

UNIVERSITY OF CALIFORNIA

Los Angeles

Trust, Proof and Persuasion in Historiography

A Litigation Analogy

A dissertation submitted in partial satisfaction of the
requirements for the degree Doctor of Philosophy
in Education

by

B. Everett Hendrickson

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ABSTRACT OF THE DISSERTATION

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University of California, Los Angeles, 2014

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Many if not most historians, and many if not most other academicians who employ history as a significant part of their discourse, form and present their arguments in ways strikingly analogous to those of lawyers in an adversarial legal system. Historians sift through and strategically select from among the legion available facts (“evidence”) to create a proof-based rhetorical narrative in support of the specific interpretation, with the understanding that reviewers, including proponents of competing arguments, will likely contest perceived instances of claim excess. While the central thesis is primarily descriptive, it may be possible to extend its logic to serve as a means of reconciling the literary and referential elements in history. The attempt to integrate those two threads has been a dominant concern in historiography for some decades now.

The central thesis takes the form of an analogy, itself emerging from a synthesis of numerous reflections by historians and historiographers about their field and subfields. Testing proceeded first through a comparison of the literature on the theory and practice of law and history, then via an examination of zones and instances where law and history considerably overlap, including legal cases where the history of a specific question is the gravamen of the case, notably in some of the landmark education decisions.

Recognition of strong parallels in the two fields should not alarm. For with historians and lawyers alike, the good ones at least, *persuasion* is both the primary means and ends of argumentation. And for persuasion the chief currency of exchange is *trust*. In turn, trust is often a function of *fairness*. Real benefits to historical scholarship can accrue through the recognition and adoption of some aspects of the lawyer's approach, prominently the need to assess critically, before dissemination, one's own narrative for internal coherence, including sufficient treatment of predictable counternarratives.

Yet some of the more salient points emerge from those instances where the analogy proves imperfect. For example, while academic users of history often behave as professional advocates, in some settings they might do so without the lawyer's fuller range of checks against abuse of position. In this respect, the thesis also is somewhat of a cautionary tale, for in extreme cases asymmetries in local leverages are anathema to good scholarship and good teaching. The findings here apply mostly to professional historians but are also applicable to non-historian academicians and thus are amenable to a wider pedagogical focus on encouraging modesty and generosity in intellectual exchange.

The dissertation of B. Everett Hendrickson is approved.

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CHAPTER 1 -- *History, Law and Navigational Heuristics* (Introduction of theory and explanatory Literature Review)

Prologue

During the last few decades a potentially delightful conversation emerged between Law and History – *potentially* delightful because to date it has been overly unidirectional, closer to a soliloquy. Legal scholars have borrowed much from critical currents in historiography to reexamine the enterprise of law, most notably how legal norms and structures and thus outcomes have tended to reflect historical elements now increasingly considered incomplete or otherwise anachronistic. The deep critique of those historical data has led to a parallel reassessment of certain legal workings.

Now it is time for a return favor, for History to employ Law as a vital part of an enhanced critical understanding of historical writing. A careful comparison of working realities in the two fields shows how historians, much like civil lawyers in an adversarial system, understand *persuasion* both as an ultimate goal and the chief means to that goal. The best practitioners in each field strive to create a sense of trustworthiness as to interpretations offered; while resource limitations force a selective approach to the fuller body of objectively discernable facts (and factuality remains critical – and possible – in the two professions), fair handling of the evidence is essential to building trust. The lens of an analogy to law practice should encourage useful historiographical candor as to issues of bounded resources, heuristics, objectivity, agenda, selectivity, interpretation, narrative, rhetoric, proof and perhaps even truth.

A. History, Law and Heuristic Analogy

The whole of human affairs reveals how Truth, Story and Utility are durably and universally confounded, tension-filled and interwoven.

Countless prior generations looked for traces of each in the night sky. The regularity and visual richness of the stars offered the ancients a gainful multipurpose tool. They elicited order out of seeming chaos by employing only a few dozen of the stars visible to the naked eye in order to construct series of constellations. Those patterns both reflected and helped to recall important seasonal events, including planting and harvest times, migration of game and herds, and religious events. Vibrant and elaborate tales around the sky figures and their movements both entertained and transmitted certain moral lessons. Narrative skymaps allowed some reliability in navigation for seafarers, caravans and other purposeful wanderers.¹

By no means was the approach flawless. Reliance on nighttime stars and daytime sun yielded decent North-South (latitudinal) readings, but less trustworthy East-West (longitudinal) calculations. Further complicating the readings were inclemencies obscuring the skies for long stretches while pushing vessels far off course, as the hulls of legion shipwrecks attest.² But in all, for many long centuries sky chronicles allowed merchants, armed forces, explorers, diplomatic figures and other travelers to depart and

¹ See James Evans, *The History and Practice of Ancient Astronomy* (Oxford, 1998) and Archie E. Roy, "The Origins of the Constellations," *Vistas in Astronomy*, 27, 2 (1984): 171-197.

² A substantial chapter of maritime history concerns the search for improved navigational aids to address just such dramatic losses of men and cargo. It was a modern age instrument – the shipboard chronometer – that most emphatically broke the age-old dependence on night and day sky sightings. For an engrossing account of how need, technology, empire, financial incentive, public sector research sponsorship, rivalry and law all intersected in John Harrison's breakthrough inventions, see Dava Sobel, *Longitude: The True Story of a Lone Genius Who Solved the Greatest Scientific Problem of His Time* (New York, 1995).

return with enough predictability to merit the individual and social risk. Navigational narrative served both truth and utility, with little if any fundamental conflict.

But the example of constellations – patterns drawn from a seemingly infinite field of light points – illustrates how knowledge and meaning quests often uncover not too little, but *too much* information, or at least more than we can collect, classify, analyze, explain and convey in any exhaustive fashion, given limited resources of time, money and attention spans (and given our own and our audience’s inevitable biases, a point to which I will later return in depth). How then to make helpful sense of it all? Traditional navigation aids discounted all but a small portion of the available and potentially useful data points (the visible stars and planets).³ In the contemporary world, despite and to some extent because of scientific advances and the concomitant knowledge explosion, we nearly drown in information, such that we constantly resort to mechanisms tending to cut information costs.⁴

In any era, and in every field of endeavor, the problems of high information costs and objectivity challenges together dictate a considerable degree of data selectivity. Researchers invariably yield to those realities and demands, either consciously or not, but in either case with some loss to saturation or depth of analysis, or both.

And so to the heuristic. From the Greek *heuriskein* (“to discover”) the word is both adjective and noun: “[adj] *providing aid or direction in the solution of a problem*

³ Stars in the night sky visible to the naked eye number about 6,000 total, with some 2,000-2,500 traceable at one time and location under optimal viewing conditions. Thus the constellations most lending to navigation utilized only a small percentage of the data points available. But that group (i.e., those stars visible without instruments) in turn comprised just a minuscule fraction of the countless light points “lost” or irretrievable because of naked eye limitations.

⁴ Among those devices are computerized search engines.

*but otherwise unjustified or incapable of justification” and [n] “the study or practice of heuristic procedure; heuristic argument; a heuristic method or procedure.”*⁵

The overall sense, then, is that heuristics are like heavenly navigational aids – tremendously useful but ultimately risking false or otherwise invalid inferences.⁶ Again, in every sphere humans seek to lessen uncertainty and simultaneously cut information costs. For example, because we cannot exhaustively research every one of our interest areas, we regularly employ heuristic devices – consulting “expert” reviews or “rankings” of consumer products and services, cultural offerings, travel destinations, learning programs, and other desired experiences.⁷ Cost-benefit considerations merge with (or spring from) cognitive limits to render such measures attractive, or at least acceptable, despite their imprecision.

Heuristics pervade academic inquiry. And scholars’ acquiescence to that notion, however grudging, has increased in the wake of breakthrough work in psychology.

⁵ *Webster’s Ninth New Collegiate Dictionary* (Norwalk, Connecticut, 1985).

⁶ Certain words, “heuristic” among them, acquire certain field-specific meanings. Professional historians and some historiographers use the term and its derivative phrases to mean a discovery tool or approach: “Heuristic has been adopted as a convenient term for the technique of investigation that can be acquired solely by practice and experience. In the case of the historian it embraces such things as knowledge of manuscript collections, methods of card indexing and classifying material, and knowledge of bibliography. It underlies other aspects of methodology as in knowledge of the capabilities of historians working in the same or similar fields or in the power of dealing expeditiously with documentary material.” See entry “Method of Historiography” in *Encyclopædia Britannica* (Chicago, 1995). While noting this specific use, throughout this writing I employ the broader, less specific definition provided on pages 3-4, *supra*, because herein I discuss History in comparison and cross-pollination with other disciplines.

⁷ In the higher education world, heuristic procedures are core to several aspects of the university life cycle. For example, as much as scholars might disdain the ubiquity of “branding” in contemporary life, one can hardly deny the strong “sorting” role the given university brand/reputation plays in: (a) attracting desirable undergraduate applicants, (b) placing those students in enviable internships and beginning jobs, (c) attracting desirable graduate student and intern/residency applicants, (d) helping to sort such applicants, the reputation of their prior institution a weighty factor, (e) eventually placing those advanced studies graduates in enviable positions, (f) attracting desirable candidates for faculty and administrative posts, all of which (g) tends to reinforce the initial brand status, more so where the institution is highly dependent on private donors, as is increasingly the case everywhere. Hence, placing some value on university branding is a broadly exercised heuristic device implicating several parties at several points in the cycle.

Kahneman and Tversky⁸ explained how three general-purpose heuristics – “availability,” “representativeness” and “anchoring and adjustment” – each a serviceably efficient mental shortcut, nonetheless associate with certain biases tending to violate the basic laws of probability. Their seminal work continues to reverberate throughout the natural sciences, social sciences and humanities, in that a key question for scholars is how well the easily available data (the “low hanging fruit”) represents the fuller pertinent set, and what adjusting efforts, if any, the given analyst should or can implement vis-à-vis the early base of anchoring data compilation.

History in particular involves immense galaxies of potentially relevant information. Should a historian wish to explore, for just one example, the strategic function of costume in diplomacy, a beginning focus on Benjamin Franklin’s chosen attire during his stay in Paris (1776-1785) as a special envoy would suggest thousands of potential data leads: the color, fabric and cut of his suits, shoes, shirts and hats, buttons, buckles, trim, where made, at what cost, jewelry and hair treatment (or absence of); the studied contrast with fashion in the French capital, with a separately distinct contrast effected (or rather affected) vis-à-vis *ouvriers, paysans, fermiers, bourgeoisie, nobilité* and *royauté*, a great many details about the clothing of those groups thus relevant on some level; the separate contrast with the attire of other American delegates of the period; the extent of press coverage devoted to Franklin’s calculated New World, Natural Man aura; the degree to which the French connected Franklin’s attire and heritage to his scientific genius; the great number of decorative items produced in the period bearing Franklin’s likeness, almost always in his intentionally humble *vêtement*; the degree to

⁸ The authors’ seminal papers from the 1960s and 1970s are assembled in Daniel Kahneman, Paul Slovic and Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases* (New York, 1982).

which French observers comprehended any connection between Franklin and the natural man imagery in Rousseau's *Emile* (1762)⁹ and other prominent works of that era; the extent to which Parisians were versed in such works by Rousseau and others.

The more multi-level and multidisciplinary the analysis – exploring and/or borrowing from economics, law, sociology, political science, psychology, literary theory, technology, art, communication means, architecture, anthropology, philosophy, military power, alliances and diplomacy, religion, class, ethnicity, gender, differing political theories, geography, natural sciences, etc., etc. – the higher the potential data yield.¹⁰ And naturally the number of possible causal and explanatory variables mounts exponentially with each extra time slice and each added geo-political zone. If the costume and diplomacy study suggested above moves beyond Franklin alone, solely during his sojourn in Paris (as bound both chronologically and geographically), a quickly mushrooming and imposing database emerges for what at first seemed a rather narrow research question.¹¹

The historian's desire – instinct perhaps – to provide better context to the principle theme thus tempts the historian to expand the inquiry in terms of chronology,

⁹ Jean-Jacques Rousseau, *Emile, or On Education*, trans. Allan Bloom (New York, 1979 [1762]).

¹⁰ Graham Allison and Philip Zelikow's classic study of the Cuban missile crisis, *Essence of Decision* (Boston, 1971) shows how the level of analysis employed alters perceptions of both problem and solution. As for multidisciplinary approaches, to what degree historians and other academics can or should use them is a matter of continued controversy, the debate hampered by nebulous definitions and understandings of borders. See, e.g., Myra H. Stober, "Habits of the Mind: Challenges for Multidisciplinary Engagement," *Social Epistemology*, 20 (2006): 3-4, and Corrine Bendersky and Kathleen McGinn, "Incompatible Assumptions: Barriers to Producing Multidisciplinary Knowledge in Communities of Scholars," Harvard Business School NOM Working Paper No. 08-044 (2007).

¹¹ Further complicating the analysis is the reality of ever mounting lacunae – lost data – as one expands the inquiry chronologically and geographically. How historians do, can or should account for the unknowable quantity and quality of facts lost to rust and rot, destruction and other dissimulation, ignorance, senility and death remains an underexplored topic.

geography, subject matter, levels of analysis and perspectival lenses employed. The data available to the historian from such multidimensional analyses are practically infinite, *assuming no limits to the researcher's resources* – time, energy, finances, etc.

But of course historians do suffer resource challenges (and are aware of their *audiences'* resource limitations in the form of time, interest levels and competing pressures). And thus they unavoidably engage heuristic devices early and frequently. Whether one can reasonably label History itself a heuristic (noun) is an interesting question; it certainly resonates with the adjective.

That dynamic has inspired much debate among practitioners and theorists alike, but somewhat oblique to heuristics *per se*, instead tending more to focus on the interrelated challenges of objectivity, selectivity and interpretation.¹² The discourse has long been prickly, but never so much as during the past four or five decades. But while professional practitioners do contribute much of the scholarly work in “historiography” – the principles, theory and history of historical writing¹³ – many historians avoid the topic altogether, in part because everyday research and writing is toilsome, but partly also, it seems, resenting that “outsiders” have made several theoretical incursions. To wit,

¹² Among the many extensive treatments here are Peter Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession* (Cambridge, U.K., 1988), and Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Baltimore, 1973).

¹³ The suffix (“ography”) of the term, narrowly construed, refers to “the writing of history” or “historical writing” and closely related concerns. As such, some commentators express resigned discomfort with the term as used to describe the analysis of history on a theoretical and practical arts plane, believing the label “historiology” (the study or science of) probably better capturing the essence. See, e.g., Novick, *That Noble Dream*, p. 8, fn. 6. Others distinguish their own work as “philosophy of history” and imply an additional and somehow more rarified level of analysis. See, e.g. Frank Ankersmit, *Historical Representation* (Stanford, 2001), pp. 66-74. According to the *Oxford English Dictionary*, where the philosophic interpretation relies on theological or metaphysical views, the term can be “historiosophy.” The topic already nebulous enough, I herein yield to the weight and momentum of the term “historiography” to refer not only to the practicalities of “writing” history but also to the philosophical, theoretical and historical considerations therein, but will also resort occasionally to such terms as “philosopher,” “theorist” and the like as concerns of nuance and flow dictate.

Patrick O'Brien (2008) notes his colleagues "allocated very little of their precious research time or made space in their syllabuses for methodological discussions. They leave that to historiographers and philosophers. They tend to ignore prescriptions from outsiders in favour of simple approaches, distinguished between comparisons and connections."¹⁴

That recent pronouncement reflects decades of like observation. For example, Appleby, Hunt and Jacob (1994) explained how one impetus for their own historiographic study was that ". . . professional historians have been so successfully socialized by demands to publish that we have little time or inclination to participate in general debates about the meaning of our work."¹⁵ In the prior decade, François Furet (1982) noted, ". . . the historian's guild has little taste either for epistemology or for the history of its own history"¹⁶ Indeed, education historian Sol Cohen, reminiscing about his own training in the early 1960s, now found remarkable the then-prevailing climate that "interest in philosophical issues [was] unnecessary, pretentious, and potentially debilitating; preoccupation with epistemology was the philosopher's business, not the historian's."¹⁷ And a half-century earlier yet, Max Weber expressed how the void had attracted commentary from outside history: "The poor condition of the logical analysis of history is shown by the fact that neither historians, nor methodologists of

¹⁴ The author was speaking of the newish cadre of "global historians." See Patrick O'Brien, "Making History: The Changing Face of the Profession in Britain." Essay adapted from Working Paper 7 in Patrick O'Brien, *Global History for Global Citizenship* (London, 2008).

¹⁵ Joyce Appleby, Lynn Hunt and Margaret Jacob, *Telling the Truth about History* (New York, 1994).

¹⁶ François Furet, *L'Atelier de l'historien* (Paris, 1982); English version, *In the Workshop of History*, trans. Jonathan Mandelbaum (Chicago, 1984), p. 1.

¹⁷ Sol Cohen, "An Essay in the Aid of Writing History: Fictions of Historiography," *Studies of Philosophy and Education*, 23 (2004): 320.

history, but rather representatives of very unrelated disciplines have conducted the authoritative investigations into this important question.”¹⁸

Thus, in considering why historiographical critiques have often sprung externally, it is probably both that scholars from such diverse fields as literary studies, psychology, sociology and physics have merely stepped into the theoretical void historians have themselves left, and that something about history inherently invites interdisciplinary attention. In the former sense Weber was the forerunner to Foucault, de Certeau, Rorty, et al. As for the latter sense, i.e., inherent susceptibility, historians habitually invade and incubate treatments in several other disciplines (consider the “histories of” science, art, philosophy, law, education, diplomacy, military, etc.),¹⁹ such incursions all but inviting reciprocal treatment. At the intersection of those two senses, it is also the case that whole schools of historiography – consider Marc Bloch and the French *Annales* writers, and Hayden White’s adaptation of structuralist literary devices – have emphatically pursued cross-disciplinary approaches, precisely because they believed the narrower modes stifling, if not altogether inadequate.²⁰

¹⁸ As quoted (preface, p. ix) in David Hackett Fischer, *Historian’s Fallacies: Toward a Logic of Historical Thought* (New York, 1970). Fischer throughout emphasized the absence of “logic” in too much historiography and shows how advances in other fields could and should enhance history.

¹⁹ Acton exemplified the attitudinal comfort here: “History is not only a particular branch of knowledge, but a particular mode and method of knowledge in other fields.” John Acton, Inaugural Lecture on the Study of History, Cambridge, June 11, 1895, in Gertrude Himmelford, ed., *Essays on Freedom and Power* (Boston, 1948).

²⁰ Marc Bloch, *The Historian’s Craft*, trans. Peter Putnam (Manchester, 1953, 1992). The “Annales School” label arises from the journal Bloch co-founded, *Annales d’histoire économique et sociale*, whose contributors, mostly French historians, drew extensively from other disciplines. The journal in the interim has seen several name changes, most recently to *Annales. Histoire, Sciences Sociales*.

