complicated. To write in the first person is scary. To use "I" is to appear naked. Few of us are as beautiful as Venus on her scallop shell or Michelangelo's *David*, and in our old age most of us look surprisingly like Larry Rivers's mother-in-law, regardless of our sex. So, the gaze of others is anything but welcoming to our first-person selves. The many linguistic dodges that we use to distance ourselves from the ownership of our prose—the "one may says," the "it may be argueds," the "there is evidence thats," the "it seems to mes"—are so comfortable that they clarify just how scary "I" is. Thus, crafting a first-person narrative, even one couched in the voice of an omniscient narrator, will be hard, even though it is only in the first person that we can affirm our common but individual humanity. Only in the first person can one own one's work, challenging our detractors: "Do better if you can!"

And challenging detractors is not often in historians' blood. Most historians are passive in the face of external criticism. While we do have our own share of self-promoters, thankfully we have few gloaters. Far, far more historians are distinguished by their ability to identify things that could have been done better in an earlier piece after having published a later one than have sky-dived, spelunked, white-water rafted, downhill-mountain biked, or jaywalked after their fiftieth birthday. Our largest demonstration of even professional ego is our confidence that, with enough time, we can skillfully wrestle into order a particularly messy paragraph.

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36. Again, though not in opposition to error or falsehood, conditions that can be fully within a concrete perspective.

37. A good example of a book that may not argue but at least asserts a different interpretation of the evidence is JOYCE APPLEBY, LYNN HUNT & MARGARET JACOBY, TELLING THE TRUTH ABOUT HISTORY (1994). It retells the story that Novick offers and it comes out in the same place as do Novick's intellectual historian critics, *see* sources cited *supra* note 6, but offers a more persuasive, because deeply social, understanding of how historians work with their material than the intellectual historians do.

Set aside the personal and move to the level of a scholar's discipline, department, or school. Here, the real difficulties with acting in a world where neither Truth nor knowledge, much less belief, are likely able to provide plausible representations of a past are quite threatening. Consider first a scholar's discipline. Since some time after World War II, the existence of separable disciplines, which once made knowledge possible, has become inimical to thought outside their ancient, narrow boundaries. Simultaneously, the tie of the department to an identifiable discipline, and thus to the tenure process, has only made these boundaries more smothering. However, for individual scholars, the lack of such a tie would be more than a little troubling. Most disciplines have some connection to the idea that scholarship is designed to identify Truth. Sometimes it is just a method or logic or math, and most often it ends with statistics, but to give up that tie is in some sense to give up that discipline and the department in which it is enshrined. It is to become a-disciplined, though not therefore undisciplined.

If one is a-disciplined, just exactly where does one go to the annual meeting? Might it be fraudulent to show up at the old place to see old friends? Might there be any journal that, learning of the author's inability to anchor a representation of a past to Truth, knowledge, or belief, would publish one's research? Would it be fraudulent not to tell them? What about one's department or school? Could one honestly accept a paycheck? Could one accept tenure, even if acceptable outside reviewers could be found and the department were willing to bamboozle the University? What about voting on appointments? On tenure? What might one say to colleagues or to visiting firemen who came to deliver papers at faculty seminars? Should one actually show up at the Dean's or Chair's annual fall party?

These are not idle, formal concerns. The presentation of self is a big part of being an academic. In the classroom, if not elsewhere, a teacher is implicitly making a representation that whatever material is transmitted to one's students is something worth acquiring, something worth paying for. If the knowledge to be transmitted is not what it purports to be, can it be honorable to transmit it anyway on the ground that most other people deny that there is such a problem? On the other hand, if one tells students that the stuff being taught elsewhere is not what it purports to be and the students believe it, might these students honestly claim that the university is engaged in a giant scam?

Questions such as these led Paul Carrington to suggest that scholars involved in Critical Legal Studies should resign their teaching positions.[38]

38. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984). The aftermath of this piece is quite enlightening. *See, e.g.*, Peter W. Martin, ed., *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985) (reprinting letters between Carrington and Robert W. Gordon and others).

That Paul was mistaken about CLS is quite irrelevant, for he had identified a real problem. For a scholar who understood that it is not possible to establish the Truth of scholarship, Carrington's proposition has more bite. And it is not obvious that one can avoid the problem by presenting only that material the teacher understands and ignoring the rest, as has been my wont for the past thirty years or more. In some sense, the "lawyer acolytes" that I am sending out might well have difficulty surviving in the world of practice were all the teachers like me. And it is not wholly charitable for me to rely on my colleagues to carry my students through into practice.

Next, set aside the disciplinary, department, and school problem for an individual scholar. Suppose that the faculty agreed that Truth was likely impossible to attain and so gave up the pretense that it was a plausible objective for scholarship. Where would the department or school fit in the greater university? After all, universities these days are largely dominated by the health sciences, the physical sciences, and engineering.

Thomas Kuhn's understanding of change in science has had an impact on the humanities and some social sciences but almost none on the University at large, the University of Science, Engineering and Health, dependent as it is on funding from the programs of the National Science Foundation and the various National Institutes. And even in most of the social sciences, efforts at refining statistical techniques seem to be the name of the game. In economics and finance departments at management schools, graduate students are limited in the thesis-planning process by the need to have a publicly available or relatively inexpensive dataset, which is just as well, as dealing with the human-subjects police is tedious and time consuming. Schools of social work and education are completely absorbed by "evidence based" research, as if personal observation could not possibly be taken for evidence. In such a world, loosening the relationship between research and Truth by any department or school risks being tossed into the arts and humanities, once the center of a proper undergraduate education but now the discard pile of the university. Who would want to be treated like Cinderella in a house full of well-fed stepsisters?

