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The Dance of History


Christopher Shannon*

John Henry Schlegel has written a book that attempts to explain why law has not followed the path of other academic disciplines in adopting a natural-science model of empirical inquiry. He convincingly argues that by the time legal academics confronted empirical science in the guise of Legal Realism during the 1920's, American legal education had already undergone a kind of scientific revolution: the adoption in the late nineteenth century of the Langdellian case-law method, a deductive approach that saw the law library as a sufficient "field" for legal research. This intellectual practice, and the

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professional identity that grew up around it, has made empirical research a "square wheel" in American legal education.¹

Schlegel offers this contextual explanation for the marginality of Realism as "an invitation to open a discussion about what intellectual history . . . is and has become as this century closes" (260). Following Realism's own move from legal texts to social contexts, Schlegel insists that "rather than a history of ideas, intellectual history needs to be the history of intellectuals, people who do things with ideas" (5). In the spirit of this invitation, my Review focuses more on Schlegel's approach to Realism than on his account of it. Schlegel dismisses the history of ideas as "an essentially empty exercise," and calls on historians to give up "the dance of reason" in order to embrace "the whole dance of life" (4, 261). Schlegel's book, however, reveals this move from text to context to be nothing more than the dance of history, an essentially empty exercise in causal explanation. In this Essay, I examine Schlegel's book not only as an account of American Legal Realism, but also as a symptom of a fundamental structural incoherence in the conception of intellectual history as an academic discipline.

American Legal Realism is the legacy of a much broader intellectual movement that Morton White long ago dubbed "the revolt against formalism." In his classic Social Thought in America: The Revolt Against Formalism, White characterized Gilded Age and Progressive Era intellectual life in terms of a general reorientation from a deductive rationalism to an inductive empiricism.² In philosophy, timeless verities gave way to a notion of historically relative truths; in social theory, contractarian individualism gave way to cultural organicism; and in economics, laissez-faire capitalism gave way to a greater acceptance of government regulation.

Schlegel's account of Realism employs all the tropes of White's revolt against formalism. Schlegel presents "classical" legal formalism as "a way of organizing and thus understanding the world of common and constitutional law in terms of hierarchically ordered, binary categories" (31). Much of classical legal thought directed itself toward the maintenance of one particular binary opposition, individual freedom versus government control; moreover, legal scholars argued this public/private distinction in terms of the "essential character" of an activity rather than mere expediency (31-32). Against this concern

for the "teleological fitness" of legal decisions, Realism sought to recast legal thought in terms of instrumental reason (49). Realists saw law as "less a matter of the invariable application of norms ... and more a matter of equitable, and thus variable, discretion on the part of officials of the state" (44). Legal reasoning was to yield not sacred "doctrines" but instrumental "rules," which were to be "organized not with reference to principles but rather with respect to considerations of policy, of social advantage" (226). Like the Progressive law reformers who predated Realism proper, Realists wanted "to see the law in action so as to reform the law in the books," and this instrumental reformism "provided the reason for engaging in empirical legal research" (229).

Schlegel's account of the general intellectual orientation of Realism confirms the work of previous scholars, but adds little. Schlegel attacks previous studies as too "rooted in the history-of-ideas tradition," but then presents the received wisdom, the official "story" of Realism that he claims to be revising, in social-historical terms (7). The story "as the story is usually told" seems very much a story of people and institutions (15).

The conventional account, as set forth by Schlegel, goes something like this. Legal Realism began in the years following World War I as a revolt against traditional legal education as practiced in American universities. Nicholas Murray Butler, the president of Columbia University, criticized legal education in America for being "too narrow and technical," too divorced from ethics and intellectual developments in the new social sciences (15). Prompted by these criticisms, Harlan Fiske Stone, dean of the Columbia Law School, appointed a committee to investigate the possibility of reforming legal education. A key member of this committee, Herman Oliphant, advocated a "functional" approach to the study of law, an approach that stressed the importance of the social context of legal problems. Oliphant hoped to incorporate the social sciences into the study of law by dividing law into three categories—business relations, family relations, and governmental relations—that would correspond to economics, sociology, and political science. Despite a fairly positive initial response, Oliphant's proposals had no effect on the curriculum at Columbia.