Such cross-pollination, already an overt element in historiographic discourse by mid-century (via Bloch, et al.),²¹ had become rampant by the 1970s and 1980s, “part of a crisis in disciplinary identity which was taking place in all quarters of the academy.”²² Few academic fields have more permeable borders than history; few are as exposed to what ethno-anthropologist Clifford Geertz termed “blurred genres,”²³ and therefore few see as much internal contestation over methods and other norms.²⁴

Again, a large portion of recent historiography employs conceptual tools from other fields, partly because historians covering other disciplines eventually contract the “contagion” of methods dominant there, and partly because at least a few of the most provocative commentators have themselves primarily trained elsewhere. To help explain complex patterns, particularly those bridging disciplinary bounds, scholars depend, once more, on heuristic devices: “Without metaphor, allegory and a thick description of the world around us there is no basis for comparative study or analysis.”²⁵

Prominent among such heuristic devices is *analogy*. Historian David Hackett Fischer approvingly noted their specific application to history and historiography:

²¹ The Nazis executed Bloch in 1944 for his resistance activities, delaying for a decade the publication of *The Historian's Craft* from Bloch's underlying drafts.

²² Novick, *That Noble Dream*, p. 584.

²³ Clifford Geertz, “Blurred Genres: The Refiguration of Social Thought,” *American Scholar*, 49(2), pp. 165-179 (1980). See also Terrence J. MacDonald, ed., *The Historic Turn in the Human Sciences* (Ann Arbor, 1996), examining a renewed appreciation of the central role of history in several other fields, a point I discuss in the concluding chapter of this work.

²⁴ In *That Noble Dream*, pp. 577-592, Novick traced fragmentation within the professional discipline, stemming from the rise of numerous history subdisciplines and competing techniques.

²⁵ Peter Hackett, “Aesthetics as a Dimension for Comparative Study,” *Comparative Education Review*, 32 (1988): 389. Hackett's observation was in the context of comparative education studies, but was reasonably generalizable to academic discourse across any fields.

Analogical inference plays an important, and even an indispensable, part in the mysterious process of intellectual creativity . . . [Analogies] suggest and persuade, inform and illustrate, communicate and clarify. They are versatile and effective pedagogical tools . . . *Historians use analogies widely* both as *heuristic instruments* for empirical inquiry, [and] as *explanatory devices* in their teaching²⁶

Historiographers, in order to ease the reader's struggle to grasp an otherwise mystifying profession, frequently analogize to some other human activity. Some of the earliest examples drew from and reinforced the notion that the historian's task was to assess past events in clinical fashion, as in the physician's approach (taking a patient's history). More recent comparisons reflect a series of upheavals in perception and epistemology that have forced a reconsideration of history, now increasingly viewed as something less than – or more than – a tidy and unadorned recounting of “the way it really occurred.”²⁷ (As discussed in more detail in Chapter 2, *infra*, those definitional shifts have been anything but even and unidirectional.)

In any case, to the extent historiographers attempt to explain how historians explore the past, analogy is a helpful navigational heuristic. The specific analogy employed says much about whether the given historiographer believes history is a mostly straightforward venture or whether it is better understood as a vehicle for any number of

²⁶ Fischer, *Historian's Fallacies*, p. 244 (italics added). In adherence to his title and central theme, Fischer offered a series of illustrations and caveats concerning how false analogies too often distort and mislead author and reader alike. Nonetheless, he underscored the critical utility of analogy generally; indeed, “[w]ithout analogies, creative thought and communication as we know it would not be merely impracticable but inconceivable” (Ibid). Other definitions bear out Fischer's read: “[A]nalogies play an important role in scientific research because they give rise to questions and suggest new hypotheses. In this vein, various authors have emphasized the heuristic role that analogies play in theory construction and in creative thought.” Roman Frigg and Stephan Hartmann, "Models in Science," *The Stanford Encyclopedia of Philosophy* (Summer 2009 Edition), Edward N. Zalta (ed.), URL=<http://plato.stanford.edu/archives/sum2009/entries/models-science/>.

²⁷ As I will explain in greater detail in Chapter 2, *infra*, Leopold von Ranke's famous dictum, when seen in proper context – i.e., the way *it* (the dictum) really occurred – was much less value-neutral than the myriad references thereto suggest.

personal, institutional or other interest group ends: amusement, ideology, suppression, exhortation, moral lesson, nationalism, propaganda, domination, perpetuation of advantage, correction, oppression, compensation, exploitation, etc.²⁸

The two paragraphs to follow contain a representative but not exhaustive list of analogies²⁹ found in historiographic literature. The entries reveal great diversity in views of history, its relation to objectivity, and its continued salience (or lack thereof) as a reliable guide to a wider understanding of human reality, challenges and potential. The list is in two clusters, analogizing “history as” and “the historian as,” respectively. Each example is but a short phrase, not fully articulated, thus inherently underspecific,³⁰ in that the main purpose is to demonstrate the regularity and extent of analogy in historiography.

We see “*history as*” – a conversation between generations,³¹ theatre/drama,³² autobiography,³³ a spectacle,³⁴ prosecution,³⁵ a box of children’s letters,³⁶ a play written

²⁸ Although I herein list historiographic analogies in the positive, i.e., “history/historian as X,” many analogies suggest a negative obverse – what history or the historian is *not*, otherwise put, “history/historian as X instead of Y.” It is also possible to cast matters in the musing neutral, what history “might be,” an option I decline here as rendering more briery an already tortuous path of analysis.

²⁹ I list *analogies* rather than and distinct from *descriptions* (such as Engels’ “all history has been a history of class struggles . . .” in *The Communist Manifesto*, preface) or other analytical modes (e.g., intellectual history, social history, cultural history).

³⁰ In this abbreviated format I cannot hope to distill the extensive commentary by each of the thinkers listed, electing instead to employ only the overarching descriptive phrase. Moreover, while identifying in footnotes the author(s) providing the metaphorical image, I am cognizant that in some cases the given theorist presented the analogy to suggest others’ views, only then to critique those views.

³¹ Edward Hallet Carr, *What is History?* (New York, 1961).

³² Alain Besançon, “Psychoanalysis: Auxiliary Science or Historical Method?” *Journal of Contemporary History* (April 1968), p. 160.

³³ Ihab Hassan, “POSTmodernISM: A Paracritical Biography,” in Lawrence Cahoon, ed., *From Modernism to Postmodernism: An Anthology* (Oxford, 2003), p. 411. Hassan asked, “[i]s history often the secret biography of historians?” Simon Schama, for one, seemed to think so, persuasively suggesting how historian Francis Parkman projected his own personal agonies onto (and into) his rendering of Wolfe’s struggles on the road to victory on the Plains of Abraham; see Schama’s *Dead Certainties (Unwarranted Speculations)* (New York, 1991), pp. 40-65, furthered discussed herein at Chapter 2, Section 7, *infra*.

by God,³⁷ a vast river mingling disparate and distant elements,³⁸ bearing children,³⁹ a landscape map,⁴⁰ an explanation sketch,⁴¹ cinema (or “moving picture”),⁴² witness or memorial,⁴³ poetry,⁴⁴ literature,⁴⁵ architecture,⁴⁶ and a sextant and compass.⁴⁷

³⁴ Bernard De Voto, *The Year of Decision* (Boston, 1943), pp. 40, 461. The author was first a novelist and seemed to retain a flair for reader gratification.

³⁵ Flavius Josephus, who sought “to prosecute the actions of both parties with accuracy,” as quoted in Beverley Southgate, *History: What & Why? Ancient, Modern and Postmodern Perspectives* (London, 2001), p. 34.

³⁶ “It often seems to me as if History was like a child's box of letters, with which we can spell any word we please. We have only to pick out such letters as we want, arrange them as we like, and say nothing about those which do not suit our purpose.” James A. Froude, *Short Studies on Great Subjects (the Science of History)* (London, 1867), p. 1.

³⁷ R.G. Collinwood, *The Idea of History* (Oxford, 1946), p. 50.

³⁸ Jacques Barzun, *Clio and the Doctors: Psycho-History, Quanto-History and History* (Chicago, 1974), p. 95: “History, like a vast river, propels logs, vegetation, rafts and debris; it is full of live and dead things, some destined for resurrection; it mingles many waters and holds in solution invisible substances stolen from distant soils.” Others noting the riverine nature of history include Earl R. Beck, *On Teaching History in Colleges and Universities* (Tallahassee, Florida, 1966), p. 15: “. . . a great river with the changes in the course and rapidity of the current sometimes abrupt, sometimes almost imperceptible. There are branches leading from the mainstream, forks, side waters, alternate channels, and diversions . . . [b]ut there are no rigid separations between the segments and the intrinsic character of each is often debated.”

³⁹ Natalie Zemon Davis, from a journal interview with her (see *Visions of History* [Manchester, 1984]) as Novick cited it in *That Nobel Dream*, p. 495. Davis alluded to a “maternal” orientation in her work, “wanting to bring people to life again as a mother would want to bear her children.”

⁴⁰ “History is formally like a map; it records what has first to be discovered through exploration – not induction or deduction.” Gordon Leff, *History and Social Theory* (London, 1969), p. 79. See also John Lewis Gaddis, *The Landscape of History: How Historians Map the Past* (Oxford, 2002).

⁴¹ Carl G. Hempel, “The Function of General Laws in History,” *Journal of Philosophy*, 39 (1942), reprinted in Patrick Gardiner, ed., *Theories of History* (Glencoe, IL, 1959), pp. 344-56.

⁴² Carl L. Becker, Detachment and the Writing of History, *Atlantic Monthly* (October, 1910): “The past is kind of a screen upon which we project our vision of the future; and it is indeed a moving picture, borrowing much of its form and color from our fears and aspirations.”

⁴³ This theme is particularly common in Holocaust histories: “It is not permissible to forget, nor is it permissible to keep silent . . . If we fail to bear witness, in the not too distant future we could well see the deeds of Nazi bestiality relegated by their very enormity to the status of legend.” Primo Levi, *The Black Hole of Auschwitz* (Cambridge, 2005), p. 3; see also Jürgen Habermas and Jeremy Leama, “Concerning the Public Use of History” in *New German Critique*, 44, Special Issue on the Historikerstreit (Spring - Summer, 1988): 40-50.

We elsewhere find “*the historian as*” – a physician,⁴⁸ more particularly a “physician of memory,”⁴⁹ or instead a pathologist,⁵⁰ a teacher/priest,⁵¹ a sculptor,⁵² a brick molder,⁵³ an opaque window filtering light of the past,⁵⁴ an expertly trained guild member,⁵⁵ a painter (rather than photographer),⁵⁶ a moral critic,⁵⁷ a psychoanalyst

⁴⁴ References to history as poetry stretch back at least as far as Homer. By the late nineteenth century a revived understanding of the connection found voice in George Macaulay Trevelyan: “The past was poetry as well as prose, it was a miracle as well as causes and effects, and for this reason the poetic faculty is required to give an account of the more extraordinary events in human affairs.” In “Carlyle as Historian,” *The Living Age*, CCXXIII (Nov. 11, 1899): 370. Such characterization was a repeated theme in overly simplified “art” vs. “science” debates throughout twentieth century historiography.

⁴⁵ Hayden White has been a leading contemporary force here. See his *Tropics of Discourse: Essays in Cultural Criticism* (Baltimore, 1978), especially pp. 81-100 in Chapter 3, “The Historical Text as Literary Artifact.”

⁴⁶ J. Franklin Jameson letter to Henry James, 31 October 1910, as quoted in Elizabeth Donnan and Leo F. Stock, eds., *An Historian’s World: Selections from the Correspondence of John Franklin Jameson* (Philadelphia, 1956), p. 136.

⁴⁷ “History is the sextant and compass of states, which, tossed by wind and current, would be lost in confusion if they could not fix their position.” Alan Nevins, quoted by Ferenc M. Szasy, “Quotes About History” (2005) in *History News Network*, George Mason University, URL = <http://hnn.us/article/1328.html>.

⁴⁸ Southgate in *History: What & Why?*, p. 19, recounted how Thucydides departed the convention of history as poetry and/or romance by basing “his own approach in the medical pioneers of the Hippocratic school.” Likewise, Gabrielle Spiegel noted how ancient historians used the Greek word *autopsia* (“to see for oneself”), the root of the modern medical term autopsy, to indicate events or other facts witnessed personally. Gabrielle M. Spiegel, “The Task of the Historian,” *American Historical Review*, Vol. 114, No. 1, fn. 6.

⁴⁹ Eugen Rosenstock-Huussy, *Out of Revolution: Autobiography of Western Man* (New York, 1964 [1938]), p. 696: “The historian is the physician of memory. It is his honor to heal wounds, genuine wounds. As a physician must act, regardless of medical theories, because his patient is ill, so the historian must act under a moral pressure to restore a nation’s memory, or that of mankind.”

⁵⁰ Yosef Hayim Yerushalmi, *Zakhor: Jewish History and Jewish Memory* (Seattle, 1982), p. 94: “But for the wounds inflicted upon Jewish life by the disintegrative blows of the last two hundred years the historian seems at best a pathologist, hardly a physician.”

⁵¹ Leopold von Ranke, *The Theory and Practice of History*, G. Iggers, ed. (New York, 2001), p. xvi. As Novick (1988) noted and quoted, von Ranke believed the course of history revealed God’s work, and thus that the “connectedness” of history in the large stands before historians like a sacred puzzle left to them to unravel and explain: “May we, for our part, decipher this holy hieroglyph! Even so do we serve God. Even so we are priests. Even so we are teachers.” Novick, *That Noble Dream*, p. 27.

⁵² John A. Cannon, ed., *The Historian at Work* (London, 1980), p. 2: “Like a sculptor, we chisel away at a granite block until it takes a shape we can recognise in the historical past.”

(explaining historical motive),⁵⁸ an activist,⁵⁹ an ideal observer,⁶⁰ a moral zoologist,⁶¹ a visitor to the foreign land of the past,⁶² a scientist,⁶³ a detective,⁶⁴ an editor,⁶⁵ a proof-employing rhetorician,⁶⁶ a court of appeal⁶⁷ and, finally, a jurist/judge.⁶⁸

⁵³ Jameson (1910); *see* note 46, *supra*, “I struggle on, making bricks without much idea of how the architects will use them, but believing that the best architect that ever was cannot get along without bricks, and therefore trying to make good ones.”

⁵⁴ Ralph H. Gabriel, review of Stuart A. Rice, ed., *Methods in Social Science: A Case Book in American Historical Review*, 36 (1931), p. 786.

⁵⁵ Bloch, *The Historian's Craft*, p. 11. Though repeatedly adopting the modest imagery of “the practical arts,” Bloch also deemed history a “a science in motion,” distinguishable from the more static crafts: “But history is neither watchmaking nor cabinet construction. It is an endeavor toward better understanding, and consequently, [in its methodology] a thing in movement.” See also François Furet, *L'Atelier de l'historien (In the Workshop of History)* (Paris, 1982).

⁵⁶ Sir Lewis Namier, *Avenues of History* (London, 1952), p. 8.

⁵⁷ John Higham, “Beyond Consensus: The Historian as Moral Critic,” *American Historical Review*, 67 (1962), 620-21.

⁵⁸ H. Stuart Hughes, “History and Psychoanalysis: The Explanation of Motive,” in Hughes, *History as Art and as Science: Twin Vistas on the Past* (New York, 1964), pp. 46-47: “. . . the most extraordinary parallels between the two fields come to mind . . . [the analyst's] professional and moral goal is the same as that of the historian: to liberate man from the burden of the past by helping him to understand that past.”

⁵⁹ David Landes and Charles Tilly, eds., *History as Social Science* (Englewood Cliffs, NJ, 1971), pp. 5-6, 13-16.

⁶⁰ Bruce Kucklick, “The Mind of the Historian,” *History and Theory*, 8 (1969), 329-30. Kucklick here was noting but not at all endorsing a trend he felt post-WWII historians had inappropriately adopted from eighteenth century moral philosophy.

⁶¹ Hippolyte Taine (1884), *The French Revolution*, trans. John Durand (Indianapolis, 1992), p. xvii.

⁶² Rene Descartes, *Discourse on the Method of Conducting One's Reason Well and for Seeking Truth in the Sciences*, trans. Donald A. Cress (Cambridge, 1998), p. 4: “For conversing with those of other ages is about the same thing as traveling.” See also David Lowenthal, *The Past is a Foreign Country*, (Cambridge, 1985), where Lowenthal borrows his title from the opening lines of novelist L.P. Hartley's *The Go-Between* (New York, 2002 [1953]): “The past is a foreign country; they do things differently there.”

⁶³ In his posthumously published (1795) *Esquisse d'un tableau historique des progrès de l'esprit humain* (Paris, 1971), Nicolas de Condorcet enunciated the full reaches of Enlightenment historiography – the history of civilization is one of progress in the sciences, with the (seemingly) imminent perfection of the natural sciences certain to echo in the human sciences (“*dans les sciences morales bien que physiques*”). In the following century August Comte issued similar discourses regarding a predicted eventual reach and salience of scientific positivism to all intellectual fields, by implication history included.

For a number of reasons made clearer throughout this dissertation, I find the final three entries – together comprising a legal or judicial analogy – overall the most productive, although shortly below I offer and explore a decided alteration and expansion of that collective analogy. For the present purposes, it is helpful to review its language and chief mechanics as more traditionally distilled:

The objective historian's role is that of a *neutral, or disinterested, judge* The historian's conclusions are expected to display the standard *judicial qualities of balance and evenhandedness*. As with the *judiciary*, these qualities are guarded by the *insulation* of the historical profession from social pressure or political influence, and by the individual historian *avoiding partisanship or bias – not having any investment in arriving at one conclusion rather than another*.

So Peter Novick neatly summarized (before critically deconstructing) the “objectivist creed” in history – “an ideal to be pursued by individuals, policed by the collectivity.”⁶⁹ Indeed, the “historian as judge” metaphor in its various guises has been a mainstay of historiography, persisting at least until the postfoundational disruptions of

⁶⁴ John Clive, *Not by Fact Alone: Essays on the Writing and Reading of History* (New York, 1989), p. 21: “. . . the historian is after all, the skilled detective who asks questions, locates and follows clues, and must not reveal the solution until the tale is told.” And Mark M. Krug, *History and the Social Sciences* (Waltham, Mass, 1967): “[T]he historian and the detective have much in common.” See also Robin W. Winks, ed., *The Historian as Detective: Essays on Evidence* (New York, 1969).

⁶⁵ For a direct treatment here, see Richard C. Vitzthum, “The Historian as Editor: Francis Parkman’s Reconstruction of Sources in Montcalm and Wolfe,” *Journal of American History*, 53 (1966): 471-486.

⁶⁶ Carlo Ginzburg, *History, Rhetoric and Proof* (Hanover, NJ, 1999).

⁶⁷ Frank Ankersmit, *Historical Representation* (Stanford, 2001), especially pp. 7-11.

⁶⁸ John Acton, in his 1895 *Inaugural Lecture on the Study of History* (p. 45, see note 20, *supra*), forged the famous image of the historian as a (to him properly) severe jurist: “There is no impartiality . . . like that of a hanging judge.” See also Carlo Ginzburg, “Checking the Evidence: The Judge and the Historian” *Critical Inquiry*, 18 (Autumn 1991): 79-92, and Primo Levi, *The Black Hole of Auschwitz* (Cambridge, 2005), p. 4: “. . . we cannot feel ourselves exempt from the indictment which our act of witness would prompt an extraterrestrial judge to lay at the door of the whole of humanity.”

⁶⁹ Novick, *That Noble Dream*, p. 2 (italics added in the longer quote).

the past few decades and now resuscitated to some degree in the present debate as to how to (re)integrate the investigatory and literary elements of history.