Whatever the case with the theoretical problems discussed above, given the personal and professional difficulties that might follow from getting the music playing again, I can, sort of anyway, understand why all of a sudden the music stopped. My story is but another example of the paradoxical relationship between professionalization and its accompanying narrowing of possible research topics, less by prescribing a methodological orthodoxy, as is often the case, than by making any but a single model of what it is to do scholarship difficult to avoid. That I or anyone else would have preferred a different result is, in the long run, likely to be unimportant. All I am

suggesting is that perhaps it would be exhilarating once again to experience in history a necessarily different cacophony in our enterprise, but still one that, with a little help, Olivier Messiaen might have understood we hear as music, even if our plumage may be rather drab.

CODA

My good editor has asked that I tell my readers what I conclude from my long exploration of this subject. That is really something I cannot do. I accept the post-modern rejection of Truth and objectivity; it is one of the reasons that I write essays, not articles. Essays meander; they do not conclude. Essays are humble; answers are the last thing they might provide. Rather, essays are written in the hope that readers will find them helpful as they too try to think seriously about a given topic.

But what I can do is to suggest that my readers consider whether anything is lost when giving up on objectivity and Truth . . . other than pretense. Perhaps, they might consider whether the last piece they had written would have been written any differently without that pretense. And, perhaps, whether, as a result, the next piece might be written in a way that didn't scream to the reader "Academic historian at work" and so have a chance, though admittedly a small chance, to allow the product of an enormous amount of work to reach a broader audience, because a reader might understand it as a good story.

APPENDIX

Ultimately, all of this may reduce to a problem of social or political vision. Why do Critical Legal Historians write history? If the anti-scientific group writes in order to understand the "structures of legal thought," what does its quest yield? Does it really matter that Blackstone's *Commentaries*, when stripped bare, reveal the contradictions of liberalism or the incoherence of rights theory when a precondition to inquiry requires no "background information on Blackstone" or his world to understand its distinctiveness or importance? Does it matter that the stages of doctrinal development are unfolded in a particular subject area—for instance, tortuous interference with contractual relations in the nineteenth century or changing conceptions of property law—when it is conceded from the start that "[w]hile some reference is made to societal changes—such as industrialization . . . th[is] Note leaves to future research the project of linking the transformation within the legal universe to developments in the society at large?"

Would we know more, and to what purpose, if we investigated the social conditions of Scottish colliers in the late eighteenth century, "some of whom wore collars bearing their owner's names," and were able to show how consideration doctrine and its ideology were inextricably related to the insistence that the bargain was every bit as important evidence as the fact that you wore your owner's name? Are those contradictions somehow more meaningful because they are more real than the image of a member of the British ruling class trying to tuck in all the untidy corners as he writes a legal treatise at a particular time? Might we know more if we listened to the voice of Nancy Gossett, an early nineteenth-century New England mill worker, insisting on her right to leave her work and therefore breach her contract in the face of legal doctrine that theoretically made it impossible for her to recover her wages? What tells more of the human condition—her voice of struggle, or that stage II, fifty years later, the doctrine changed?

Under these conditions of historical writing a new legal history runs the risk of looking like a new lawyer's history. For all its probing of consciousness, structures, conceptions, and ideology; its discussions of autonomy or relative autonomy; its dismissal of change as a meaningful historical category and of traditional Marxist thought as too deterministic; and its embrace of descriptive relationships and their ultimate indeterminacy, the new critical legal history, but for its political tilt, reminds one of Roscoe Pound and his methodology.

As one stage of legal thought inexorably and magically becomes another, and the raw material of the system of thought remains within the confines of judicial reporters and treatises, a central irony stands clear. Instead of demystifying, one of the general programs of critical legal thought, the critical legal theorists engage in a method of writing history that may very

well inadvertently remystify as a logical step after demystification. The lesson seems to be that most social experience is indeterminate or unrelated to categories of thought. In other words, experience is by its nature always contradictory or incoherent. In that sense, all history can hope to be is subversive, but it cannot point the way to the future. Law once again becomes unrelated to social experience and autonomous structures of thought rule; law governs and the mystique once again triumphs.

Now, it would be foolish to decry the importance of ideas or for that matter the proposition that people are moved by ideas or thoughts. But most appeals to ideas seem to resonate most deeply when construed as a call to action and measured against the daily experience of one's lives. At that moment, ideas seem true or false, worthy of acting on or ignoring. Critical legal thought, at its most abstract level, tends to abnegate, and ultimately tries to understand the complexity of human relationships without seeking to recreate the way in which most people experience their lives.

This is not to say that a working definition of consciousness should not have an important role in legal history. It is only to question the legitimacy of its central role. To elevate it is, of course, to elevate law. Then what does the future hold—the promise of law changing? Or doctrine changing? Hardly. Can concrete social change be addressed or are we paralyzed because ultimately nothing matters? We are governed by everything and nothing. No political vision—no political action emerges from this study of law, as ephemeral as it is. In fact, the engineers of neo-structuralist thought have, with their steel girders, reinforced the thin, film-like fabric of the seamless web.[39]

39. Reproduced with the permission by the author, Alfred S. Konefsky.