At the same time, Robert Maynard Hutchins sought to incorporate empirical social science into the curriculum at Yale. Like Oliphant, Hutchins met with some initial interest followed by a reassertion of the case-law method. As the established law schools lost interest in the social sciences, Realists established their own school, the Institute of Law, at Johns Hopkins. Headed by Walter Wheeler Cook, a refugee from the Yale Law School, the Institute enjoyed a brief
period of funding, yet Hopkins, too, soon lost interest. The Depression Era brought not only a scarcity of funds, but also a cultural reaction against empirical social science as a naturalist philosophy hostile to moral values. Given this economically and culturally hostile environment, many Realists decided to take advantage of the new employment opportunities available in various New Deal agencies, and Realism simply died out (15-21).

Schlegel cautions that “some things may not have happened this way” (15). He insists that the story as it is usually told bears “only a modest resemblance to what it was like to be a Realist in the 1920’s and 1930’s” (15). In the spirit of Realism itself, Schlegel sets out to revise this story through his own empirical study of Realism. Schlegel bases his story primarily on three case studies of Realism and Realists at work: Charles E. Clark and William O. Douglas at Yale, Underhill Moore at Yale, and Walter Wheeler Cook at Johns Hopkins. Each study offers a detailed account of the specific institutional context of a specific brand of Realism, but the contexts rendered fail to alter, in any fundamental way, the conventional understanding of Realism. Schlegel concedes a “sameness” to “these three stories of empirical legal research . . . a recurrence of cases of modest success followed by . . . well . . . nothing” (211). He concludes that Realists “preached, and occasionally delivered evidence of, the importance of an empirical understanding of the workings of the legal system and yet somehow Realism always returned to case-law analysis” (25). At this level, Schlegel seems merely to confirm the story as it is usually told.

At another level, Schlegel takes issue not so much with the story of Realism as with the causes of that story. He rejects the common explanation that Realism failed because it had nothing to say, and argues that the movement “gave out when, faced with the implications of their own constructions, the protagonists lost their nerve” (2). He traces this failure of nerve to the pressure of the professional identity of the legal academic that developed before the advent of Realism in the 1920’s. The process of professionalizing the study of law at the turn of the century entailed “the development of the norms of a scholarly vocation” and the “identification and delineation of a field of knowledge that would be peculiar to, and the exclusive preserve of, the nascent legal academics” (36). Conceived by James Barr Ames of Harvard and propagated by the newly formed Association of American Law Schools, this new professional ideology demanded a commitment to the production of “detailed, systematic, sustained, and comprehensive works of scholarship on the German grand scale” (27). In developing professional standards for acceptable research, this first generation of legal academics drew on a case-law method of library research fundamentally at odds with the empirical approach.
that would come to dominate the social science professions in the 1920's. Law and the social sciences followed a similar process of professionalization, yet developed professional standards so distinct as to allow for little dialogue across professional boundaries.

Schlegel argues that by the 1920's the Realists had undergone a process of "internalization of professional norms and practices" that ultimately hindered their commitment to Realism (70). He presents this psychological process as a product of a specific social experience, a period of "colonial service" in Midwestern state universities, where many of the Realists developed a commitment to the legal profession that would eventually lead them back to the more prestigious Eastern law schools (27). These "colonial officers" developed a "mutual support network" at once intellectual and social: a "Chicago summer session" seminar served as the "main site for . . . intellectual interchange," while "treks around and about Madison's two beautiful lakes and time in Chicago's beer gardens" provided the "social" setting for the development of the Realists' professional vocation (36, 40).

Schlegel's contextual approach balances social history with biography, what he calls "the 'accident' of person" (213). Schlegel explains the failure of Realism not only as a consequence of professionalization, but also in terms of the personal idiosyncrasies of the Realists themselves. The Realists were a "restless" and "cantankerous" lot (253). They were attracted to the study of law, but they were "unhappy with the world of the common law professor" (224). Lapsing into armchair psychology, Schlegel declares that "while malcontents often drift away from the activity that makes them unhappy, they can also attempt to improve their situation by remaking that activity." Moving from psychology to psychopathology, Schlegel suggests that Realists were attracted to empirical social science precisely because of its opposition to "law's traditional wisdom," and pursued Realism in order to feed their malcontentedness (224).