B. Judicialist Imagery in Historiography

Carlo Ginzburg traced back the roots of the historian as judge metaphor at least two and one half millennia, to the ancient Greek historians' adaptation of the medical technique and term *historia* to judicial argumentation. Like physicians, historians sought the natural causes of particular cases and then communicated, as in a tribunal, "a vivid representation of characters and situations."⁷⁰ Nonetheless, until the mid eighteenth century, the collection of proofs was a task "historians" (enamored with rhetoric) left to "antiquarians" and "erudites." The Jesuit scholar Henri Griffet began to close that gap with his 1769 treatise comparing historians to judges who carefully and fairly examine proofs and witnesses.⁷¹ By the nineteenth century, Hegel's grand metaphysic included the core notion of history as the "world's court of justice" with an emphasis on (so Ginzburg argues) "the judge's sentence."⁷² As that century neared its close, John Acton (1895) pronounced the ability of evidence-based historiography to manage disputes by serving as "an accepted tribunal, and the same for all." Early in the next century Alphonse Aulard (1907) characterized his countryman Hippolyte Taine as projecting the attitude of a "superior, detached judge" in assessing the French Revolution.

⁷⁰ Carlo Ginzburg, "Checking the Evidence: The Judge and the Historian" 79-80. Where discussing rhetoric and proofs in history, Ginzburg drew extensively from Arnaldo Momigliano, in this case the latter's work *History between Medicine and Rhetoric*, trans. Riccardo Di Donato (Rome, 1987).

⁷¹ Henri Griffet, *Traité des différentes sortes de preuves qui servent à établir la vérité de l'histoire*, 2d ed. (Liège, 1770), cited in Ginzburg, "The Judge and the Historian" at p. 80.

⁷² Ginzburg noted how the English translation mostly drops the religious character of Hegel's phrasing, which arguably conveys the sense of "final judgment." *Ibid.*, p. 80, note 6.

Ginzburg suggested Aulard's comment, not at all meant as complimentary, reflected the beginnings of a cycle of decline or shift in judicialist historiography, a time when Aulard and other historians of varying stripes began more aggressively to interrogate, to pretend to "prosecute" even, the principle actors and events of major historical passages.⁷³ Succeeding (but never fully supplanting) that tendency in historiography was the widening of inquiry and analysis beyond the traditional political, diplomatic and military focus to include broader social and geo-environmental forces. By mid-century, multidisciplinary work by Bloch, et al., signaled a further turn away from pronouncing judgment and toward achieving "understanding,"⁷⁴ although as Novick detailed, during the first half of the century Carl Becker, Charles Beard, et al. had already launched vigorous relativist assaults on any notion of *objective* understanding.⁷⁵

After a brief stretch of what Novick termed "counterprogressive" "consensus" after World War II, with "defense of freedom" then of paramount concern among many historians (or at least many American historians),⁷⁶ the relativist wars flamed anew for a long stretch beginning in the early 1960s. This time the assault on positivistic objectivity garnered even more momentum and power at the confluence of two new discourse streams: (1) the rise of "social" and "cultural" histories of a decidedly confrontational

⁷³ While the torrent of works on the topic seems to have slowed in the last decade or so, the French Revolution for more than two centuries after its outbreak remained a key touchstone for ideologic and literary debate. See, e.g., Jacques Godechot, *Un Jury pour la Révolution* (Paris, 1974); Ferenc Feher, ed., *The French Revolution and the Birth of Modernity* (Los Angeles, 1990); Barton R. Friedman, *Fabricating History: English Writers on the French Revolution* (Princeton, 1988).

⁷⁴ Ginzburg in "The Judge and the Historian," p. 82, citing to Bloch, *The Historian's Craft*, p. 140.

⁷⁵ Novick, *That Nobel Dream*, Part II, "Objectivity Besieged," especially Chapter 6 "A Changed Climate."

⁷⁶ *Ibid.*, Chapter 11, "A Convergent Culture," especially pp. 332-33.

tenor;⁷⁷ and (2) an overarching post-foundational revolution in thought, including prominently the linguistic/literary turn in both structuralist and post-structuralist guises (Chapter 2, Sections 6-7, *infra*, provides greater detail of these factors). One significant aspect of the fallout experienced generally in academe took form more specifically in sustained uncomplimentary depictions of history and historians. The notion of historian as “neutral, disinterested judge” never seemed so distant.

Although intellectual works neither arise spontaneously nor stand alone in any given era, one might reasonably identify Thomas Kuhn’s head-turning *The Structure of Scientific Revolutions* (1962) as the start point for now fifty years of crisis in historiography.⁷⁸ That demi-siècle in turn is roughly divisible into four sub-periods – sixteen years before the first utterance of the term “postmodern” in an American Historical Association (AHA) presidential address (William J. Bouwsma, 1978), twelve more before a pronouncement in the *American Historical Review* (AHR) of a resulting epistemological crisis for historians (David Harlan, 1989), another eight before an AHA presidential call for a return of sorts, i.e., a balanced approach that would somehow acknowledge both “language’s insinuating codes” and history’s “irreducible positivistic

⁷⁷ But Novick also reminded us that some of the new confrontational historiography – most prominently the Marxist- inflected work – was expressly *positivistic* in nature. *Ibid.*, pp. 566-72 of Chapter 15: “The center does not hold.” In any case, any previous consensus was quickly evaporating.

⁷⁸ Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, 1970 [1962]). While Kuhn’s doctorate was in theoretical physics, as a junior fellow he began to explore terrain at the intersection of his formal scientific training and his lengthy avocation for the philosophy of science, showing that prior historians of science had offered differing assessments of science, in line with inherited epochal norms pressing differently on each. Kuhn’s eventual focus on the history of science proper thus highlighted the “sociology of the scientific community” (Preface, p. ix). Claiming no less than “a historiographic revolution in the study of science” (p. 3), Kuhn saw his “paradigm shift” approach and terminology lend force to critical reassessments in several knowledge spheres, including of course in history/historiography itself – if even the natural sciences progress more via anomaly and rupture than from accretion, how then can history assume the mantle of pure objectivity? These points receive further treatment in Chapter 2.

element” (Joyce Appleby, 1997),⁷⁹ and since then a long fifteen year stretch of fatigued yearning for some discernable mechanics of any such approach. Some might even see that most recent period as itself bifurcated, pre- and post-9/11, with a string of tragedies having ushered in an era where satire and irony no longer seem adequate and fully appropriate modes of discourse.

Thus Gabrielle Spiegel’s 2009 endorsement of Appleby’s call comes in the context of historians’ frustrated exhaustion (and/or boredom) with postmodernist commentary, especially the linguistic turn (“a growing sense of dissatisfaction with its overly systematic account of the operation of language in the domain of human endeavors of all kinds”). Still, it merits asking which of those lessons have continued salience for ongoing and new work: “[E]ven as we sense that the hold of poststructuralism and postmodernism on current historiography is declining . . . [w]hat, if any, shared epistemologies, methodologies, and questions might exist between the fundamental postulates of the linguistic turn and the new foci of historical work on the immediate horizon?”⁸⁰ If Appleby and Spiegel were at all representative, slowly emerging and gaining momentum for historians was (and is) an instinct to re-integrate some traditional approaches and tools, albeit in modified form, in some fashion one might reasonably label neo-positivism, or perhaps re-construction.

⁷⁹ Gabrielle Spiegel noted the Bouwsma, Harlan and Appleby comments in her own 2009 AHA presidential address, “The Task of the Historian,” *American Historical Review*, 114, p. 9.

⁸⁰ *Ibid.*, p. 12. Spiegel suggested several fresh areas for exploration arising just from “hyperglobalization” (inter alia, “. . . border, travel, creolization, transculturation, hybridity . . . transnational migrant circuits . . . exile, expatriation, post-coloniality, migrancy, globality and transnationality.” At least a few of these topics concern issues of *discontinuity* and thus continue to draw on a favored theme in postmodernism.

I believe they are indeed representative of a great many commentators in general history and specialty fields alike. Philosopher of history Frank Ankersmit,⁸¹ for example, though a scathing critic of old school positivism, declared “the time has come to find the *juste milieu* between the linguistic innocence of traditional historical theory and the hyperbole of some postmodernist theorists”⁸² In the same vein, Sol Cohen, while conceding the pervasive influence of Hayden White’s ubiquitously cited⁸³ works accelerating the “literary turn”⁸⁴ and challenging realist historiography, remained uneasy about overly privileging the literary above the referential:

I cannot leave the impression that I think history is simply a literary pastime, all genre plots, tropes and textual strategies. That offends my sense of the discipline I was trained to serve. *History may be a kind of writing, but it has always insisted on its truth claims.*⁸⁵

Indeed, in acknowledging the “two rhetorics” and “double discourse” notions of J.H.

Hexter and Michel de Certeau,⁸⁶ respectively, Cohen noted that written histories

⁸¹ Ankersmit distinguished between “historiographers” (those concerned with historical writing, i.e. the production of the text itself) and “philosophers of history” (those focusing on epistemological problems of “how the historian accounts for or represents the world”), listing himself as a member of the latter group. Frank Ankersmit, *Historical Representation* (Stanford, 2001), pp. 63-73. My own belief is that questions about the logic of representation have considerable overlap in their multiple levels of analysis, largely negating the utility of distinguishing between historiographer and philosopher.

⁸² *Ibid.*, p. 21.

⁸³ Interestingly, Spiegel’s failed to – or refused to – mention White in her 2009 AHA presidential address, despite her stated intention, in order to find ways to move past the implications of the linguistic turn, to “investigate how such a profound transformation in the nature and understanding of historical work, both in practice and in theory, could have taken place.” Spiegel (2009), p. 3. In Chapter 3 I further discuss such instances of selectivity – positive and negative – as argument-framing approaches in history.

⁸⁴ “An Essay in the Aid of Writing History: Fictions of Historiography,” p. 318 (emphasis added). Cohen’s helpful use of the phrase “literary turn” lent nuance to the more generally employed “linguistic turn” (traceable to Richard Rorty in 1965) to isolate the core Whitean argument that literary tropes are the principal vehicles for content in historical writing.

⁸⁵ *Ibid.*, p. 329.

necessarily include both narrative plot (superstructure) *and* empirical base (substructure). The latter “incorporates the factual and answers to the demand of the discipline’s codified research methodology and practices – evidence, documented facts, citations, quotations, references, and so forth – which attest to the truth, validity and credibility of the utterances and statements contained in the narrative superstructure.”⁸⁷

In light of such talk of “codified” practices, we might find some renewed role for the legal analogy, appropriately modified. Ginzburg, a founding specialist in the “microhistory” approach – which relies extensively on legal records⁸⁸ – had long wrestled with the proper assessment of the judicialist tradition, particularly the elements of rhetoric and proof central in law but also, upon reflection, critical to history, where held in balance. The hyper-relativist line stretching from Nietzsche through Barthes and White, lamented Ginzburg, disrupts that essential tension by reducing historiography to (mere) argumentative narrative,⁸⁹ thereby sponsoring “an idea of rhetoric that is not only foreign, but actually opposed, to proof.”⁹⁰

Ginzburg moved to rescue proof from the dustbin of historiography by revisiting Aristotle to argue that the famous line in *Poetics* (1451b) (“poetry is something more scientific and serious than history”), beloved by anti-positivists, is less helpful in

⁸⁶ J.H. Hexter, *The History Primer* (New York, 1971); Michel de Certeau, *The Writing of History*, trans. T. Conley (New York, 1988).

⁸⁷ Cohen, “An Essay in the Aid of Writing History,” p. 330.

⁸⁸ The only traces in official records of common persons throughout much of history are in birth and death recordings, unless haled into court for some legal matter. See Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth Century Miller*, trans. John and Anne C. Tedeschi (Baltimore: 1980), and Natalie Zemon Davis, *The Return of Martin Guerre* (Cambridge, 1983).

⁸⁹ Ginzburg, *History, Rhetoric, and Proof*, p. 38.

⁹⁰ *Ibid.*, p.2.

understanding the debate than are careful explanations in the philosopher's *Rhetoric*. With great erudition, Ginzburg there parsed Aristotle's differing categories of rhetoric and associated proofs, noting that "judiciary rhetoric" called for the "enthymeme" type of proof (which included "witnesses, tortures, contracts and the like"⁹¹): "Enthymemes are most suitable for forensic speakers, because the past, by reason of its obscurity, above all lends itself to the investigation of causes and to demonstrative proof." *Rhetoric* (1.9.41).

Thus, to Ginzburg, anti-positivists misunderstood what arguably is *the* seminal formula in historiography, still inescapably vital after 2,500 years: "in the past, proof was considered an integral part of rhetoric . . . this once obvious fact, now forgotten, implies an image of the working methods of historians, including our contemporaries, that is much *more realistic and complex* than the one fashionable today."⁹²

More realistic and complex because all of life requires judgment of both cognitive and moral issues, of concrete and abstract, the certain, the probable, the preferable. History is no exception. For Ginzburg, "[t]he limitation of relativism . . . is that it misses the distinction between judgment of fact and value judgment, suppressing, depending on the case, one or the other of the two terms."⁹³

Ginzburg's pointed critiques of what he considered runaway relativism predictably attracted some equally barbed retorts. Yet one of his most vigorous attackers seemed to signal his accord (however inadvertently) with Ginzburg's general principle of the need for discernment and the historian's ability to deliver it, once understanding the

⁹¹ Indicative of deep reliance on written evidence already in societies like ancient Athens and, regarding "tortures," a sobering clue that too little has changed. Ginzburg, *History, Rhetoric, and Proof*, p. 40.

⁹² *Ibid.*, p. 1, emphasis added.

⁹³ *Ibid.*, p. 20.

task and available tools. Indeed, in exploring how historians might arrive at the *juste milieu* he exhorted, Ankersmit reminded historians how they have long employed “transversal reason”⁹⁴ to navigate “different domains of intellectual activity and the domain-specific form of rationality obtaining there.” Next, equating transversal reason to “historical reason,” Ankersmit saw historians as a necessary “higher court of appeal” to protect against one-dimensional thinking, particularly in the present chaotic atmosphere, i.e., where “the postmodern world has disintegrated into an infinitely complex mosaic of *petits récits*.” Discernment in the form of transversal/historical reason had traditionally been the central element for any such court: “Most, if not all of what the historian does can be understood in those categories . . . for more than two hundred years it has been the historian’s main intellectual instrument in his effort to make sense of the past.”⁹⁵

Does all this discussion about the role for judgment (of both fact and values), transversal reason, historical reason and discernment within a higher court of appeals represent some sort of neo-judicialism? The evidence is mixed. For example, while one possible read of Ankersmit’s term *juste milieu* is the “just” or “fair” middle, thereby again implying the judiciary as classically imagined, his comments elsewhere (“the best historical representation is the most original one, the least conventional one, *the one that is least likely to be true* – and yet cannot be refuted on the basis of existing historical

⁹⁴ In his *Historical Representations*, Ankersmit borrowed the concept of transversal reason from German philosopher Wolfgang Iser, likely from Iser’s “Reason and transition” -- *Die eine Vernunft und die vielen Rationalitäten*, hrsg. von Karl-Otto Apel und Matthias Kettner, Frankfurt/Main: Suhrkamp, 1996, 139-165.

⁹⁵ *Ibid.*, pp. 7-11 (acknowledging Lyotard [at p. 8]) for the term *petits récits*) and p. 9, respectively.

evidence”⁹⁶) contradict the standard notion of court-like assessments. As for Ginzburg, despite wide neo-positivist ruminations, he remained ambiguous about a parallel full revival of the judicial analogy as Novick described it (page 16, *supra*). On the one hand, Ginzburg recognized some durable similarities: “Judges and historians share a concern for ascertaining facts . . . therefore, they share a concern for proof.”⁹⁷ The two professions seem to process proofs similarly: “. . . the tasks of *both the historian and the judge* imply the ability to demonstrate, according to *specific rules*, that x did y, where x can designate the main actor, albeit unnamed, of a historical event or of a legal act, and y designates any sort of action.”⁹⁸ In this respect Ginzburg’s “specific rules” remind us of Cohen’s “codified” methodologies and practices (see page 22, *supra*), i.e., procedures and language operative as much in history as in law.

Yet Ginzburg also identified what he believes are some notable distinctions: “[j]udges are supposed to pronounce sentences, historians are not; judges are concerned only with events leading to individual responsibilities, historians are not.”⁹⁹ The seeming summary absolutism of that statement is most likely a function of specific context. In fact, some eight years earlier Ginzburg wrote that while judges had “traditionally” dealt with individuals, leaving historians to assess the political and military activities of states, such bifurcation of duties did not hold in the case of historical biography.¹⁰⁰ A further distinction, Ginzburg claimed, is that despite the

⁹⁶ Ibid., p. 22, with some of the original italics removed here to lend greater focus on the remaining.

⁹⁷ Ginzburg, *History, Rhetoric and Proof*, pp. 49-50.

⁹⁸ Ginzburg, “The Judge and the Historian,” pp. 84-85.

⁹⁹ Ginzburg, *History, Rhetoric and Proof*, p.50.

aforementioned coaffinity for procedural rules and codes, “. . . sometimes cases a judge would dismiss as juridically nonexistent turn out to be fruitful to a historian’s eye.”¹⁰¹

Thus, although the judicialist model centering on a judge continues to deliver potent insights, Ginzburg and Ankersmit were not fully satisfied with it, and rightly so. However, I believe they and other historiographers have much wrestled with calibrating the legal analogy because all have focused on the wrong actor within the legal system – historian as judge instead of *historian as lawyer*, the latter my central stance herein.

Assuming I am correct (and I devote the next three chapters to the proposition), why has the historian as judge analogy obscured the more fruitful comparison I suggest? Three possible explanations move to the forefront.

First is the cognitive tendency to form meaning links between similar words and phrases.¹⁰² It is vital to history that its practitioners employ considerable discernment, i.e., good *judgment*, at every stage of the project – inquiry, data selection, organizing and rectifying the story for presentation to the intended audience. Thus, by the late Victorian period, eminent historian Mandell Creighton offered guidance for the profession then just emerging as an independent academic discipline: “The aim of the study of history should be the formation of a right judgment on the great issues of human affairs.”¹⁰³ But the descriptive term *judgment* does not subsume the ascriptive noun *judge* (as understood as a formal position in legal systems). Good judgment indeed is a fine phrase and

¹⁰⁰ Ginzburg, “The Judge and the Historian,” pp. 85, et seq.

¹⁰¹ *Ibid.*, p. 85.

¹⁰² For an overview of the “conceptual coherence” variety of transference, see P. Thagard and C.P. Shelley (2001) “Emotional Analogies and Analogical Inference” in D. Gentner, K. H. Holyoak and B. K. Kokinov, eds., *The Analogical Mind: Perspectives from Cognitive Science* (Cambridge, 2001), 335-362.

¹⁰³ Mandell Creighton, *Historical Lectures and Addresses* (London, 1903), p. 16.

aspiration, but countless laborers in fields far apart from history see discernment as a central aspect of their daily duties. That historians almost uniquely have conflated the two concepts perhaps betrays some hubris. More likely (or even relatedly), it suggests a self-protective reaction to long cycles of cynicism and relativism to considerable extent fingering historians as not much better than fusty fabulists, or/and as unwitting, undercritical propagandists for entrenched dominants.

It follows that a second explanation for the persistence of the judicial model concerns sensitivities in historians' self-perception. With insult and umbrage afield, the imagery of a judge restores much dignity and psychic balm. It is not terribly difficult to understand the appeal of the conventional view (however typecast) of the judge: highly trained, learned, discerning, commanding respect and deference, robed like timeless sages – wisdom and justice personified. The courthouse is festooned with symbols of knowledge, discretion and power. All rise upon entry of judge, who further is introduced orally and addressed in writing as “the Honorable . . .” and addressed inside the court as “Your Honor” at trial hearings, and even in back chambers. The chambers themselves are augustly lined with walls of thick tomes, a shelf portion often reserved for the classic allegorical statuette of Justice with her scales and blindfold. In the courtroom the elevated bench, dais seal, and flags of the various arms of the State confer gravity and official “final authority” on the matters considered (save appeal, a process where judges are even more visually prominent, the bench set higher, the air more formal yet). In the interim the gavel allows pause and interjection at any point desired. This exalted standing transcends the workplace; judges regularly give speeches and preside over formal affairs, and are accorded great respect on boards of nonprofit organizations such

as churches and other community entities. In contrast, lawyers, although most often paid considerably more than judges (or academics), receive far less “psychic income” in the form of social and intellectual status, reaping instead because of their zealous agency of clients’ interests the opprobrium that supposedly more impartial historians wish to avoid.

Finally, and in theoretical terms perhaps the most robust explanation, is the underexplored (at least in historiography) distinction in law between the Continental prosecutorial/inquisitorial system and the Anglo-American adversarial system. It strikes me that a good many of the original sponsors (Ginzburg, et al.) of the feasibility of “proof” in history – and several of the primary critics of positivism (Barthes, de Certeau, Foucault, Ankersmit) – are more familiar with (or have more in mind) the image of a judge in the Continental system than the Anglo-American system. In the former, judges generally both actively direct the inquiry and render decisions (or give extensive guidance to juries). In the latter, *lawyers have the primary role in pursuing truth claims*, with juries very often deciding the case with limited input from judges, who play almost no part in investigating the evidence. The precise distinctions between the two systems are of course more complex and nuanced, and thus in Chapter 3 I offer a more detailed discussion of theory and practice realities of the adversarial system in particular as it compares to the historian’s work.

For the present purposes, it is enough to suggest that in researching the universe of potential facts, selecting a relevant and convincing subset, then weaving and communicating their argument in narrative form, many if not most historians, much if not most of the time, behave more like advocates in the Anglo-American legal system than like judges in either that system or the Continental order.

C. Tentative Thesis and Research Questions

*Historiography . . . is a philosophical discourse that is unaware of itself.*¹⁰⁴

*Historians who draw a firm line between history and philosophy of history fail to recognize that every historical discourse contains within it a full-blown, if only implicit, philosophy of history*¹⁰⁵

I find at least two ways to read this pair of provocative statements by de Certeau and White, respectively. The first is to see a protest that the writing of history proceeds with authors (often overworked) semi-contently unconscious that every choice – era, region, sources, topic, etc. – uncritically reflects some basket of assumptions, value and beliefs about the nature of reality. A second, subtler, but more incitive interpretation is to conclude that even when the specialty philosophers we label historiographers believe they are weighing the factors most critical to assessing the history field, they themselves cannot avoid selectively shaping the range and nature of the resulting discourse. Hence the primary research question for the present thesis:

Analogizing the academic field of history to Anglo-American adversarial law practice, do historians behave more like lawyers (advocates) in civil litigation than like judges/arbiters (supposed neutrals) and, if so, what are some of the key implications for historiography and broader pedagogy in theory and practice?

It is my contention that historians' selectivity is not only unavoidable practically, it is of unavoidably paramount importance to the given historical work strategically, and that strategy considerations, while not always fully conscious, are more central to the exercise than commonly considered. And as discomfoting as the implications might be

¹⁰⁴ Michel de Certeau, *The Writing of History*, p.12

¹⁰⁵ Hayden White, "The Fictions of Factual Representation" in *Tropics of Discourse: Essays in Cultural Criticism* (Baltimore, 1978), pp. 126-127.

for history, historians and historiographers, what I believe is more problematic still is incomplete self-awareness on the matter.

Introducing his overview of the role of proof as a key element in rhetoric, Ginzburg modestly declared, “[i]t does not propose a rapprochement between theoreticians and historians, and probably will displease them both.”¹⁰⁶ I believe he in fact was wishing some gap closure but prudently expected continued controversy. I adopt that attitude in offering in turn what I hope is a helpful step toward integrating the best observations of succeeding and often overlapping waves of historiographic commentary. I herein attempt some fusion of neo-positivist, neo-relativist and neo-literary approaches, each element modified considerably from the original case, toward something akin to a neo-judicialist approach, allowing historians to make reasonable truth claims despite the fertile critiques of the past decades, in fact even because of those lessons.

I propose an analogy of *the historian as lawyer*, more precisely (for reasons later made clearer) as an Anglo-American style civil litigator. This comparison is closer to reality than prior judicialist analogies and therefore readily accommodates many of the other history analogies long in circulation (see again the list on pages 12-15, above).

But the comparison also carries some strongly negative baggage. Who has not been privy to legion lawyer jokes, of which, however deservedly so, many are rather sharp-edged? As I earlier alluded, attorneys enjoy nowhere near the social respect accorded to judges, helping to explain why historians warm better to the traditional judicialist analogy. Beyond that is the idea that lawyers as an everyday matter earn their

¹⁰⁶ Ginzburg, *History, Rhetoric and Proof*, p. 2.

living by representing specific clients with specific agendas, which goals historical accuracy might not further. Indeed, when the formal guidelines assign attorneys the ethical duty of “zealous advocacy”¹⁰⁷ of the client’s interests, where is any ultimate allegiance to “truth” or, even in historiographical terms, to von Ranke’s “as it really occurred”? These are all understandable reservations. Historians are reasonably hesitant at such a direct likening.

My intent is not to drag historians through the mire – just the opposite, i.e., to stimulate and perhaps even elevate thinking about what benefits a properly understood professional system allows in both law and history. But first some correctives. Lawyers have more internal and external checks on overly creative storytelling than one outside the practice might surmise. Moreover, lawyers are acutely cognizant of them, arguably more than historians generally are of their field dynamics. Thus, while law practice involves its own theoretical, ethical and practical issues as to the tension between what Cohen calls “the literary” and “the referential,”¹⁰⁸ the comparatively overt fashion of grappling with those tensions in law leads to greater field coherence (but of course nowhere near total) in legal practice and legal studies than what we see in history and

¹⁰⁷ “A lawyer . . . may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer should act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf.” Comment to Rule 1.3 of the American Bar Association Model Rules of Professional Conduct. The ABA Model rules emerged in part from the earlier (1908, until 1970) ABA Canons of Professional Ethics Rules, which included in Canon 15 the following remark: “The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.” The quotes above are found in Thomas D. Morgan and Ronald D. Rotunda, *1991 Selected Standards on Professional Responsibility* (Westbury, New York, 1991), at pages 12 and 442, respectively. However, as I show in Chapter 3, *infra*, the seeming free hand inherent in the norm of zealous advocacy in fact confronts significant checks.

¹⁰⁸ In his “An Essay in the Aid of Writing History,” p. 328, Cohen voices his reservations with surprising candor: “The grand narrative of realist historiography may no longer be credible, but I think I may have too uncritically privileged the literary over the referential and that makes me uncomfortable.”

historiography. As I expound in Chapters 3 and 4, historians who accept how closely in several key measures their practice realities parallel civil litigation likewise stand to prosper, partly by a greater confidence in the potential for integrative historiography (literary and referential) and, relatedly, partly through the liberating effect of shedding unnecessary and often untenable claims of utter or near certainty.

What are these key measures supposedly in common? At this point, I offer the following eight briefly stated sub-theses:

- 1) In history there is always an argument and an effort to persuade;*
- (2) While some important evidentiary gaps can exist, overall historians grapple with a considerable surplus of potential evidence;*
- (3) Limited resources force historians to be data selective;*
- (4) Historians nonetheless can objectively discern the merits of certain individual facts (or certain fact clusters) and relationships;*
- (5) Historians and lawyers direct their narratives largely to matters of causation;*
- (6) From a selective basket of (arguably) objective facts, and with skillful phraseology and paratext, the historian defines, shapes and directs the terms of rhetoric within a recognizable, orderly, plausible and compelling narrative.*
- (7) Notwithstanding all the above, external pressures – including the devices of formal and informal counteradvocacy and external judgment – help reinforce the historian’s presumed objectivity, fairness and trustworthiness; and*
- (8) The historian’s realistic standard of proof is cast in probabilities similar to those in jurisprudence – not “beyond a reasonable doubt” (criminal law) but rather “more likely than not” (civil law).*

Each proposition holds in civil law practice. The body of this dissertation shows how the literature about actual practice in history and law affirms the likeness.

On a little further reflection, the strength of the comparison should not be so surprising. Moving away temporarily from the particulars of the analogy for quotidian practice, let us contemplate some higher-level convergence in the two fields. I have already noted the wide use in historiography of legal or quasi-legal terms such as judge, jurist, judgment, verdict, or their close variations. Though often treated with flitting superficiality (as the given historiographer rapidly shifts to a more penetrating analysis of an entirely or mostly separate set of points), the very ubiquity of legal terminology underscores the critically intertwined nature of history and law.

For law – both procedural and substantive – utterly depends on history, and history is largely about law, its making, violation and effects. Events at the intersection of the two fields eventually resound in all other fields of academic inquiry and pedagogic practice. Three brief illustrations underscore the potential richness of the inquiry:

(a) Long recognition of the interrelationship in *general* histories – as Gibbon (1776) intoned, “[t]he laws of a nation form the most instructive portion of history.”¹⁰⁹

(b) The degree to which law permeates *specialty* histories – strongly so, for example, in the history of education, with *Brown v. the Board of Education of Topeka* (1954) the most famous of a string of weighty cases (the *Brown* progeny also demonstrating bidirectionality of approach, i.e., where education history experts helped create the legal briefs in cases turning largely on history).

(c) The susceptibility of that law/history interrelationship to critical assessment – “The history of black people is not simply a history of extralegal violence – it is a history of legal violence, of violence sanctioned by the law.”¹¹⁰

¹⁰⁹ Edward Gibbon, *The Decline and Fall of the Roman Empire* (London, 1987 [1776]), Chapter 44, p. 250.

I expect my analysis to confirm that legal scholars (including both traditional and critical legal historians), as suggested directly above, have in recent decades adapted historiographic concepts not only to describe law practice but also to critique important aspects of the history/law overlap. But even they – along with history generalists and specialists – have underrecognized and thus undertreated the obverse, i.e., *the legal analogy as applied to history*. I argue that now the exchange comes full circle – History can and therefore should contemplate salient aspects of Law. I believe the initial mining of that comparison within the “historian as judge” analogy misses the investigatory mother lode, for the richest veins of the law metaphor run considerably deeper in the “historian as lawyer” seam, but with no thorough exploration of the terrain to date (known to me at least).

Now, after a half-century of extracting insights from Kuhn, et al.’s great instigative challenges to positivism in the whole academy, actors in history (and other knowledge fields) remain suspended between continued denial and grudging acceptance, in either case increasingly impatient and annoyed with the seeming impasse. As for any durable synthesis, my hypothesis is an argument long possible within the tradition of conceptual analogy, but one that has nonetheless gone unrecognized. Why, then, has it remained “hidden in plain sight”? Again, I believe the explanation is that historians traditionally viewed their proper role as “a neutral, or disinterested, judge . . . it must never *degenerate* into that of an *advocate*”¹¹¹ When the judicialist model withered under myriad anti-objectivist assaults through the twentieth century, other possible

¹¹⁰ Leon L. Litwack, “Trouble in Mind: The Bicentennial and the Afro-American Experience,” *The Journal of American History*, 74 (September, 1987), pp.315-337.

¹¹¹ Novick, *That Noble Dream*, p. 2 (italics added).

variants within the larger legal analogy faded with it, never having enjoyed a constituency.

My reinterpretation of the legal analogy is fairly aspirational, raising for me some degree of reservation about optics. On the one hand, modesty of assertion and approach is always welcome. On the other, scholars consistently exhort the stretching of knowledge boundaries. “To think up new and better methods of arguing in any field is to make a major advance, not just in logic, but in the substantive field itself.”¹¹²

That goal is consistent with university guidelines – a dissertation at UCLA aims to “constitute a distinct contribution to knowledge in the principal field of study.”¹¹³ Because history and (less apparent) epistemology are fundamental to so many courses at all education levels, and particularly at the university level, this writing engages a major pedagogical concern and thus just as appropriately issues from the School of Education as it might otherwise arise in the School of Law or Department of History. Moreover, the analysis throughout directly and indirectly examines certain implied accusations against subspecialists in education history – chiefly, that historians there are particularly “presentist” and “instrumentalist” – to discern whether such charges are in fact justified or, conversely, whether all subspecialists (and generalists) more or less equally follow the “historian as lawyer” analogy. The potential implications for all pedagogy are considerable.

¹¹² Stephen Toulmin, *The Uses of Argument* (Cambridge, 1958), p. 257.

¹¹³ *Standards and Procedures for Graduate School at UCLA*, p.13.

D. Research Approach/Method/Methodology

What I attempt herein is an extension of existing theory, or otherwise put, an extension of certain analogies to help think about existing theory. It follows that the means of my inquiry fall in the middle territory between deduction and induction. Indeed, I have always considered claimed distinctions between the deductive and inductive approaches somewhat illusory. For example, even a supposedly inductivist historian necessarily narrows the choice of era, region and level of analysis, thus already revealing a degree of deductivism in the search for provocative data and ideas. In my case, an experiential grid of (a) several academic programs where historicizing is critical, and (b) more than a decade of law training and practice, helped inform a “deduction” of sorts about what patterns I might find should I pursue, as here, a long fascination with historiography. And while some of my initial conceptions indeed have been on target, altogether new insights and departures sprang from further intensive reading, a process or approach one might call “rolling inductivism” after the initial pump-priming deductivist push.

As for evidence, one is ever mindful, after the linguistic turn, of the potential rich yield from the mining of language itself. Thoroughly steeping contemporary academe is the understanding, consistent with Foucault, et al., that within critical discourse language particularities (1) are key tools (or weapons), (2) comprise a key end goal, and thus (3) are key pieces of evidence with which one can trace the dynamics of influence and preponderance.

Applied here, I examine a large number of historiographical pronouncements, some by literary figures or multidisciplinary academics, but the great majority by

professional historians. Those quotations – *historians’ language, not mine* – are the central corpus of evidence. In the present case, such utterances are primary source material, analyzed not for what they state about a particular historical datum or event, but for what clues they directly or indirectly provide about the analogy I suggest. I do not argue the authors’ underlying historical claims; my task is to synthesize the historiographical musings.

That stated, I must of course acknowledge no little selectivity in the sampling, consistent with the quasi-deductivist/rolling-inductivist approach of the thesis, but also in line with one of the observations central to the thesis, i.e., that considerable selectivity is unavoidable in most analytic endeavors, history writing among them. With that bias understood, and because of the original source nature of the language itself, I have chosen not to paraphrase commentators as extensively as one might in other forms of analysis. Instead, thinkers’ direct quotations (with occasional ellipses so as to not overburden the reader, preserving as much as possible the contextual gist) appear, as appropriate, throughout the literature review, thesis articulation and ensuing discussion sections. Although, again, no claim of randomness arises, one benefit of inspecting numerous language cases is “concept saturation” as related to the notion of “purposive” or “theoretical” sampling. The posited analogy does not stand on merely a few thinly scattered statements by historiographers.

Indeed, the research corpus here includes a dense and abiding set of commentary, at least as to Euro-American historiography, consistent with a history-law analogy. As I have previously noted, one of the standard interpretations is in the judicialist guise: historian as judge. I thus explore that read as a preface to my own suggested analogy –

historian as civil lawyer – obliquely hinted in much literature but somehow never (to my knowledge) previously fleshed out directly and comprehensively. A more contemporary understanding of the historian’s actual approach to forging a persuasive fact-based narrative notes the similarity to the lawyer’s task; in each field, language mining (of the sort I pursue here) is a normal activity, a precursor to the “disciplined” selection, contemplation and utilization of evidence.

In that vein, I trace how the presumption of “historical objectivity” retained remarkable equilibrium, managing to weather centuries of sometimes caustic demurrals, until the tenuous *modus vivendi* seemingly fragmented altogether under the severe critiques battering all knowledge fields over the last five or six decades. I show how History did not escape, in fact has been a favorite target of, the several “isms” (postcolonialism, feminism, multiculturalism, and the like) fueling discourse in the still-ongoing postfoundational, deconstructed, “postmodern condition.” The history discipline, quite naturally, has responded with a series of re-constructive efforts, prominent among them a revival of sorts of judicialist concepts, imagery and language.

Again, the combination of my deep familiarity with how lawyers craft narratives from the given case “history” and my very broad exposure to historicizing in academe allows a multidisciplinary and multiperspectival assessment of that renewed analogy, and is (instinctively, or at least arguably) helpful to any attempted composite approach. That my formal training is in political theory and economics, law, management, and education (with coursework in historiography, though not in a history program *per se*) should not preclude an attempt to posit connexial ideas regarding history, which after all co-occupies practically every other field. In this respect a noteworthy precedent is Kuhn,

who trained in theoretical physics before reorienting focus to the intersection of history and science.

In any case, my multidisciplinary background should have utility in helping to mitigate some of the hazards inherent in a monoperspectival approach, although of course I do not claim the utter absence of bias (indeed, one of my premises is that no analyst can).

The work here, then, is an attempted *synthesis*, a rethinking and recalibration of approaches and materials originally aimed elsewhere. Once more, I am unaware of any prior academic analysis employing my proposed lens set – while law depends vitally on history, and while recent studies in law employ history for a critical reassessment of certain legal principles and patterns, neither field has produced a thorough treatment of civil law practice as a close theoretical and practical analogy for the historian’s craft. Do historians make their arguments in strikingly similar fashion as do litigators in American-style adversarial law practice, and is their work comparatively reliable in terms of achieving truth claims of reasonable credibility and thus utility? I posit that the two pursuits in fact display tremendous similarity and crossover in approach and technique in several measures.

Because the analytical prism is unique, my comparison of the most relevant literature in law and history is also prototypal, thus constituting original research. Accordingly, I examine enough language to saturate the principal concepts.

At this point some caveats are due:

(1) My hypothesis concerns the way many or most historians act much or most of the time. I do not ask readers to condemn such patterns – they are largely unavoidable and thus inevitable, and may even deliver some real benefits. First, I mean mostly to identify and describe such parallels, to offer an additional lens through which observers might garner a better understanding of what many historians actually do, especially in conjunction with other helpful lenses already in circulation. In that vein, I believe my hypothesis does no violence to, but is consistent with and/or can accommodate prominent theorists such as Foucault, White, de Certeau, Ginzburg, Ankersmit, and several others. And a few specific aspects I do consider normative, prominently including that historians should (as some do) recognize and adopt as potentially beneficial the way lawyers internally go through “devil’s advocate” exercises as a critical aspect of argument preparation. It strikes me that to the extent many historians much of the time behave as I postulate, that very frequency suggests melioristic utility in the James/Peirce/Dewey/Rorty pragmatist sense.¹¹⁴

(2) Any analogy stretched far enough will fray and eventually snap, for it is never the *res* itself. So we will witness here, but – following Foucault on this point – it is also in the departures or disjunctions that important observations can arise.¹¹⁵ First, in the present hypothesized analogy I believe the exceptions are few enough to suggest

¹¹⁴ While utility has always been key in pragmatism, its connection to truth remains a topic of some debate. See, e.g., Bruce N. Waller, “The Sad Truth: Optimism, Pessimism and Pragmatism,” *Ratio*, 16:2 (June 2003): 189-197; see also Nicolas Rescher and Thomas C. Vinci, “On the Truth-relevancy of the Pragmatic Utility of Beliefs,” *The Review of Metaphysics*, 28:3 (Mar. 1975).