A proper social historian, Schlegel allows for individual differences within this general psychological orientation and links particular psychologies to particular career paths. Walter Wheeler Cook, the most restless and least secure of the Realists, found in Realism "the home, the stability he had made for himself in his restlessness" (80). Reflective by nature, Cook "spent a long time and much effort growing into a scholarly vocation in his chosen field" (79). Legal analytics "afforded an outlet for the basic combativeness of Cook's personality," a combativeness that ironically ensured both his commitment to Realism and his failure to sustain the professional friendships necessary for building an institutional base for Realism (79, 220). Underhill Moore, in contrast, was "more secure than Cook,
less reflective" (80). Moore had "a nonacademic identity" developed in his private practice and had little interest in developing a scholarly vocation. He sought in Realism simply a "social understanding of law" that could be used for practical, progressive reform. Moore had no patience for legal analytics, and when faced with resistance from the legal academy, he simply abandoned empirical research.

Schlegel provides a balanced and convincing explanation of the institutional trajectory of Legal Realism and Legal Realists. He accomplishes what he set out to do: Embracing both biography and social history, he provides a model of intellectual history as the history of intellectuals. Ironically, the strengths of the book reveal the weaknesses of intellectual history as a scholarly endeavor.

Schlegel rightly identifies empirical research as a square wheel in the legal academy, yet he fails to consider his social history of intellectuals as a round wheel that fits all too well into the practice of academic history. I realize that Schlegel writes as a legal academic rather than as a historian, but, as an intellectual historian, I find his assessment of the current state of intellectual history to be something of a straw man. Legal history is itself still a kind of square wheel that has yet to find a secure place in the legal academy, and much of the work on the history of Realism may be of an older history-of-ideas style, but that style is far from the mainstream of the current practice of intellectual history.

Schlegel throws down the same gauntlet that social historians threw down in the 1970's, and picks it up in much the same way as intellectual historians of that era. Works like Thomas Haskell's *The Emergence of Professional Social Science* and Mary O. Furner's *Advocacy and Objectivity*, both written some twenty years ago, answered the objections of social historians by proposing the very professionalization thesis that Schlegel relies on so heavily in his book. Schlegel convincingly argues that as an interdisciplinary movement, Legal Realism fell between the cracks of professions concerned primarily with maintaining their distinct institutional identities within the university; however, since the late 1970's, "professionalization" has been used to explain just about everything that intellectuals have said and done in the twentieth century. Schlegel does cite Haskell and Furner in a footnote, but his opening polemic suggests that he is in some way the first person to examine professionalization as a serious factor in intellectual history (273).

I do not mean simply to criticize Schlegel for a lack of originality. In an academic profession driven by novelty, this may be an issue for some, but I feel that Schlegel's polemic raises issues deeper than the proper acknowledgment of scholarly debt. Schlegel's method and subject matter are intimately linked. His social history of intellectuals stands as a Realist history of American Legal Realism. Ironically, Schlegel's own account of Realism as an intellectual orientation constantly calls into question the validity of the Realist project, and by implication the validity of his own. Schlegel's insistence on an institutional explanation for the failure of Realism works against his own evidence of the intellectual failure of Realism in its own terms.

Schlegel's empirical study of the Realists suggests the Realists' empirical study of the law was, itself, an essentially empty exercise. In case after case, Schlegel judges the empirical data collected by the Realists to be either predictable or inconclusive. Schlegel cites three major studies at Yale: Charles E. Clark and William O. Douglas's joint study of court congestion, Douglas's study of the administration of bankruptcy law, and Clark's study of auto accident compensation. Schlegel concludes: "If what was wanted was the facts on which to base the argument for reform, quantitative empirical research either produced too many, as in the courts studies, or worse, a very few at an enormous cost, as in the business failures or auto accidents projects" (230). Underhill Moore fares no better in Schlegel's assessment: "Moore's view of science brought with it few ideas with real explanatory power," and while it "allowed one to study anything, it was remarkably thin in the help that it offered with the task of coming to understand the meaning of what one learned" (233).