¹¹⁵ Foucault spoke to “the efficacy of dispersed and discontinuous offenses.” Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. Colin Gordon (New York, 1980), p. 82. As Hayden White explains, Foucault “is interested . . . in the ‘ruptures,’ ‘discontinuities,’ and ‘disjunctions’ in the history of consciousness, that is to say, in the differences between the various epochs in the history of consciousness, rather than the similarities.” Hayden White, “Foucault Decoded: Notes from the Underground” in *Tropics of Discourse: Essays in Cultural Criticism* (Baltimore, 1978), p. 234.

robustness in the rule. The few main areas of departure illustrate points of special concern in history, the other humanities and social sciences,¹¹⁶ and in fact all of education. The most important of such disjunctions, as I presently understand it, is the absence in teaching settings of as many layers of systemic checks as one predictably finds in civil litigation (and as covered in Chapter 3, Section 7, *infra*). Insufficient awareness and/or concern about that relative weakness gives rise to potential accountability problems, particularly acute in the classroom, where disequilibria of power, knowledge and intentionality result in conditions where historical truth claims are subject to no real challenge (I discuss in Chapter 4 the wide perception, however accurate, of such patterns). Some of these dynamics in our educational institutions cannot realistically be avoided, but then of course some teachers are wiser and fairer than others, and the level of peril fluctuates with the degree of issue cognizance and extent of intellectual generosity and humility employed.

E. Dissertation Organization and Roadmap

Because the dissertation proposes a novel conceptual lens through which to evaluate historical writing and prior theory, the literature review and research are much intertwined, with the merged analysis woven throughout the first three chapters and to some extent in all five.

Chapter 1, as seen above, introduced how navigational heuristics deeply engage in the humanities and social sciences and how analogy is a common, even central, heuristic in those fields, notably in history and historiography. I then proposed a central

¹¹⁶ Whether history more properly belongs to the humanities or to the social sciences is a matter of some continued debate, a question I visit at least in passing in Chapter 2.

hypothesis as a distinct and heretofore untreated (at the very least undertreated) variation of an existing prominent analogy cluster, essentially that historians' behavior is more analogous to that of adversarial lawyers than to that of (ostensibly) neutral judges. I provided an overview of the research approach and key questions, and now offer the notes just below laying out the roadmap for the dissertation remainder.

Chapter 2 covers the long ellipse of judicialist historiography. It picks up the literature review commenced in Chapter 1 to trace the rise and fall of objectivist positivism in historiography. I start with the Anglo-Continental positivist tradition, then how "imperfect transAtlanticism" resulted in Euro-American scientism. I explore the often-overlooked cycle of interwar relativism and how it subordinated to a mid-century temporary *détente* in the context of the Cold War and late modernist empiricism. Then I survey how the overlapping 1960-70s "turns" (social, linguistic, et al.) in all their corrective impulse and other agendizing, touched on and challenged all epistemology, effectively dissolving much if not all common ground in historiography. In that context, I note how some experimentation in history writing seemed to reflect the collective instinct to grapple with the less than crystalline definitions (as to, e.g., structuralism/poststructuralism, literary/linguistic theory, modernism/postmodernism, deconstructivism), and other implications and possibilities of the decentered condition. Finally, and echoing some points first raised in Chapter 1, is a recounting of ensuing aspirations and attempts toward a new (or renewed) viable synthesis in historiography via a (re)emphasis on objective fact testing.

Chapter 3 acknowledges the critical context of the prior literature for the fuller exposition of the working theory, i.e., the historian-lawyer analogy and its salient terms, including the distinction in law between the Continental prosecutorial/inquisitorial system and the Anglo-American adversarial system. I continue to employ extensive *verbatim* commentary by historians, augmenting those sources with reference to practice guides and other commentary, all further to illustrate the deep parallels in the logic and technique of historical and legal interpretive argumentation, such consistencies expressed in at least eight measures, i.e., the sub-theses previously listed (page 32, *supra*). Among the notes of potential optimism in the model is the recognition of structural pressures in both fields that, while ostensibly highlighting differences between parties, actually promote zones of greater factual accuracy and fairness of presentation.

Chapter 4 begins with a brief recap of the findings, i.e., the expected preliminary confirmation of the central proposition and supporting subcomponents. Next is the identification and discussion of a number of potential reservations about the model, with a finding that the thesis overall is reasonably capable of accommodating the tensions inherent in such comparisons, perhaps better so than any prior historiographical analogy.

Chapter 5 briefly reviews how the thesis at hand co-exists well with and incorporates much prior work, and is also consistent with much observed behavior, thereby pointing to a durable synthesis in historiography. I then suggest some broader implications (and dangers) for pedagogy by generalizing the observations about historians to all academicians employing history as some non-trivial portion of course offerings.

F. Personal Notes, Background, Expertise

Professor Louis R. Gottschalk in a different era remarked, “History is life; he who has not lived, or has lived only enough to write a doctoral dissertation, is too inexperienced with life to write good history.”¹¹⁷ In our time, a fair percentage of graduate students bring into their studies insights gained from significant other world experiences, including prior advanced training and experience, which combination enables some cross-pollination of thought in germinating and articulating theses.

In my case, I have formal training (JD) and a decade of experience in law, complementing other training in international policy studies (BA), political science (MA), entrepreneurship (MBA) and now doctoral work in Education. In all, I have completed coursework in basic studies at a community college, in upper division studies at a small private college, in a graduate academic program at a major public university, in a graduate professional program in a major public university, in a graduate professional program at a major overseas quasi-public university, and now in a graduate professional/academic program at a major university. In each of these settings professors buttressed their arguments, or attempted to, by citing numerous examples drawn from history, in some cases more uncritically than others.

While completing lower division general education I received the college award for best History student. My upper division coursework in International Policy Studies and then initial graduate work (MA) in Political Science drew extensively on history, and to some extent law, as key elements for the theorizing in question. I first began to notice

¹¹⁷ For an overview of the author’s historiography, see Louis R. Gottschalk, *Understanding History: A Primer of Historical Method* (New York, 1950).

some aspects of the nexus (advocacy-academe) examined herein while a law student (one of my more interesting courses was on Education Law).

In my ten years of formal law practice (mostly civil litigation) an everyday task was to weave convincing legal-factual narratives, i.e., to fit patterns of selective facts to the appropriate body of laws. A constant reality is that the narrative need be *persuasive*, enough so to overcome the judge/jury's healthy skepticism as heightened by vigorous contestation by highly motivated opposing counsel. Mostly represented plaintiff side lawsuits against institutions or corporations, I saw the differing levels of resources the parties bring to bear on the issue litigated. That knowledge has increased my interest in speaking to the matter of disequilibria in any debate setting, including academic discourse. I also trained as a professional neutral (arbitration and mediation), a pursuit in which it was necessary to learn how to switch perceptual hats readily; I thus better came to understand some of the difficulties in attempting neutrality in a judgment situation.

Ten years ago I completed an MBA course at the University of Oxford. I selected Oxford for three main reasons. First, it is the oldest English language university in the world and I reveled in the history oozing from every wall and niche. Second, from a critical perspective, one could consider Oxford traditionally a main driver in Eurocentric and class oriented thought and thus a superb setting for attempts to understand the cumulative critiques in those topic areas. Third, my MBA focus was on Social Entrepreneurship, a subfield that prominently includes education, and one that in turn, like education, deeply depends on heuristic measures (branding, et al.) for decision-making under conditions of uncertainty.

And finally I am completing doctoral work in Education, with a strong emphasis on Social Studies. My assigned advisor turned out to be among that subset of historians particularly intrigued by historiography, including the application (and perils) of such insights as the linguistic turn in history and all other narratives, and now the difficulty of preserving – or reviving – some role for history and some means in history for making substantial and credible fact claims. It was Prof. Cohen’s comment in a History of Education seminar (after I had taken an earlier seminar with him in Historiography) that keened me to pursue what then was still just a cluster of vaguely emerging hypotheses. He was speaking of John Dewey, that giant of education and social commentary. “Nonetheless” (and here I paraphrase from memory), “for all his brilliance . . . he had no theory of conflict,” a germinal statement for me in that, as mentioned above, I had trained and practiced professionally both as advocate and arbiter. I began to muse much more purposefully whether and how most academic pieces – especially histories and subjects depending on a (certain) reading of history – for all their tenor and gloss of reasoned neutrality, in fact might also be characterized as exercises in strategic advocacy, much akin to arguments in Anglo-American style adversarial law practice. If so, the observations should be generalizable to most if not all history genres, i.e., beyond “standard” treatments, to include biography, autobiography, photojournalist histories and documentary film. In any case, a chief concern for me is to distinguish and contemplate the adequacy of formal and informal systemic “checks” – as exist in law practice – against excessive agendizing in historical expression, whether in publications or (especially) in the classroom. A related concern is epistemological, in the sense that as a consumer and sometimes writer of history I also yearn for the durable viability of truth

claims. The instant dissertation topic of “historian as lawyer” emerges from those interrelated issues and is aimed at suggesting some synthesis in historiographical discourse and practice.

Before further proceeding, and because a few of my comments, if taken in isolation, may perturb some field actors, I wish to profess my tremendous admiration and respect for History as both vocation and avocation – few realms of inquiry have enjoyed as much concentrated brilliance over long centuries, even millennia. I am a constant consumer of History in every essay and in practically every significant life judgment, certainly as a social and political being and citizen, I am concerned that the past be recorded accurately both as an aesthetic principle and that instructive, illuminating lessons may emerge for application in present and future acts. And in a different aesthetic sense, I simply enjoy a history well and persuasively wrought, its recounting deftly struck: “First, history, conscientious, well written, causes delight, and no honest delight should be refused to men.”¹¹⁸

In sum, it is exactly because I so esteem history that I strive to better understand its workings – theoretical, practical, political, ideological, instructional, pleasurable – and all the reasons above, I would be hard pressed to find an equally stimulating and rewarding topic so in tune with my own lived expertise and intellectual interests.

¹¹⁸ Jean Jules Jusserand, et al., *The Writing of History* (New York, 1926), p. 28. Dexter Perkins, in his 1956 *AHA Presidential Address*, struck much the same tone: “History is a kind of introduction to more interesting people than we can possibly meet in our restricted lives; let us not neglect the opportunity.” And not just Carlyle’s “great men,” although they certainly are compelling, but also the characters peopling Davis’s and Ginzburg’s microhistories.

CHAPTER 2 *The Long Ellipse of Judicialist Historiography*

This chapter continues the literature survey commenced as a supporting element in Chapter 1. It traces the emergence and logic of judicialist historiography within its broader and deeper context of Euro-American¹¹⁹ historiography over several centuries, with more detailed attention to movements, divergences and tendencies in the era of “professional” history writing. The focus then further narrows as to how the erosion of positivism after a lengthy reign has forced thinkers in every knowledge field, prominently including History, for some decades now to struggle with the implications. The resulting protracted theoretical and practical tension between the two polar extremes of positivism and relativism has in turn fostered attempts to find gap-closing approaches, i.e., some plausible and productive set of accommodations that could transcend either reactionary denial of, or broken capitulation to, the new challenges.

One must resist the temptation to view the movements toward and away from either pole as segments of a smooth and consistent arc. The evidence suggests otherwise, or at least as prominent commentators have compiled and recorded it, as summarized in the pages to follow. Given so much discussion in recent decades as to the fall of totalizing certainties, it can be surprising to learn just how persistently some key reservations about history writing had previously been expressed. In contrast, scientific history, at least in its more adamant guises, predominated for a relatively brief stretch.

¹¹⁹ The instant review is overtly and, I believe, necessarily Euro-Ameri-centric. Historiographical treatments emanating elsewhere and in languages accessible to this researcher are relatively rare and in pre-twentieth century cases only occasionally reflect a Euro-American type pretense to scientific objectivity, or the deep questioning thereof. A few of the references in this Chapter, *infra*, illustrate some approach distinctions.

The path of Western historiography has been one of brambled discontinuity. But amidst the general tangle is a discernable subtendency (by no means universal) to denote historiography in judicialist tones, either in the affirmation of some variant of the earlier mentioned “Objectivist’s Creed” (“[t]he objective historian’s role is that of a *neutral, or disinterested, judge . . .*”) or in the decided rejection of any such impartiality, for even in the latter extreme, as we shall see, is the continued elevation, however unconscious or inadvertent, of the historian’s judge-like discernment (“judgment”) and, especially as to moral questions, the historian’s judge-like sentencing power.

My subdivision of the overview here requires the same set of familiar but unavoidable artificialities with which historians grapple, i.e., the delineations of chronology, geography, subject matter and levels of analysis. While noting the understanding that some thinkers and works bridge neat categories, I have organized Chapter 2 along the following grid:

- (1) *Ancien régime: objectivity and reason in the Anglo-Continental tradition*
- (2) *Empire, imperfect transAtlanticism, and American Exceptionalism:*
Euro-American judicialist scientism
- (3) *The forgotten cycle: New-century activist relativism*
- (4) *Underexamined retrenchment in the Age of Ideology*
- (5) *The fall of the House of (purely objective and positivist) Science*
- (6) *The social-personal turn: Corrective, standpoint, agenda, impasse*
- (7) *Turns linguistic and literary*
- (8) *The neo-judicialist synthesis: Attempted reconciliation*

I discuss in sequence (with occasional backtracking) some of the vital aspects of each of the above, then supply some brief comments toward Chapter 3 and the thesis proper.

(1) Ancien régime: objectivity and reason in the Anglo-Continental tradition

To demonstrate just how long the debate has run as to the notion of historical truth objectively recounted, British professor (history of ideas) Beverley Southgate proposed a multimillennial view of historiography, suggesting a straight-line tracing of the concept back to the ancients.¹²⁰ He recounted how Thucydides (fifth century BC) patterned his own approach on the Hippocratic school of medical inquiry – careful observation and recordation were the preconditions to the ability to elicit patterns in the course of diseases and responses to treatments, allowing informed future prescriptions. Thus, something akin to “scientific method” could be transferred from the Hippocratic writers to the study of history.¹²¹ Here we see the roots of history as science, with “historical truth” yielding universal laws of human behavior as a natural product of careful evaluation of the evidence.¹²² Thereafter Aristotle (384-322 BC), reflecting on Homer’s much earlier (eighth century BC) *Iliad*, a poetic supposition of the Trojan War, distinguished *history* (which relates “what has been”) from *poetry* (which relates “what might be”): “Poetry is concerned about *general* truth, history about *particular*”¹²³

¹²⁰ Beverley Southgate, *History: What and Why?* (London, 2001).

¹²¹ Albeit with all the reservations in the form of deficient evidence now better understood to hamper each field, where reliance on others’ reports or recordation threatens the inquiry with distortions flowing from the witnesses’ incomplete, imperfect or otherwise biased memories, a point raised anew in Chapter 3, *infra*.

¹²² Southgate, *History: What and Why?*, pp. 19-21.

Lucian of Samosata in the second century AD in turn seized that conceptual baton, opining that history is a question of “laying out the matter as it is. . . a true account of what happened”¹²⁴ – the historian should “bring a mind like a mirror, clear, gleaming-bright, accurately centred, displaying the shape of things just as he receives them, free from distortion, false colouring, and mis-representation.”

But Southgate too casually intimated (or by elision encouraged the reader to accept) that the ancients’ belief in the attainability of historical truth, and in a neat division between history and poetry, held steady through a millennium and more, such that one may with little dissonance fast-forward to pick up the trail in the Renaissance and earlier modern period, now with special reference to English historians. One reasonably muses whether the author’s position as a U.K. academic lent to the notable anglo-centric selectivity of his survey. In any case, Southgate persuasively argued that sixteenth and early seventeenth century English historians Roger Ascham (“wryte nothing false”), Thomas Blundevill (“tell things as they were done, without either augmenting or diminishing them, or swarving one jote from the truth”) and William Camden (“the love of Truth”) perpetuated the idea of history as simply a true record of the past, discernable to those willing to devote sufficient energy.¹²⁵

In this vein, Francis Bacon (1561-1626, also English), that early champion of the inductive empiricist approach in science, deemed poetry no more than “feigned history”

¹²³ Ibid., pp. 15-16. And thus, according to Southgate, Aristotle believed poetry the superior pursuit, given its focus on universal truths. Nonetheless, Ginzburg (1999), as shown in Chapter 1 *supra*, energetically contested the notion that Aristotle meant to deprecate History.

¹²⁴ Thereby predating Ranke’s famous dictum by some 1,700 years. Lucian quoted in D.R. Kelley, ed., *Versions of History* (London, 1991), pp. 66-67, cited anew in Southgate, *History: What & Why?*, pp. 13-14.

¹²⁵ Ibid., p. 21. Southgate did acknowledge the era leap: “So there are gaps, and in particular historical writing of the mediaeval period is grievously under-represented; one cannot do it all.” Ibid., p. 12.

and thus guilty of exaggeration – in order to reinforce the moral order, it portrays “acts and events more heroical” than actually having occurred.¹²⁶ While the historian’s world emerges much more mundane, it is a virtue that historians, rather than give leash to imagination in recording past events, employ “reason” which “doth buckle and bow the mind unto the nature of things.”¹²⁷

Bacon left little doubt as to the historian’s ability and thus duty to render objective reports: “It is the true office of history to represent the events themselves, together with the counsels, and to leave the observations and conclusions thereupon to the liberty and faculty of every man’s judgment.”¹²⁸ It is unclear from these last two quotes whether and how Bacon distinguished the historian’s “reason” and “counsel” from the “judgment” reserved for others. But each of these terms of course commonly appears in Law – here it is critical to note that Bacon was, *inter alia*, a barrister – such that Bacon’s language foreshadows by well over a century Henri Griffet’s 1769 work that Carlo Ginzburg identified as a landmark in European judicialist imagery (see again the discussion in Chapter 1, *supra*).¹²⁹

Italian historian Giambattista Vico (1668-1744), also trained in Law, equated the dignity of history with that of the other sciences via a slightly different route, but one still compatible with Bacon. To Vico, scientific and mathematical knowledge was only

¹²⁶ Ibid., p. 17.

¹²⁷ Ibid., p. 18.

¹²⁸ From “Civil History” in Book II of *The Two Books of Francis Bacon, of the Proficiency and Advancement of Learning, Divine and Human* (London, 1808), pp. 159-160.

¹²⁹ Ginzburg’s references tend more to the Continental, a factor I identified in Chapter 1, *supra* (and discuss again in Chapter 3, *infra*), as perhaps lending to his focus on the judge rather than lawyer as central in and to the judicialist analogy.

“certain” because the human mind had forged the concepts and symbols there employed. We therefore can just as readily and thoroughly comprehend history, for human-constructed symbols and concepts such as words, rituals, traditions and myths are all potential evidence susceptible to critical examination. Vico conceptualized human history as cyclical – an “age of poetry” followed by an “age of heroes” and then an “age of humans,” the cycle potentially interrupted and/or repeated within an overarching design. As for the reliability of historical evidence, the historian should not favor the more romantic portions of the given cycle; statements about a prior poetic “golden age” are particularly suspicious and ripe for discerning interrogation.