The contrast between Schlegel's sympathy for the Realists and skepticism toward Realism appears nowhere more glaring than in his account of the greatest of the Realists, Walter Wheeler Cook. According to Schlegel, it was Cook "alone among the Realists who had a well worked out understanding of what it was to apply scientific method to law" (224). Not a particularly original thinker, Cook nonetheless brought the Deweyan, pragmatic revolt against formalism to bear on the study of law. He insisted that "human laws are devices, tools, which society uses to regulate and promote human relations" (154). Judges and lawyers should evaluate "a given rule of law . . . by finding how it works" rather than by how well it conforms to established legal principles (154). With these notions, "Cook literally dragged the modern idea of science into law" (225). Schlegel insists that "this was a significant achievement"; he concludes, however, that the program of Cook's major Realist undertaking, the Institute of Law at Johns Hopkins, simply did not "hang together" (225, 223). Even as Schlegel concludes "there was no program" at the
Institute, he insists that "all this aside there were real achievements" (243).

This tension cannot be excused as interpretive balance. It borders on textual schizophrenia. Schlegel declares that Cook's ideas "offered absolutely no innate direction for research" (158). He presents the Institute of Law at Hopkins as "nothing more than a mishmash of what each individual . . . wanted to do" (205). There "was no theoretical or even less grandiose idea that might have grounded the Institute's research . . . no agreement on what a scientific approach to law meant" (205). In one instance, the Institute undertook a study of the courts of Ohio, Maryland, and New York to investigate the excessive cost, duration, and uncertainty of litigation. Schlegel concludes that "although there were interesting facts presented along the way and occasionally quite penetrating insights into modern litigation, it was usually the case that it was unclear what the study might prove" (179). Indeed, the survey of the courts provided "an interesting, massive, but wholly un-thought-out agglomeration of data, hypotheses, projects, and opinions" that evoked a "sense of simple technique overrunning understanding" (181, 204). Having said all this, Schlegel nonetheless insists that such problems "ought not to be allowed to overwhelm the positive achievement of these studies" (204). Well, for this reader, they should.

Schlegel's evidence consistently belies his conclusions. The problem lies not in Schlegel's scholarship, but in the sentiments he brings to his scholarship, sentiments he makes clear in his polemic on intellectual history. Schlegel writes as a Realist, as someone who believes that truth lies in empirical inquiry into the "social, economic, or legal conditions or practices" of ideas; consequently, his work suffers from the same deficiencies he finds in Realism (21). The Institute of Law's court studies vacillated between truism ("the data were reasonably smooth along the classic American urban-rural axis") and nihilism ("but within groups chaos reigned") (204). Similarly, Schlegel's account of Realism vacillates between clichés about professionalization and profiles of the "accident of person" that work against any generalizations about historical processes or the nature of American Legal Realism.

I do not disagree with Schlegel's account of the institutional course of Realism. I do feel, however, that his account suffers from a problem similar to that of a study proposed by Underhill Moore: "A suggestion to go to Cincinnati to 'observe the operations of bank tellers at close range' was pointless when a call to a friendly banker coupled with a bit of imagination would provide the same information" (237). The failure of law to follow other humanistic disciplines in modelling itself on empirical social science may seem
strange when one considers the norms that shape most of twentieth-century American intellectual life; however, when one considers the hundreds of years of prescientific practice that the legal profession brought to its confrontation with empirical social science, it appears less strange. By the late nineteenth century, secular academics had successfully marginalized the central discipline of a classical humanities education, theology. Empirical social science did not transform the classical curriculum so much as it created an entirely new one—the academic division of labor that plagues us to this day. Law followed a different path. The secular rationalism of the Constitution may have transformed the understanding of common law in nineteenth-century America, but it could not completely eradicate the “insider” perspective of common-law interpretation. The nineteenth century disestablished religion, but it did not disestablish law. Legal discourse retains an air of sanctity largely lacking in the humanities due to its connection to “sacred,” pre-scientific interpretive traditions. Schlegel describes the translation of these traditions into “professional norms,” but he fails to explain their persistence in the face of the modern assault on the sacred. Beyond an armchair observation on the weight of institutional continuity, I do not see how this persistence could be explained.