Some decades later (1769) yet another 17th century Englishman, Walter Charleton, in extending natural philosophy to history, employed judicialist diction in distinguishing history (rooted in reason and “Judgment”) from poetry (springing from imagination and “Phansie”). For Charleton, where poets engage, “Phansie ought to have the upper hand, because all Poems of what sort soever, please chiefly by novelty.” But with history, “*Judgment* ought to have the Chair; because the virtue of History consisteth in Method, Truth, and Election of things worthy Narration; nor is there need of more Phansie, than what may serve to adorn the stile with elegant Language.”¹³⁰ The imaginative, while to some extent necessary and thus regular in history writing (and in law practice), in proper measure should in no way drive the narrative, but rather only lend seasoning and color to it.

And so “the humanities” further faded in historiography, ever more yielding to

¹³⁰ As quoted in Southgate, p. 18 (italics apparently in original).

dicta to uncover and scrutinize data “with an observant but empty mind.”¹³¹ This distinct arc eventually etched itself as deeply on the Continent as in Britain. Indeed, the extent to which an approach dominates a particular region and era is sometimes revealed in contemporary complaints. As would grumble French essayist, philosopher and historian of theater, mathematics and astronomy, Bernard de Fontenelle (1657-1757), whose extraordinary span of years and interests bridged the worlds of the literary *beaux esprits* and Enlightenment *philosophes*, “[t]o amass in head fact upon fact . . . that is what is called doing history . . . I had as soon a man acquired exactly the history of all the clocks of Paris.”¹³² To de Fontenelle, trained in both Law and Letters, wit and erudition were key humanizing and thus bridge-building elements in critical persuasion, all the more with difficult topics, an approach winning him great favor with Voltaire and other leading lights. Southgate suggested, however, that de Fontenelle is an exception proving the general rule – it was the purer Baconian view of inductive reasoning that prevailed to dominate history practice for centuries, in line with the increasing tendency of historians to cast their *métier* in the mold of “scientism,” with significant traces still extant until deep into the twentieth century.

How thoroughly the old hesitations had been repudiated. “For so great is the obscurity and variety of humane affairs, that nothing can be clearly known, as is truly said by our Academicks, the least insolent of all the Philosophers.” So had mused Erasmus, the great humanist skeptic, in 1511.¹³³ But on the heels of Bacon later in

¹³¹ Ibid.

¹³² As quoted Southgate, p. 19 and note 16, in turn citing to I. Kramnick, ed., *Lord Bolingbroke: Historical Writings*, Chicago, Chicago University Press, 1972, p. xxvi.

Erasmus's century came the extraordinary discoveries by Newton and others during the "scientific revolution" of the next, and, then in the eighteenth the full Enlightenment, with its faith in human progress, largely a function of extending the new scientific principles and methods to the study of human affairs. If the perplexities of the physical universe could be systematically comprehended, why not seek, by extension, those truths and laws governing society? To their detractors then (and now), the scientific "academiks" had metamorphosed from the least insolent philosophers to the most.

"All things must be examined, debated, investigated, without exception and without regard for anyone's feelings." Denis Diderot's challenge succinctly described the methods and goals of the *Encyclopédie* he edited,¹³⁴ and which survived no little opposition to provide a summary of Enlightenment ideas (and ideals, in many respects), attempting to address in its more than 70,000 articles all aspects of human knowledge.¹³⁵ Diderot schematically arranged (left-to-right) his introductory taxonomy in three columns to represent a knowledge tree with three principal branches – *memoire/histoire*, *raison/philosophie*, *imagination/poésie*. In this arrangement history and poetry are now further estranged (recall Charleton's *Judgment* and *Phansie*), with scientific reason the bridging – and/or perhaps the dividing – realm.¹³⁶ To what extent the several leading

¹³³ Desiderius Erasmus, *The Praise of Folly* (New York, 1942), p. 170.

¹³⁴ Along with Jean le Rond d'Alembert in the earlier years.

¹³⁵ Published in Paris in 1751-1772 and originally entitled *Encyclopédie, ou Dictionnaire raisonné des sciences, des arts et des métiers, par une société de gens de lettres, mis en ordre par M. Diderot de l'Académie des Sciences et Belles-Lettres de Prusse, et quant à la partie mathématique, par M. d'Alembert de l'Académie royale des Sciences de Paris, de celle de Prusse et de la Société royale de Londres*. ("Encyclopedia: or a Systematic Dictionary of the Sciences, Arts, and Crafts, by a Company of Men of Letters, arranged by M. Diderot of the Academy of Sciences and Belles-lettres of Prussia: as to the Mathematical Portion, arranged by M. d'Alembert of the Royal Academy of Sciences of Paris, to the Academy of Sciences in Prussia and to the Royal Society of London.")

philosophes and other *lumières* across several spheres who had contributed articles to *l'Encyclopédie*¹³⁷ endorsed that approach is unknown, but they and much of their audience¹³⁸ did seem to share a belief that comprehensive knowledge, engagingly but methodically and unsentimentally transmitted, could transform common and “outmoded” ways of thinking. In this view, because histories, for example, could conceivably reflect the full factual and systemic context,¹³⁹ they would grow both “truer” and more utile, like the other sciences.

“What is now proved was once only imagined”¹⁴⁰ famously intoned in 1793 the then still pre-Romantic artist and poet William Blake, revealing just how potent and durable Enlightenment influence had grown in a great many spheres, such that even a reputed mystic could find something compelling in the direction of scientific inquiry, although always preserving a place for organicism. But an ensuing formulation purported to thresh away from science any vestige of imagination itself, and to extend that approach even to history writing.

In 1794 in fact, the very next year, the French mathematician, philosopher and political scientist Condorcet expressed the lack of need for “hypothetical surmises” in

¹³⁶ Did Diderot purposefully arrange the schematic for that effect? I have seen no such evidence, but nonetheless muse that speculation along this line would not be inconsistent with certain deconstructionist approaches (see Section 7, *infra*) to deciphering the author’s deeper instincts and/or motivations.

¹³⁷ Voltaire, Montesquieu, Madame de Pompadour among them.

¹³⁸ In this era, Paris quite arguably was the intellectual center in the West, with French language skills widely disseminated among the intellectual and governmental elite throughout Europe.

¹³⁹ “The goal of an *Encyclopédie* is to assemble all the knowledge scattered on the surface of the earth, to demonstrate the general system to the people with whom we live, & to transmit it to the people who will come after us, so that the works of centuries past is not useless to the centuries which follow, that our descendants, by becoming more learned, may become more virtuous & happier, & that we do not die without having merited being part of the human race.” Diderot, *Encyclopédie*, opening statement.

¹⁴⁰ William Blake, *The Marriage of Heaven and Hell* (Boston, 1906), p. 16.

tracing history; instead, “it is enough to assemble and order the facts and to show the useful truths that can be derived from their connections and from their totality.”¹⁴¹ Posthumously appearing in 1795,¹⁴² his *Esquisse d'un tableau historique des progrès de l'esprit humain* is a monument of late Enlightenment thought, recasting the history of civilization as one of progress in the sciences, with science also driving the development of human rights and justice, such that scientific knowledge would entirely shape any future rational society. Regarding the overlapping domains of history and governance (“political science”), Condorcet predicted that “the application of the arithmetic of combinations and probabilities to these [social] sciences, promises an improvement by so much the more considerable, as it is the only means of giving to their results an almost mathematical precision, and of appreciating their degree of certainty or probability.”¹⁴³

Nineteenth century proclamations underscored what would prove an enduring positivist turn in European historiography. In the first half-century two major developments further directed European historiography toward scientism and away from its poetical roots. One was the rise of the “professional” historian, working mainly from newly emerging research universities and, accordingly, reinventing and refining the pursuit as a formal academic discipline with professorships and graduate training.

The other key development was a body of totalistic philosophy applicable either

¹⁴¹ As quoted in Donald R. Kelley, ed., *Versions of History from Antiquity to the Enlightenment* (London, 1991), p. 495

¹⁴² Ironically, despite Condorcet’s pronouncement that “the principles of the French constitution are those of every enlightened mind,” the excesses of the French Revolution led to Condorcet’s arrest in early 1794, with his death in prison coming short months thereafter.

¹⁴³ Marie Jean Antoine Nicolas de Caritat, marquis de Condorcet, *Esquisse d'un tableau historique des progrès de l'esprit humain* (Paris, 1795); English version *Outline of an Historical View of the Progress of the Human Mind* (Philadelphia, 1796), quote from p. 275.

indirectly or directly to history. One titan in that movement, Georg Wilhelm Friedrich Hegel, while by academic position a philosopher rather than historian, addressed much of his work to matters historiographic, particularly the need to employ critical reason in scrutinizing one's own assumptions and lenses in contemplating the great sweep of historical determination. First, in exhorting historians "[i]n everything that is supposed to be scientific, Reason must be awake and reflection applied"¹⁴⁴ Hegel revealed his own supposition of history as "scientific" and therefore able to yield, if treated with sufficient analytical rigor, fruitful statements about the nature of the past as it affects the present and future. It follows that Hegel's dialectic of *thesis*, *antithesis* and *synthesis* mostly abandoned poetry, instead employing metaphysical reasoning to harness history to teleology ("[t]he History of the world is none other than the progress of the consciousness of Freedom").¹⁴⁵ Other celebrants of universalist and totalizing historiography followed suit. Jules Michelet attempted total synthetic history (with France chauvinistically portrayed as the key to human destiny) by analyzing the "fullness of life" – "[h]istory is a reconstruction of life in its wholeness, not of the superficial aspects, but of the deeper, inner organic processes."¹⁴⁶ Beyond the usual focus on politics and diplomacy, a keen sense of geography and anthropology as central historical determinants would lead to understanding how and when the inexorable march to a glorious unified future would eventually overcome those two factors.¹⁴⁷ Michelet also championed the resurrection and

¹⁴⁴ Georg Wilhelm Friedrich Hegel, *Philosophy of History* (New York, 1900 [1837]), p. 19.

¹⁴⁵ Hegel, *Lectures on the Philosophy of History*, trans. J. Sibree (London, 1914), pp. 19-20.

¹⁴⁶ *History News Network*, George Mason University, URL = <http://hnn.us/article/1328.html>.

¹⁴⁷ Michelet's writing was considerably less critical than Hegel's and more colorful than typical among universalists, and his unabashed patriotism would eventually speed his fall from favor.

popularization (via an 1827 translation) of Vico, whose constructionist discussion of how history was knowable in the same manner as science – and thus historical cycles just as traceable as the physical laws¹⁴⁸ – resonated well with historians in this new era. History might yet be demystified (although such an objective seems a bit off-tune to contemporary ears, given the extent of metaphysics then in play).

Within and upon this newly articulated philosophical grid we find operating the esteemed Leopold von Ranke to offer, indeed demand, some practical techniques of historical inquiry that would give form and teeth to his predecessors' more nebulous implorations to engage history with "critical reason." Sound methodology of course would also lend *bona fides* to history as a serious academic profession, a vocation Ranke had recently joined as a history professor at the University of Berlin.¹⁴⁹ Ranke was, and still is, almost universally acclaimed as the progenitor of modern professional technique in history; while not the first to emphasize primary sources or employ footnotes, his proselytization of careful archival research and source annotation ever altered historical work. His single most remarked passage (1824) struck, and for many decades thereafter echoed, the dominant aspirational tone in professional history practice:

History has had assigned to it the office of *judging* the past and of *instructing* the account for the benefit of future ages. To show high offices the present work does not presume; it seeks only *to show what actually happened* [*wie es eigentlich gewesen*].¹⁵⁰

Although the introductory sentence has drawn less commentary over time than the

¹⁴⁸ Arguably, the logical extension is that history, human-made and thus responsive to human senses, is even more immediately knowable than some of the "other" sciences.

¹⁴⁹ Ranke was Hegel's colleague at Berlin, although less given to teleology.

¹⁵⁰ From the Introduction to Leopold von Ranke, *History of the Latin and Teutonic People* (1824), as recorded in English in Leopold von Ranke, *The Secret World History: Selected Writings on the Art and Science of History*, Roger Wines, ed. and trans. (New York, 1989), pp. 56-59 (italics added for emphasis).

second, it reflected the persistence in historiography of a benevolent judicialist theme, here helping also to edify and equip. Ranke was less enamored with teleology than the above-mentioned theorists before him and the Marxists, et al., to follow, but did believe edifying patterns in history were both extant and discernable. The far better known second sentence disclosed Ranke's seeming insistence to remain utterly objective, what later professionals deemed a dictate to remain "colourless,"¹⁵¹ not so much by adopting a dry writing style, but in the sense of emulating the scientist's supposed dispassion. As I discuss in a section shortly below, the nuances of context and language translation worked perhaps to distort, or at least to oversimplify Ranke's writings, which contained more metaphysical and nationalistic musings than pure objectivists wished to think. But the simpler reading of the Rankean course prevailed, for a long interval at least, with the effect of further entrenching the positivist movement then generally dominant.

Perhaps the most emphatic champion of mid-century positivism was Auguste Comte. The self-claimed founder of the (European¹⁵²) discipline of sociology, he argued that the means and likelihood of achieving mastery in the full range of human fields differed little from those for the physical sciences: "The first characteristic of Positive Philosophy is that it regards all phenomena as subject to invariable natural Laws Our real business is to analyze accurately the circumstances of phenomena, and to connect them by the natural relations of succession and resemblance." Comte extended that sense of certainty to the discipline of history (and historiography), declaring:

¹⁵¹ See, for example, Acton: "Ranke is the representative of the age which instituted the modern study of history. He taught it to be critical, to be colourless, and to be new." John Acton, *Lectures on Modern History* (London, 1906), p. 19.

¹⁵² A line of study similar to Comte's sociology arose North Africa some four centuries earlier, its chief contributor Ibn Khaldūn of Tunis (1332-1406), who also touched on historiography, political economy and law. For an overview of his work, see Allen Fromherz, *Ibn Khaldun: Life and Times* (Edinburgh, 2010).

“History has now been for the first time systematically considered as a whole, and has been found, like other phenomena, subject to invariable laws” Although Comte’s increasingly grandiose and unbalanced visions led to his fall from favor during his own lifetime, for a season at least (and for a posthumous period of revival in the 20th century), his seeming full sundering of history and poetry held broad sway. Moreover, for Comte and his adherents, the idea was to employ new objective understanding prospectively and melioristically: “For it is only by knowing the laws of phenomena, and thus being able to foresee them, that we can . . . set them to modify one another for our advantage Whenever we effect anything great it is through a knowledge of natural laws From Science come Prevision; from Prevision comes Action.”¹⁵³

Soon following Comte arrived the Engels-Marx¹⁵⁴ adaptation of Hegel’s dialectic to a strictly anti-metaphysical construct, “dialectical materialism.” In this view, history would unfold in particular patterns neither because of some overarching design à la Vico, Hegel and Michelet, nor because enlightened social scientists install ever more impeccable systems of human affairs management à la Condorcet and Comte. To the extent Marx tilled common ground with positivists,¹⁵⁵ it was in the claim of invariable and discoverable laws gridding down on human matters. However, Marx injected an additional degree of inevitability – these immutable laws had dictated all relations to date

¹⁵³ Comte quotes are from his *Course in Positive Philosophy* published in six volumes in 1830-1842. Auguste Comte, *Cours de philosophie positive* (Paris, 1830-1842). A somewhat condensed English version of the work is *The Positive Philosophy of Auguste Comte*, trans. Harriet Martineau (London, 1853). See also Gertrud Lenzer, ed., *Auguste Comte and Positivism: The Essential Writings* (New York, 1975).

¹⁵⁴ Friedrich Engels is widely credited with first deriving and expounding the variation of Hegel’s dialectic to fit what most refer to as the “Marxist” framework.

¹⁵⁵ Some commentators have taken the view that the resort to positivistic imagery was somewhat of a way station for Marx’s more fully fleshed-out political views, partly because it provided the most developed language of social science then in circulation.

(“The history of all hitherto existing society is the history of class struggles”) and, by extension, would order the pattern of all to come.¹⁵⁶ Thus, an objective read of history is the key to comprehending the present and auguring the future (more than just imagining it). But first the analyst must affix the proper perceptual lens. For Marx, economics was the sole workable prism, with the means of material production the primary conditioning factor in humanity. In the history of successive “modes of production” – primitive communal mode, ancient mode, feudalism, capitalism – the latest class (capitalist industrial employers) had proved a temporary solution (a “synthesis”) to the frictions between feudal lords and a rising middle class. In the Marx-Engels dialectic, the synthesis becomes the new “thesis.” Hence the capitalist class by overreaching sows the seeds of its own destruction in conflict with the new “antithesis,” here the proletariat, with the vast numbers of the working class ensuring eventual victory. Socialism would prevail as the new synthesis – but this time lasting – because it could best secure the means of human survival; it would be the natural outcome of historically and presently operating economic conditions.

Marx’s construct was deeply and necessarily historical, not just to cast an explanatory look back, but also to identify the central determinant – the historical pattern of material production – for the great and inevitable socialist upheavals then seemingly just ahead. In turn, the inevitability element in the dialectic liberated the analyst from laboring over questions of what is just or right, or other moral sentiments. Thus, in Marxist determinism, historians adopting variants of scientism as the guide star to their equations found support in treating “[m]orality, religion, metaphysics and all the rest of

¹⁵⁶ Karl Marx and Frederick Engels, *The Communist Manifesto: A Modern Edition*, with an introduction by Eric Hobsbawm (London, 1998), p. 34.

ideology”¹⁵⁷ as dependent rather than independent variables. Marx and Engels had inverted prior positivist causality in history:

The sum total of these relations of production constitutes the economic structure of society – the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general character of the social, political and spiritual processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness.¹⁵⁸

In this light it is not surprising that, as for human free agency in history, Marx saw only a limited degree: “Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past.”¹⁵⁹

Marx’s highly selective references to history, both as to the facts and then their analysis via dialectical materialism, has of course drawn much pointed criticism, and it would be left to later apologists to explain why socialist victories did not universally occur as predicted.¹⁶⁰ But few doubt the enduring allure of this sort of “grand narrative.” Totalizing approaches, often also deterministic, teleological and triumphalist, would flourish largely unabated until the last decades of the twentieth century. Some survive still. These metanarratives tend to centralize history, for consciousness of the “true” historical conditions leads straight to the ordained set of socio-political and (sometimes) ethical-moral conclusions, not much distinct from how religion weaves an explanatory

¹⁵⁷ Karl Marx, “First Premises of Materialist Method,” *The German Ideology* (Moscow, 1968).

¹⁵⁸ Karl Marx, Preface to *A Contribution to the Critique of Political Economy* (Moscow, 1977 [1859]).

¹⁵⁹ Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (New York, 1963 [1852]), p. 1.

¹⁶⁰ On ongoing debate here concerns how (or whether) Marx discounted how some combination of political and social reform would work to “co-opt” or otherwise seduce and/or repress the proletariat.

tapestry of past journeys, present struggles and obligations, and future realization.¹⁶¹ But an abiding common thread for more secular or quasi-secular metanarratives is their reliance on claimed objectivity, in the scientistic mode and nearing scientific certainty, as to historical conditions.