To be fair, Schlegel explicitly rejects “the heavy hand of the contemporary historian/explainer” and insists that “the point of this book is the stories” (12, 13). This raises the question: What is the point of the stories? Like so many of the court studies undertaken by the Realists, Schlegel’s biographical portraits may be interesting, and they may provide insights into individual personalities, but it is not clear what they prove. Cook’s failure to get along with his coworkers may have contributed to the ultimate failure of the Institute of Law, but according to Schlegel, internalized professional norms had already stacked the historical deck against Realism regardless of the personalities of individual Realists. Lacking any strong explanatory power, these professional biographies merely “prove” what Schlegel calls “that humanistic ideal—people trying their best to get from Monday to Tuesday in as honorable a job as they have managed to find” (261). Far from being “deeply postmodern,” this bureaucratic existentialism represents one classic strain of nonrevolutionary modernism, perhaps best embodied in Freud’s affirmation of the rational analysis of everyday life in pursuit of ordinary everyday unhappiness. One does not need to “embrace . . . biography and

social history" in order to prove this ideal; one could just as easily read Freud. Of course, people never really "prove" this ideal, they simply affirm it. As advertisements for the nihilism of modern humanism, Schlegel's stories reduce life to the everyday world of work and love.⁵

At times, Schlegel's account of Realism calls his own humanistic values into question. Schlegel expresses some dissatisfaction with the influence of John Dewey on Realism, and on Walter Wheeler Cook in particular. The greatest humanistic philosopher in twentieth-century America, Dewey constructed his pragmatic philosophy around the "primary assertion . . . that people do not think axiomatically in syllogisms but, rather, with an end or problem in view" (68). Schlegel follows Dewey by accepting the primacy of instrumental reason to human life, but concedes that "Dewey's insight said absolutely nothing about what to think about and, indeed, in its generality, it suggested that one might think pragmatically about anything at all" (68). The lack of direction in Cook's Institute of Law would seem to be as much a problem of ideas as of personal idiosyncracies or professional norms. My frustration with Schlegel parallels his frustration with Dewey and Cook: To say that intellectual history should be the history of intellectuals who do things with ideas does not tell us which intellectuals we should study, and implies that we might study any intellectuals at all. The only criterion for fit subject matter would seem to be proximity to the humanist ideal of bureaucratic muddling through.

Schlegel justifies his book as a search for "intellectual heroes" (259). Ironically, the book finds as its hero not an intellectual, but an idea: the idea of history itself. Despite his admiration for the Realists, Schlegel criticizes them for ignoring history in favor of "narrowly quantitative studies" (235). Schlegel sees in the grand tradition of European historical sociology a road not taken, one capable of providing "alternative frameworks for understanding" the data collected by the Realists in their various empirical studies. He argues that this tradition "was closed off to the Realists . . . for reasons of language, discipline, approach, and source," but concedes that the Realists refused to engage even "the good American historical scholarship of Henry Adams, Charles Beard, and James Harvey Robinson" (235).

Schlegel explains this refusal in terms of the prevailing understanding of history in the legal academy: "Unfortunately, but understan-

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dably, the Realists conflated history with one of its types, doctrinal history, and so eschewed history altogether because for them it had the wrong resonance" (235). Realists saw in doctrinal history a formalism too tied up with the tradition of legal interpretation to be able to get outside of the law and examine it objectively. The European and American historical traditions offered models of thinking that combined methodological looseness with a "rigidly objective . . . treatment of sources" (235). Cut off from these traditions, Realists drew on the increasingly tighter methodology of American sociology. Schlegel concludes: "Theirs would be a red-blooded American's quantitative empiricism even if the collection of totals and analysis of percentages benumbed the brain" (236). Presumably, an engagement with history would have provided a qualitative antidote to this vulgar, quantitative empiricism.

Schlegel fails to make clear just what "quality" history could have brought to the social-scientific study of law. Schlegel's book, however, makes clear that historical studies of American Legal Realism tend to be occasions for reflecting on the tension between a qualitative and a quantitative social science, and affirming the need for both in the scientific study of man and society. Morton Horwitz's *The Transformation of American Law, 1870-1960*, presents a different portrait of Realism than Schlegel's book, but also sees the historical significance of Realism in terms of the tension between quantity and quality in humanistic inquiry. Horwitz argues that the "critical thrust of Realism has been virtually smothered by the exaggerated emphasis placed on the Realist turn to social science." Identification with "the most intellectually regressive forms of behavioral and value-free social science" has obscured "a central element of the Realist legacy—its interpretive or hermeneutic understanding of reality."6

Unlike Schlegel, Horwitz insists that the Realists were "passionate about values." Horwitz blames the tendency toward "ethical positivism" in American legal discourse on the neutral-principles school that rose up in reaction to Realism in the years following World War II. This school of interpretation rejected the Realists' insistence on the connection between law, politics, and morality in favor of a "morality of process" independent of results. The triumph of this separation of law from politics has enabled American legal discourse "to hide behind unhistorical and abstract universalisms in order to deny, even to itself, its own political and moral choices."7 Schlegel and Horwitz disagree on the Realists, but they agree on

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7. Ibid., 182, 253, 268, 272.
history: Both link history to some kind of moral sensibility, and in grand humanist fashion insist that such a sensibility be brought to bear on the study of law.

Like most historians of social science, historians of Legal Realism tell a story of the conflict between positivism and humanism, between a value-free and a value-informed mode of inquiry. Historians who tell this story tend to write from a humanist perspective, and tend to conclude with some kind of affirmation of “values.” A representative work in this genre of historical writing, Schlegel’s book unintentionally reveals the opposition of positivism and humanism to be false, and the affirmation of “values” to be empty. Schlegel more-or-less successfully reconstructs the meaning of Realism through his reconstruction of the context of Realism, but his social-historical reconstruction provides no basis for an ethical evaluation of Realism itself.

Schlegel’s biographical approach may avoid the mind-numbing “collection of totals and analysis of percentages” commonly associated with positivism, but apart from any explicit normative context for inquiry, biographical sketches themselves appear as mind-numbing “facts”—interesting perhaps, but of questionable significance. Schlegel’s social history of intellectuals places text in context without addressing the problem of how one evaluates text or context once one has accepted the positivist assumptions of empirical social science. In this way, it embodies the very procedural norms so often decried by historians of Realism and American legal discourse in general. Like so much of academic history writing, Schlegel’s book embodies an “operational aesthetic” geared merely toward revealing the mechanics of history.

For truth, Schlegel substitutes moralism. This moralism, moreover, reveals itself to be as much a procedural norm as the social history of intellectuals. Schlegel concludes his book with an affirmation of the Realists as “intellectual heroes” who “expressed care, concern, and patience in carrying . . . work to a conclusion,” had “idea[s] [they] passionately believed in,” and possessed “extraordinary flinty integrity and seriousness of purpose” (257). The Realists may have possessed these qualities, but none of these qualities are specific to Realists or Realism. Schlegel’s book suggests that passionate belief in an idea is

9. I take this phrase from Neil Harris’s account of P. T. Barnum’s museum of freaks and curiosities. Perhaps not as entertaining as Barnum’s shows, academic history has become increasingly Barnumesque with every passing year, and continues to prove that, yes indeed, there is a sucker born every minute. See Neil Harris, Humbug: The Art of P. T. Barnum (Chicago: University of Chicago Press, 1973), chap. 3.
more important than any particular idea believed in, and that seriousness itself is more important than any purpose to which seriousness could be directed.

This procedural orientation unites the social history of intellectuals with the history of ideas. I agree with Schlegel that the history of ideas is "an essentially empty exercise," but not because it fails to connect ideas to a material context. Connecting ideas to a material context does not tell us something more than connecting ideas to other ideas, it simply tells us something different. Ideas and texts may serve as contexts for understanding related ideas and texts. As contexts change, so will meanings. This excess of meaning leads to calls for synthesis, and synthesis soon leads to calls for revision. The belief that "it is an important thing for any culture to know where the ideas in its past and present came from" drives this process in social history and the history of ideas (259). Just why it is important to trace the course of ideas over time is not clear to me from Schlegel's book. Schlegel does not argue for history, he simply assumes it, and affirms it. In this existential affirmation, process becomes substance. Still, the textual genealogies of the history of ideas and the contextual genealogies of social history both fail to provide any basis for evaluating the ideas and intellectuals studied.