Thus, by the last quarter of the nineteenth century, one prominent storyline was that the question of objectivity rooted in the inductive empirical approach, for European historians at least,¹⁶² had been resolved for some time, the practice having found new vitality in the path the natural sciences had blazed since Bacon, et al. More recent figures in that legacy included Charles Darwin, who likewise claimed that “true Baconian principles” led him to devote years to collecting data before speculating any overarching theory.¹⁶³ “History is and should be a science” declared Numa Denis Fustel de Coulanges (1830-1889), chair of medieval history at the Sorbonne (1878) and oft considered the founder of the scientific approach in professional history in France.¹⁶⁴ De Coulanges apparently believed the historian *cum* scientist could eliminate any trace of personal bias: “Do not applaud me” he once reproached an enthusiastic audience, “[i]t is

¹⁶¹ For a seminal examination of how ideology in some important ways served (until its putative collapse) as a religion substitute, see Daniel Bell, *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties*, Cambridge, 1988 [1960].

¹⁶² Southgate, *History: What & Why?*, pp. 23-25. Southgate seemed to recognize the Eurocentric (even Anglocentric) nature of his core analysis, although his discussion of multiculturalist challenges to Euro-historiography spans but a few pages (pp.107-113).

¹⁶³ *Ibid.*, p. 24. During his voyage aboard the *Beagle* in 1831, the young naturalist Darwin noted many of the observations that would lead many thinkers, historians included, to abandon the notion of teleology, for one interpretation of the data was that complex designs of the sort found in the physical world manifest naturally, without a blueprint or designer. Herbert Spenser, who coined the term “survival of the fittest,” extended such conclusions to human socio-economic relations, earning high repute with upper crust sorts wishing to justify their favored position by reference to “Social Darwinism.”

¹⁶⁴ “History is not the accumulation of events of every kind which happened in the past. It is the science of human societies.” Fustel de Coulanges, quoted at *History News Network*, George Mason University.

not I who speaks to you, but history which speaks through my mouth.”¹⁶⁵ Insisting on complete objectivity and, like Ranke, on archival primary sources (he thought secondary sources unreliable), de Coulanges promoted a modern version of historical impartiality, openly disapproving, for example, the previously common practice among distinguished figures of switching career hats, politician and historian.

In view of the foregoing several leading figures in European thought and historiography, one might conclude that any argument about the primacy of scientism over poetics in history was over.¹⁶⁶ To wit, as the new century dawned, renowned historian J.B. Bury encapsulated the Victorian historian’s ideal of progress and rationality in suggesting the dissolution of the field from other human studies, in that history had “begun to enter into close relations with the [natural] sciences, which deal objectively with the facts of the universe.”¹⁶⁷ Or more emphatically: “History is a science, no more and no less.”¹⁶⁸ Bury, who counted himself also a philosopher of history, labeled the history discipline a “methodological science” in which truth-seeking proceeds reliably via a course of inquiry derived from the natural sciences: “It is . . . of supreme moment that the history which is taught should be true; and that it can be attained only through the discovery, collection, classification, and interpretation of facts.”¹⁶⁹

Bury spoke that last line in 1902, i.e., at a time when the discipline, especially in

¹⁶⁵ Quoted in George P. Gooch, *History and Historians in the Nineteenth Century* (London, 1952), p. 202.

¹⁶⁶ An additional and slightly later European voice here was Spanish philosopher José Ortega y Gasset (1882-1955): “History is the science of people.” *History News Network*, George Mason University.

¹⁶⁷ As quoted in Southgate, p.26 (bracketed qualifier mine).

¹⁶⁸ John Bagnell Bury, *An Inaugural Lecture: The Science of History* (Cambridge, 1903), p. 7.

¹⁶⁹ *Ibid.*, pp. 23-24.

the Anglo-American context, was still relatively early in the process of securing respect as a valid profession,¹⁷⁰ with Bury, Regius Professor of Modern History at Cambridge, a leading voice in that effort. One wonders whether he and his colleagues ever attempted to disaggregate their adoption of a scientific mode from their career aspirations (a question just as pertinent for their predecessors on the Continent and contemporaries there and in America). In any case, Bury's apparently uncritical clustering of the words *true*, *interpretation* and *facts* raises some long recognized problems in inductive "discovery, collection, classification" of facts and, relatedly, in their interpretation.

Indeed, the notion of an unbroken ascending line of historical objectivity stretching from the ancient Greeks through the Enlightenment, its zenith achieved with the emergence of German and other European professional historians, encounters several complications. First, the ancients themselves shared no precise understanding as to the means of deriving knowledge from insight. As for historical understanding, the early Greeks identified the muse Clio as the source "inspiring" the given chronicler (Clio's mother is Mnemosyne, memory personified), but made little attempt to articulate the exact mechanism in rational terms. Similarly, the Sophists, assertive and critical, would come under attack by Socrates and others for their too slight emphasis on logic or proof in their rhetoric. And Aristotle, though oft considered the father of empiricism and the scientific method, rejected the notion that one discipline could subsume the several diverse branches of human inquiry. For him, different axioms attached to different sciences, yielding varying levels of precision. While Aristotle argued certain

¹⁷⁰ The Germans in particular had spearheaded the formalization of such status, along with much verbiage that emerging American scholars interpreted as allegiance to a scientific approach. See Peter Novick, *That Nobel Dream* (Cambridge, 1988), pp. 21-31.

metaphysical categories (e.g., quantity, quality, substance and relation) were key in describing phenomena of all types, for characterizing human nature he rejected the application of exact laws.¹⁷¹

Second, key thinkers in the Enlightenment period, in far from a monolithic show of what constituted intellectual “progress,” sponsored divergent viewpoints regarding knowledge origination and certainty, as underscored in the centuries-long battle between rationalists and empiricists. The latter group, united to the extent they opposed Cartesian logical speculation, itself fragmented as to what extent one could gain human understanding from observation. An extreme skeptic among the empiricists was David Hume (1711-1776), who argued that inductive reasoning by observation was an unreliable guide to truth, because detection of a seeming regularity does not preclude that a future case might differ.¹⁷² The memorable “black swan” example illustrates Hume’s point – although in Europe one might conclude that “all swans are white,” a journey to Australia would contravene such typology.¹⁷³ (Not until much later work by Karl Popper was this “problem of induction” addressed with real promise, and even there, with lingering questions about, inter alia, the initial selection of which data pools or slices to review “inductively.”) Separately, Voltaire, the critic perhaps most commonly identified with holding up human endeavors to Enlightenment rationality, and a historian himself (albeit in the pre-professional era), at times aimed his mordancy at Clío: “History consists of a series of accumulated imaginative inventions” and “[t]here is no history,

¹⁷¹ Phillip Stokes, *Philosophy: 100 Essential Thinkers* (New York, 2003), p. 25.

¹⁷² See David Hume, *An Enquiry Concerning Human Understanding* (London, 1748).

¹⁷³ Hume apparently never referred to the bird, but his early readers had likely heard reports of Dutch explorer Willem de Vlamingh, who in 1697 became the first European to see a black swan in Australia.

only fictions of varying degrees of plausibility.”¹⁷⁴ Soon thereafter, and more cynically yet, the same Bonaparte who imposed continent-wide the French rationalist order would charge, “What then is, generally speaking, the truth of history? A fable agreed upon.”¹⁷⁵

Finally, even the era and regions birthing the professionalization of history lacked a uniform sense of what historians could objectively state and should pass judgment upon. For example, in France and the United Kingdom, the numerous nineteenth century commentaries on the French Revolution ranged considerably in ideology and tone,¹⁷⁶ some sporting unmistakable vestiges of Romanticism, a counterreaction to Enlightenment thinking that positivist writings conveniently glossed over, as if the movement never occurred. Exclaimed Goethe, one of the Romantics’ great idols: “Not all that is presented to us as history has really happened; and what really happened did not actually happen the way it is presented to us; moreover, what really happened is only a small part of all that happened. Everything in history remains uncertain, the largest events as well as the smallest occurrence.”¹⁷⁷ And in seeming accord were some of the most prominent historians of the era. “Nothing falsifies history more than logic” lamented Francois Guizot (1787-1874), one of the early history professionals in France, appointed chair of

¹⁷⁴ First Voltaire quote from *History News Network*, George Mason University; second Voltaire quote from *Active History*, URL= http://www.activehistory.co.uk/historical_quotations.htm.

¹⁷⁵ Statement as claimed by Emmanuel-Auguste-Dieudonné, comte de Las Cases (20 November 1816) in *Mémorial de Sainte Hélène: Journal of the Private Life and Conversations of the Emperor Napoleon at Saint Helena* (London, 1823), Vol. 4, p. 251. The phrase has appeared in several guises, at least two predating Napoléon. For example, Claude Adrien Helvétius cited to Bernard le Bovier de Fontenelle in *De l'esprit* (Paris, 1758), p. 592: “. . . l'histoire n'est qu'une fable convenue.” Voltaire unsurprisingly had also chimed in, citing perhaps to yet a third personage: “Toutes les histoires anciennes, comme disait un de nos beaux-esprits, ne sont que de fables convenues.” Voltaire, *Jeannot et Colin* (Neuchatel, 1771), p. 345.

¹⁷⁶ Barton Friedman, *Fabricating History: English Writers on the French Revolution*. (Princeton, 1998); Hayden White, *Metahistory: The Historical Imagination in Nineteenth-century Europe* (Baltimore, 1973).

¹⁷⁷ History News Network, George Mason University.

Modern History at the Sorbonne in 1812, at the outset of a great revival of historical scholarship in France.¹⁷⁸ Concurred Thomas Carlyle (1795-1881), Scottish author of the seminal, flamboyantly phrased, and broadly read *The French Revolution*; history, literary at its core, is properly understood as “the distillation of Rumour.”¹⁷⁹

Some of the more conceptually inclined among the early professionals also resisted historical scientism. In Switzerland, Jacob Burckhardt (1818-1897), having studied in Berlin under Ranke before returning to Basel as a history professor, nonetheless allowed that “[h]istory is still in large measure poetry to me; it is a series of the most beautiful and picturesque compositions.”¹⁸⁰ A first master in both art history and cultural history,¹⁸¹ Burckhardt urged historians to make reference to art, literature and music as vital primary sources for appreciating the tremendous fruitfulness of prior societies. He rejected the unjustified smugness of rationalist narratives proclaiming an upward slant of human achievement, to reach its pinnacle in the present day or foreseeable future. With Ranke, he instead believed “every generation is equidistant from God,” despite differing measures of material prosperity or other supposed “progress.” That supposition contrasted sharply with the teleologic constructs separately or in some blend dominating the human sciences discourse of the day, their form

¹⁷⁸ As quoted in Fischer, *Historians' Fallacies*, Preface, p. x. Guizot, an orator, statesman and unrepentant religionist, shuttled in and out of public office during his career, a fairly common practice in the era for historians, who apparently saw no conflict of perspective.

¹⁷⁹ Thomas Carlyle, *The French Revolution: A History* (London, 1837), p. 222.

¹⁸⁰ *Active History*, URL = http://www.activehistory.co.uk/historical_quotations.htm.

¹⁸¹ Burckhardt is credited with co-founding, with German historian Georg Voigt, the field of Renaissance history studies. He also authored two seminal studies in Classical world – *The Civilization of the Renaissance in Italy* (1860) and *The Greeks and Greek Civilization* (1872) – again centering cultural and intellectual achievements.

metaphysical (Hegel, et al.), positivistic (Comte, et al.) or economic (Marx, et al.). For Burckhardt, triumphalist doctrines of “historical necessity” unwisely bartered the cultural wonders of city-states like Athens and Florence for the vulgarity, materialism and alienation of modern society. How then should the historian weigh the importance of past societies and events? As attests the title of a posthumous collection of Burckhardt’s lectures, *Judgments on History and Historians*,¹⁸² with Burckhardt’s reversion to pre-systematic (or extra-systematic) approaches, we see a revival also of the judicialist instinct in historiography. The historian was to judge: not how much something contributed (or did not) to material and technological gains toward modernity, but rather how well the present age employs (or does not) the rich heritage of intellectual, spiritual and artistic insight available to it, too deeply discounted or altogether ignored in historo-scientific approaches.¹⁸³

In Germany, theorist Wilhelm Dilthey (1833-1911) likewise strove to demonstrate how properly to distinguish the human sciences (*Geisteswissenschaften*) from the natural (*Naturwissenschaften*), echoing to some extent Aristotle on the point. Having early included history in his realm of inquiry as to those differences, Dilthey pondered: “How are we to overcome the difficulty that everywhere weighs upon the human sciences of deriving universally valid propositions from inner experiences that are so personally limited to, so indeterminate, so compacted and resistant to analysis?”¹⁸⁴ Borrowing from Vico (see discussion some pages above), Dilthey centered his hopes on empathy –

¹⁸² Jacob Burckhardt, *Judgments on History and Historians*, ed. Alberto Coll (Indianapolis, 1999 [1929]).

¹⁸³ Burckhardt emphasized judgment of the present, held up against its historical cultural underpinnings, more than of the past, the latter limited to instances where universal moral laws had been violated.

¹⁸⁴ Wilhelm Dilthey, *Pattern and Meaning in History*, ed. H.P. Rickman (New York, 1961).

because humans in a sense create history by actively engaging in the historical process, historians possessing adequate self-understanding can contextualize, comprehend and interpret social phenomena by means unavailable to natural scientists. Put otherwise, because “temporality” is a natural state for humans, those employing “descriptive psychology” can readily cognize the connections between past, present and future. Dilthey proposed an extension of hermeneutics as it first applied to exegesis of the Bible and classical texts, now not only to literature, law codes and historical documents, but also to human actions and other historical phenomena, all of which are akin to “texts” for interpretation. Moreover, in a “hermeneutic circle,” experience influences interpretation, which in turn alters experience, such that “[u]nderstanding is a rediscovery of the I in the Thou.”¹⁸⁵ Here is a view of history inextricably fused with and processed through the historian-analyst. A historiography of human action as decipherable text may have resonated with some later twentieth century theorists, but in his own period Dilthey’s approach was a very long distance from understandings of Comtean objectivism and the Rankean methodology¹⁸⁶ supposedly still ruling the day.

But Burckhardt and Dilthey were only mild dissidents compared to the pessimistic and contentious Arthur Schopenhauer (1788-1860), a philosopher who had briefly been at Berlin with Hegel and Ranke. While Schopenhauer considered his own field an empirical science (rather than speculative or transcendental), History was another matter. Far outdoing Voltaire, Napoleon and Goethe, he issued one of the most

¹⁸⁵ The better known exposition of the “I and Thou” dynamic is, of course, a 1923 book with that title by theologic philosopher Martin Buber, once Dilthey’s student at Berlin. Offering a rebuttal to excessive internality of experience, Buber opted for more a dialogic intersubjectivity. See Martin Buber, *I and Thou* (New York, 1937) (first American edition).

¹⁸⁶ Ranke had retired from the University of Berlin by the time Dilthey was there as a student and later professor, but still loomed gigantic in matters historiographic.

distrustful and disdainful history quotes ever: “Clio, the muse of history, is as thoroughly infected with lies as a street whore with syphilis.”¹⁸⁷ Of greater importance for historiography is Schopenhauer’s more esoteric, yet ultimately even more assertive, theoretical distillation: *The world is my representation . . .*¹⁸⁸ Drawing from both Kant and Buddhism, Schopenhauer’s take on subject-object distinctions left little room for the sort of certainty that scientific historians advocated. Instead, Schopenhauer deemed the world of experience illusionary, in that our own desire-driven perspectives distort reality. “Will” (*Wille*) and “Representation” (*Vorstellung*) are two aspects of the same perceptual dynamic. Will-representation is inherently egocentric and disorderly, viciously so in fact, such that peaceful cooperation in human affairs is an impossibility: “His paradigm image is of the bulldog-ant of Australia, which when cut in half, struggles in a battle to the death between its head and tail. Our very quest for scientific and practical knowledge creates a world that feasts upon itself.”¹⁸⁹ This vision is the utter antithesis of, leaves absolutely no room for, teleological, triumphalist historicizing.

Schopenhauer’s near suffocating bleakness foreshadowed in the longer term (i.e., following each World War of the next century) a spate of similarly unoptimistic works.

¹⁸⁷ Arthur Schopenhauer, *Parerga and Paralipomena*, trans. E. F. J. Payne (Oxford, 2000 [1851]). A later commentator offered a considerably more genteel variation: “Clio may be the most austere and chaste of the Muses, but she has been known to come down informally from Mount Helicon in a mood so raffish that there are those who claim to have seen her with her slip showing.” Willis Thornton, *Fable, Fact and History* (New York, 1957).

¹⁸⁸ Italics mine. An alternative translation of “representation” as used here is “idea.” Hence, one version of the fuller passage reads: “‘The world is my idea’ is a truth valid for every living creature, though only man can consciously contemplate it. In doing so he attains philosophical wisdom. No truth is more absolutely certain than that all that exists for knowledge, and, therefore, this whole world, is only object in relation to subject, perception of a perceiver – in a word, idea. The world is idea.” See Arthur Schopenhauer, *The World as Will and Idea*, 3 Vols., trans. R. B. Haldane and J. Kemp (London, 1883).

¹⁸⁹ Robert Wicks, “Arthur Schopenhauer”, *The Stanford Encyclopedia of Philosophy* (Winter 2011 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/win2011/entries/schopenhauer/>>.

Little surprise, then, that in the shorter term his radical axioms helped inspire Friedrich Nietzsche's iconoclasm, including Nietzsche's own deep misgivings about historical writing.¹⁹⁰ Nietzsche (1844-1900) eventually discepted much of Schopenhauer,¹⁹¹ but retained the underlying suspicion of history as egocentric projection.

In his essay most pointedly addressing the field, "On the Use and Misuse of History for Life,"¹⁹² Nietzsche portrayed three categories of history, the historians in each category satisfying differing psychic needs or inclinations. "Monumental" history rendered present day complexities and crises bearable by focusing on great achievements in idealized bygone worlds: "[This type of] History belongs above all to the man . . . who needs models, teachers, comforters and cannot find them among his contemporaries."¹⁹³ But the foundation myths emerging from that genre degrade the instinct and opportunity for exercising choice and thus retard the forging of new worlds. Hence, although

¹⁹⁰ Nietzsche shared his admiration for aspects of Schopenhauer with the less sardonic Burckhardt, whose lectures he had attended while shortly at Basel as a young professor. While friendly with Nietzsche, Burckhardt subtly distanced himself from the latter's more extreme formulae and tried not to encourage Nietzsche's stance that Greek culture (one of Burckhardt's specialties) could be well captured in depictions of opposing "Apollian" and "Dionysian" instincts. Separately, Nietzsche's fascination with Schopenhauer's theory that music was a great and potentially mitigating exception to generally dark patterns of human experience caught the imagination also of his friend, composer Richard Wagner.

¹⁹¹ In George Santayana's view, Nietzsche's philosophical work is almost entirely a commentary on or "an emendation of that of Schopenhauer. The will to live would become the will to dominate; pessimism founded on reflection would become optimism founded on courage; the suspense of the will in contemplation would yield to a more biological account of intelligence and taste; finally in the place of pity and asceticism (Schopenhauer's two principles of morals) Nietzsche would set up the duty of asserting the will at all costs and being cruelly but beautifully strong. These points of difference from Schopenhauer cover the whole philosophy of Nietzsche." George Santayana, *Egotism in German Philosophy* (London, 1916), p. 114.