Why is it important to know where ideas come from? To play the devil's advocate, I will explain one cliché in terms of another: We study the transformation of ideas over time because those who do not know the past are destined to repeat it. In this spirit, Schlegel draws a practical lesson from his study of Realism: "Until some genius comes up with some reason for seeing law as something else, and sells it in a culture where currently the only alternative understanding of law available is that of . . . law as who you know . . . there is no point in talking" (256-57). As practical advice, this amounts to asserting that we need to change the culture before we can bring about cultural change. Professional identity "explains" the failure of Realism about as well as dormative powers explain why opium causes sleep. Legal Realism and the professional history monograph of the type Schlegel has written both grew out of a Progressive intellectual ferment committed to the belief that the new social sciences could tame the irrationalities of the market by revealing the chain of causality that drives the development of society. Against this faith, the twentieth century has seen the irrationality of the market merely supplemented by the irrationality of the state. The social sciences have failed to deliver the control promised in the fields they successfully shaped in their own image; there is no reason to think that law has much to learn from them. Social-scientific causality is little more than
common sense and tautology. The study of the past cannot bring control.

Of course, one may study the past for other reasons. Schlegel's stated purpose of finding "intellectual heroes" or role models suggests that the study of the past may serve as a means for character building or personal edification. This merely begs the question of what kind of character one should build and why. Schlegel presents a convincing portrait of the Realists as iconoclastic-but-committed academic bureaucrats, but does not advance any convincing argument for the worth of this character type. Indeed, such substantive arguments lie outside the procedural norms of history writing. Even so "rarified" an intellectual historian as Arthur O. Lovejoy never argued for the ideas he studied; he merely argued about them. Lovejoy led the fight against Realism at Hopkins, but his brand of the history of ideas objectifies the past in a manner similar to the Realist social history practiced by Schlegel.10 Lovejoy clearly sympathizes with the ideas he studies in his masterpiece, The Great Chain of Being, and Schlegel clearly sympathizes with the Realists, but neither historian claims to be bound to their subject matter in any substantive way; indeed, both scholars accept objective detachment from their subject matter as a precondition for proper historical inquiry. Lovejoy and Schlegel submit not to the authority of the texts/contexts that they study, but to the procedural norms of evidence and argument that structure professional history writing. Their work may tell us in different ways how certain ideas develop over time, but it cannot tell us if these ideas are true. Failing the test of truth, the "rarified atmosphere" of the history of ideas and the solid ground of social history are both "so much hot air" (208).

The problem of the relation of the historian to history points to a central issue in Realism itself. According to Schlegel, the conflict between the formalism of nineteenth-century legal science and the antiformalism of twentieth-century Legal Realism may be understood in terms of the conflict between the perspectives of the insider and the outsider. From the insider perspective, "law was about norms" (227). "Legal scientists examined case reports and from the cases derived ... doctrines that were fit into a system of principles that governed the action of judges because they formed the law" (226). Progressive reformers working within the tradition of legal science accepted the normative authority of legal rules, and sought simply to make existing rules better. Legal Realism drew instead on Oliver

3. Lovejoy compares the study of the history of ideas to "analytic chemistry."
Wendell Holmes’ prediction theory of law, which “suggested that it was plausible for a party inside the system to act as if he were observing the system” from the outside (227). Thus, Walter Wheeler Cook insisted that legal research, whether in the library or in the field, should yield “rules . . . organized not with reference to principles but rather with respect to considerations of policy, of social advantage” (226). This outsider, instrumental view of the law “suggested that the legal science of the insiders produced not the objective truth that it had always purported but something else” (227).

Skeptical of the insider perspective, Cook could not dismiss it completely without cutting himself off from the legal profession that for the most part operated within it. In the grand pragmatic tradition, Cook simply never bothered to reconcile the two perspectives. As Schlegel sums up this evasion: “Anything could be done scientifically: one simply adapted the available tools to the materials and objectives at hand and set to work at whatever one wanted” (227). Outsiders and insiders could peacefully co-exist, making use of each other’s work when it suited their goals, and otherwise ignoring it. Cook’s compromise “literally dragged the modern idea of science into law,” yet “enabled law to avoid the awful morass of statistical method in which social science still finds itself” (225, 228).

A similar compromise has come to structure the humanities in general in the wake of the pragmatic revolt against formalism. Schlegel’s own book embodies the very insider/outsider schizophrenia he analyzes in law. Strident assertions of value (the humanistic ideal) co-exist with strident assertions of value-free objectivity (the social history of intellectuals), both of which co-exist with strident qualifications of value and objectivity (“I have no illusions . . . that my narrative is more direct, more unmediated, less controlled than would be the case were I to adopt a more argumentative form of presentation”) (13). The academic division of labor has ensured that these contradictory orientations rarely appear together in a single work, and this arrangement has proven comfortable enough for so long as there has been a basic agreement on the ends of humanistic inquiry. These ends found their clearest formulation in the “consensus” era following World War II: economic prosperity through some form of a mixed economy, and cultural cosmopolitanism through government support of the arts and education.

Since the early 1970’s, the political mood of the country has shifted against these values. Universities and law schools in particular have come under attack as strongholds of a cultural cosmopolitanism perceived as hostile to tradition. The left-liberal consensus that still dominates the mainstream of the academy has responded with ever more strident assertions of an increasingly empty humanist ideal, and
ever more paranoid denunciations of the “authoritarian personality” of their opponents; both strategies suggest desperation. Against the ethically and intellectually bankrupt humanism of the academy, mainstream conservatives have attempted to revive the “traditional” nineteenth-century virtues of free markets and family values; this, too, suggests desperation. There is nothing “traditional” about these values. The free market of the nineteenth century defined itself against not only the decaying feudal order and the mercantilist state, but also against all traditions that might restrict the pursuit of economic self-interest. Middle-class ideologues of domesticity reinvented the family as a separate sphere of value apart from the amoral marketplace, but this arrangement has long since proved incapable of protecting the family from the totalizing logic of the market. By embracing the “value” of economic growth, conservatives ensure instability in the family and every other would-be “sacred” sphere of life.

The sterility of the humanist outsider perspective and the vacuity of the conservative pseudo-insider perspective reflect the persistent failure of American intellectuals to reconcile Enlightenment universalism with some substantive understanding of tradition. This failure has been particularly glaring in American law. During the nineteenth century, American judges and lawyers struggled to accommodate the outsider perspective of the Constitution with the insider perspective of common law. The Constitution soon became something like holy writ, man-made yet handed down, invested with all the sanctity of an ancient tradition; however, common law soon changed from a body of principles to be applied to specific cases to, in Morton Horwitz’s words, “a creative instrument for directing men’s energies toward social change.” The principle of instrumentality has since provided a rather dubious basis for reconciling tradition and revolution in American law. Law remains an exegetical tradition bound by the authority of precedent, yet American law offers only a precedent of change hostile to all tradition.

Of course, debate over the “traditional” status of American law depends on some explicit understanding of the meaning of tradition. I take as my standard the social relations of knowledge embodied in what Roberto Unger, in his Knowledge and Politics, has identified as the “dogmatic disciplines” of grammar, theology, and legal doctrine. Within these traditional disciplines, there is no “clear distinction between the object accounted for and the account itself.” In the case of law, “the legal doctrine participates in the evolution of . . . the law,

helping define its shape and determine its directions.” The “reasonings of lawyers and judges are drawn from the very tradition they expound and develop,” and “because of the intimate relationship between the account and its object, every claim . . . is an elaboration of some point of view already present in the community” of legal interpretation.¹²

American Legal Realism stands at the opposite pole from this understanding of law as a tradition. John Henry Schlegel’s account of Realism argues that American law operates somewhere between the extremes of a pure insider and pure outsider perspective. Like his historical subjects, Schlegel, too, operates between those extremes. Schlegel’s social history of intellectuals reduces the ideas of Realism to their historical context, only to affirm those ideas as transcendent values. If this be “the whole dance of life,” it would appear that the jig is up. The outsider perspective denies the truth status of the insider perspective, yet detaches itself from all the normative ordering principles necessary to make sense of the reality it objectively renders. Olympian denials of truth vacillate with existential affirmations of truth. This schizophrenia seemed to “work” during the glory days of academia in the 1950’s. I suppose as long as enough lawyers and legal historians have enough jobs, it will still seem to “work” despite its lack of intellectual coherence. For those content with this incoherence, American Legal Realism and Empirical Social Science provides a comfortable and comforting reading experience.