¹⁹² The title can be translated otherwise, e.g., "On the Use and Disadvantage of History for Life" and "On the Use and Abuse of History for Understanding." The work first appeared in 1874 in a collected essays from 1873-1878, entitled *Untimely Meditations* (variously *Untimely Observations*, *Unfashionable Observations* or *Thoughts out of Season*). See Friedrich Nietzsche, *Untimely Meditations*, ed. D. Breazeale, trans. R.J. Hollingdale (Cambridge, UK, 1997).

¹⁹³ *Ibid.*, at § 2.3

“Antiquarian” history evaded the grand narratives of monumentalism, in its own manner it also stifled engagement with the present by harvesting and meticulously ordering huge piles of minutia: “The trivial, circumscribed, decaying and obsolete acquire their own dignity and inviolability through the fact that the preserving and revering soul of the antiquarian man has emigrated into them and there made its home.”¹⁹⁴ To the degree the past acquired authenticity in such archival traces, it was useless to the contemporary world, because it was alien to and yielded no clue how to break free from the constraints of the present. In this view, “Critical” history alone had/has liberatory potential. It comprehends history as a long trail of offenses and other blunders that cumulatively mold and impound the present, such that only by demythologizing and indicting the past humans can surmount it: “If he is to live, man must possess and from time to time employ the strength to break up and dissolve a part of the past: he does this by *bringing it before the tribunal, scrupulously examining it and finally condemning it . . .*”¹⁹⁵

Once more, then, we see judicialist language in the treatment of history. Nietzsche’s version, however, is a rather odd mix. On the one hand the act of judgment runs central in his exhortations. But on the other, the sense of distance, self-restraint and balance common to Novick’s judicialist imagery as cast in the Anglo-American tradition (“a neutral, or disinterested, judge”¹⁹⁶) is mostly absent – for Nietzsche the verdict was absolute, prefigured and not debatable: “Every past . . . is worthy to be condemned.”¹⁹⁷

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., italics added for emphasis.

¹⁹⁶ Novick, *That Noble Dream*, p. 2. See again my comments on this point in Chapter 1, *supra*, noting *inter alia* how historiographers with Continental roots may have a different starting view of the role of judges in legal proceeding, i.e., more inquisitorial/prosecutorial than in the adversarial Anglo-American tradition.

Nietzsche's conflation of judge and prosecutor instead reflected the Continental "prosecutorial" legal tradition, although his was a far more nihilistic and fatalistic view than attaches for Continental courts generally.

How does one condemn history without an objective compass, moral or otherwise? Nietzsche held that with the death of God, universal perspectives would eventually evaporate, in turn also dissipating any workable accord as to unbiased truth.¹⁹⁸ But he thereby ensnarled himself in what may be the chief (and in our era commonest) paradox in historiography: the denial of all objectivity in history erodes the ability to denounce the past as decisively and powerfully as Nietzsche urged. For if the verdict is unvarying and the evidence hopelessly compromised – "every word is a prejudice"¹⁹⁹ – where is a role for persuasive proof? Why bother going through the motions instead of overtly and unapologetically constructing a take on history consonant with one's own agenda? This conceptual and practical impasse would echo softly for a near century, then resound as a central pulse in postmodernist²⁰⁰ historiography. It eventually elicited a number of attempts at rehabilitation, including Carlo Ginzburg's effort to reconcile rhetoric and proof within a revived judicialist model (as discussed *supra* in Chapter 1 and *infra* in Section 8 of this Chapter 2, then again in Chapter 3).

¹⁹⁷ Otherwise phrased "Every past is worth condemning."

¹⁹⁸ See Laurence Lampert, *Nietzsche's Teaching: An Interpretation of "Thus Spoke Zarathustra"* (New Haven, 1986), pp. 17-18. For reasons akin to these, some commentators have paired Nietzsche with Kierkegaard (who unlike Nietzsche opted for belief) as the earliest existentialists. For just one example, Camus considered Nietzsche "the only artist to have derived the extreme consequences of the aesthetics of the absurd." See Neil Cornwall, *The Absurd in Literature* (Manchester UK, 2006), p. 186.

¹⁹⁹ Friedrich Nietzsche, *The Wanderer and His Shadow*, § 55, in *Human, All Too Human*, trans. R.J. Hollingdale (Cambridge, UK, 1996). *Wanderer* was an 1880 supplement to *Human* (1878).

²⁰⁰ Nietzsche's fondness for metaphor, irony and aphorism, his dismissal of teleology, objectivity and historical progress, and his view that knowledge is contingent and conditional (perspectivalism), all presaged postmodernism, a point revived in Section 7, *infra*.

(2) Empire, imperfect transAtlanticism and American Exceptionalism: Euro-American judicialist scientism

The foregoing pages traced two parallel and competing arcs in Western historiography. The first was a scientific, reason-based approach originating in the classical world, then further germinating (largely) in England and France, and enhanced by (largely) Teutonic universalism in the nineteenth century, all reinforcing the preferred self-view of the professionalizing historian caste then rising. The second concerned a counternarrative existing over the same eras, also largely Teutonic,²⁰¹ but here distrustful, iconoclastic, quasi-mystical, neo-Romanticist or anti-rationalist, with stronger emphasis on the poetical and rhetorical side of the age-old question. Both were in high flower when the rise in American capacity and ambitions began to run parallel with the still vast reach and influence of the British Empire. While never completely prevailing, the former approach predominated in the Anglo-American context, and perhaps even more fully yet in the U.K. separately.

Recall British historian J.B. Bury's stance at the century break, i.e., that history had surely broken from the humanities to become a discipline of methodological science. Some went even further in defining the aspired realignment, rejecting any recourse to philosophy and/or theory as at best surplusage, at worst anathema. As historian Leslie Stephen, also British, declared in 1900: "Nothing distorts facts as much as theory . . . a scientific historian should be on his guard against the philosopher of all men."²⁰²

²⁰¹ Schopenhauer, Burckhardt, Nietzsche and Dilthey were all born before the emergence of Germany as a nation-state. Dilthey was Swiss German, and Nietzsche considered himself stateless, having renounced his Prussian citizenship, instead insisting on a (unverified and doubtful) Polish ancestry.

²⁰² Leslie Stephen, *The English Utilitarians* (London, 1900), Vol. 3, p. 341.

Stephen, a specialist in intellectual history, was no marginal figure on either side of the Atlantic. Novelist William Makepeace Thackeray was his father-in-law, Virginia Woolf his daughter,²⁰³ with whiggish historian Thomas Babbington Macaulay (champion of the supposed civilizing effect of British culture, language and tradition), and several transatlantic literary and political progressives, including American jurist Oliver Wendell Holmes, Jr., among influential friends and associates.

In a sense, Stephen epitomized a durable Anglo-American aversion to historical theory (outside the quasi-theory of progressivism, more an ethos), that tendency particularly acute over a period of several decades when the British Empire (with its notion of the White Man's Burden via colonial benevolence) was still a global master and the United States (with its intertwined doctrines of American Exceptionalism and Manifest Destiny) had begun to actualize its potential reach and brawn. Imperial and American optimism, and the sense of some predestined civilizing role, resided in stark contrast with the esoteric gloom-castings of Schopenhauer and Nietzsche, and even the less scornful but still anti-teleological abstractions of Burckhardt and Dilthey. While exact percentages and range of influence are hard to measure, a weighty portion of Anglo-American historians in the period discounted or otherwise ignored continental theorizing extending to historiography. As Oxford-trained historian Marnie Hughes-Warrington noted regarding Dilthey's nuanced views: "General distrust of European ideas in the Anglo-American world . . . has meant that his ideas are largely unfamiliar to many scholars."²⁰⁴ Nietzsche's greatest influence would wait some decades, especially

²⁰³ By his second wife Julia Princep Jackson, after Harriet Marian Thackeray's death.

²⁰⁴ Marnie Hughes-Warrington, *Fifty Key Thinkers on History* (London, 2008), p. 72.

outside Germany. In the U.K., it was not until 1931 that Herbert Butterfield published *The Whig Interpretation of History*, his lacerating and influential critique of Macaulay-style triumphalist presentism in the British (and American²⁰⁵) mode claiming the day by mid-century (more commentary on Butterfield appears further below). Until then, the favored approach could reasonably be distilled within two pronouncements by Macaulay's nephew, George Macaulay Trevelyan (considered one of the last influential whiggish historians in the U.K.): "It is not man's evolution but his attainment that is the greatest lesson of the past and the highest theme of history" [and] "*Disinterested intellectual curiosity is the life blood of real civilization.*"²⁰⁶

Trevelyan's second adage just above again calls to mind Peter Novick's enunciation of the deep-rooted "objectivist creed" at the heart of judicialist history (Chapter 1, *supra*). Novick then focused on the seed of such disposition as transported to America and its ensuing growth in the fresh(er) ground there. By his approach, the geographic and, arguably for some period, the cultural-intellectual isolation of the New World provided another means to assess the arc of scientific/judicialist objectivity in historiography. For Novick, to explain American historiography until recent times, one need not reach all the way back to antiquity (as did Southgate and others), but rather merely to chief currents of thought in nineteenth century Europe.²⁰⁷ In this sense, a

²⁰⁵ As Butterfield trenchantly put it: "... our general version of the historical story still bears the impress that was given to it by the great patriarchs of history-writing, so many of whom seem to have been whigs and gentlemen when they have not been Americans." Herbert Butterfield, *The Whig Interpretation of History* (London, 1951 [1931]), p. 4.

²⁰⁶ George Macaulay Trevelyan, *English Social History: A Survey of Six Centuries: From Chaucer to Queen Victoria* (London, 1942), Introduction (italics added).

²⁰⁷ Novick, *That Noble Dream*, Chapters 1-2 ("The European Legacy" and "The Professionalization Project"), pp. 21-60.

recounting of objectivity in American history practice until the last quarter of the twentieth century is as Eurocentric as Southgate's multi-millennial account. But such an emphasis may be commonsensical, for American education in the early decades, and especially higher education, patterned itself on European models. As stated historian of higher education Arthur Cohen, "[t]he curriculum in the colonial colleges was a direct import from Europe."²⁰⁸ From the same subspecialty, Martin Trow noted: "[h]eridity in higher education is a particularly strong force. The [American] universities of today can draw a direct line back to Bologna, Paris, Oxford and Cambridge."²⁰⁹ This European heritage stateside is no less profound in the academic discipline of history, especially at the graduate studies level.

A wave of young American scholars looked to Germany in particular for advanced academic training during the nineteenth century, because graduate study at home was for the great part of the century either nonexistent or sorely underserved.²¹⁰ In Germany they discovered the idea of the university as a "community of investigators" dedicated to rigorous scholarship under the guidance of highly esteemed professors whose moral and social authority lent power to their demands on graduate students. Advanced training in history was particularly exacting and unsparing:

²⁰⁸ Arthur M. Cohen, *The Shaping of American Higher Education* (San Francisco, 1988), p. 30.

²⁰⁹ Martin Trow, "American Higher Education – Past, Present and Future," in *Studies in Higher Education*, Vol. 14, No. 1 (1989), p. 10.

²¹⁰ And because universities in Britain and France had greater practical barriers at the time: "English universities were concerned with turning out gentlemen, not scholars – and until 1871 required degree candidates to sign the Thirty-nine articles of the Anglican church. French universities offered no easily attainable advanced degree, and to study at the Sorbonne was to face perils of the flesh in the "vice dens" of the capital Also, study in Germany was inexpensive [compared to] the leading American universities." Novick, p. 22.

Graduate students encountered a dazzling array of refined and esoteric techniques for ferreting out and verifying the historical fact: paleography, numismatics, epigraphy, sphragistics, and many more. Technique was important, but even more important was rigor, assiduity in research, an infinite capacity for the most painstaking and arduous pursuit of the fact. Their ideal was the man who could “cross an ocean to verify a comma.”²¹¹

But something essential to the German approach got lost in its transplantation to America, especially in the degree of allegiance to scientism. Returning scholars seemed not to discern some critical subtleties and elusiveness of the German academic nomenclature. For example, the term *die Wissenschaft* means “learning” or “scholarship” while *eine Wissenschaft* refers to an academic discipline. Neither term carries in German the notion of a “science” based on purely empirical and neutral approaches. As Novick further explained: “If *Wissenschaft* had vaguely idealist implications, there could be no doubt of the idealism implicit in the *Geisteswissenschaften*: idiomatically, ‘humanistic disciplines,’ but more literally and evocatively, ‘spiritual studies.’ History, together with philosophy, literature, and theology, was unequivocally *eine Geisteswissenschaft*.”²¹² Statements by Ranke himself underscored just that sense: “It is striking how history, when resting on the memory of men, always touches the bonds of mythology” and “[i]n schoolbooks and in literature we can separate ecclesiastical and political history; in the life of mankind they are intertwined.”²¹³ Similar difficulties in nuanced translation surrounded the term *Objektivität*, which disparate intellectual communities adapted in

²¹¹ Novick, p. 23. Paleography is the study of ancient handwriting; numismatics concerns medals, coins and other currency; epigraphy focuses on deciphering inscriptions; sphragistics examines seals and signets.

²¹² Ibid., p. 24.

²¹³ Foreshadowing to some extent Nietzsche and White. Ranke’s expression here was not inconsistent with his exhortation to rely primarily on the archives, although the archives themselves are human-built repositories of memory, those memories themselves not neatly encapsulated into separate topics. Leopold von Ranke, *History of the Popes: Their Church and State* (New York, 1901 [1834-1836]).

varying ways to fit their own notions of “objectivity.” Concepts such as “objective science” or “scientific objectivity” in nineteenth century American historiography therefore derived from shaky premises, leading Americans to misread and misapply the writings of leading historiographers, Ranke prominently included.²¹⁴

Novick argued that Ranke was far from an adherent of scientism, and in fact was a leading voice in the *romantic* reaction against materialistic universalism of the Enlightenment “radicals” (and especially the French), whose zeal for reform required deep criticism of the past. He and his German colleagues for the most part accepted the past without moral judgment (negative judgment, at least, with Ranke even asserting that all history revealed “the hand of God”²¹⁵). For Novick, then, “Ranke’s abstention from moral judgment, rather than manifesting disinterested neutrality, was, in context, a profoundly conservative political judgment.”²¹⁶ American historians missed that point altogether, translating the famous dictum to show history “how it really was” (variously, “as it actually was” or “as it actually happened”) in the absence of the subtle modifier “*essentially*.”²¹⁷ Thus, while German historians viewed Ranke as “the antithesis of a non-philosophical empiricism” their American counterparts venerated Ranke – in 1866 the first honorary foreign member of the AHA – as “empirical science incarnate.”²¹⁸

And it was in the sciences “proper” – i.e., the natural sciences, rather than the

²¹⁴ Novick, p. 25

²¹⁵ For Ranke, it was the historian’s privilege to work at discovering and deciphering the “holy hieroglyph” of God’s presence in the world. See Novick, p. 27, citing to Leonard Krieger, *Ranke: The Meaning of History* (Chicago, 1977), p. 361.

²¹⁶ *Ibid.*, p. 27.

²¹⁷ *Ibid.*, p. 28.

²¹⁸ *Ibid.*

humanities or arts – that early professional historians in the U.S. found their other primary role models. Yet here also Novick traced these historians’ imprecise understanding of how scientists actually engaged methodology, rather than how they claimed to do so. A good example concerns Charles Darwin’s supposed and (thus) much admired hyper-Baconian inductivism. To the extent that Darwin’s breakthrough theorizing epitomized (in a sense of both cause and effect) nineteenth century scientism, his prominence and acclaim reverberated through the intellectual community, including disciplines such as history.²¹⁹ The received wisdom about Darwin’s scientific methodology hugely influenced historiography in the following decades, with the question of “scientific” inductivism in historical work remaining a central concern.

In 1910 Albert Bushnell Hart, then AHA President, reflected approvingly: “Did not Darwin spend twenty years in accumulating data, and in selecting typical phenomena before he so much as ventured a generalization?”²²⁰ Such blind confidence was misplaced. Darwin in fact perceived the strategic benefits in winning acceptance for his work by *publicly* acknowledging the primacy of inductivism in science while *privately* holding strong opinions to the contrary. As he revealed in an advisory personal letter: “[L]et theory guide your observations but till your reputation is well established be sparing in publishing theory. It makes persons doubt your observations.”²²¹

That theory should make observers doubt is perhaps an even deeper instinct in the U.S. than in Darwin’s Britain. In his classic *Democracy in America* (1835), Alexis de

²¹⁹ American historian Henry Adams, an early AHA president (1894) was given to historiographical explanations in imagery of natural physical laws.

²²⁰ Southgate, p. 25 and Novick, p. 38 each found noteworthy Hart’s insistence.

²²¹ Novick, p.36, fn. 22, quoting from Darwin’s 1863 correspondence to John Scott, a young zoologist.

Tocqueville expounded on the roots of the “philosophical method of the Americans.” He believed that a recent history of revolutionary ferment and ensuing class-flattening democracy²²² spawned an individualist action-centered society far more interested in means of material advancement through practical problem-solving than in speculative theory: “I discover that in most of the operations of the mind each American appeals only to the individual effort of his own understanding Men are no longer bound together by ideas, but by interests; and it would seem as if human opinions were reduced to a sort of intellectual dust, scattered on every side, unable to collect, unable to cohere.”²²³ As for the effect of the contrast with less democratic and class-bound Europe, “permanent inequality of conditions leads men to confine themselves to the arrogant and sterile research of abstract truths; whilst the social condition and the institutions of democracy prepare them to seek the immediate and useful practical results of the sciences.”²²⁴ Americans thus gravitated to the intellectual “middle zone” where their tremendous energy and inventiveness yield impressive results despite a disdain for theory: “These very Americans, who have not discovered one of the general laws of mechanics, have introduced into navigation an engine which changes the aspect of the world.”²²⁵

²²² As Richard Hofstadter added: “What we loosely call Jacksonian democracy completed the disestablishment of a patrician leadership that had been losing its grip for some time. At an early date, literature and learning were stigmatized as the prerogative of useless aristocracies.” Richard Hofstadter, *Anti-Intellectualism in American Life* (New York, 1963), p. 51.

²²³ Alexis de Tocqueville, “Philosophical Methods of the Americans,” Volume 2, Chapter 1 in *Democracy in America*, trans. and ed. Harvey Mansfield and Delba Winthrop (Chicago, 2002 [1840]).

²²⁴ *Ibid.*, Chapter 10. “Why the Americans Are More Addicted to Practical Than to Theoretical Science.”

²²⁵ *Ibid.* De Tocqueville’s description of the American manner of achieving technical breakthroughs brings to mind the later example of Thomas Edison, who famously pursued a “trial and error” approach in his legion inventions. As Edison emphasized: “Genius is one percent inspiration, ninety-nine percent perspiration.” Spoken statement (c. 1903); published in *Harper’s Monthly* (September 1932). Regarding the American preference for inventive skill over pure science approaches, see Richard H. Shryock,

That tendency covered historical matters also, or so one view from Europe suggested – the New World occupants had little use for historiographical theory, and little even for history itself. As the editor for Burckhardt’s collected *Judgments in History and Historians* observed: “Burckhardt had one name for those not interested in their past: ‘barbarians.’ He was quick to judge Americans for their plutocratic ways, but he judged them even more harshly because he thought they did not believe they had much of value to gain from studying history. Indeed, in his opinion, Americans took pride in being ‘new,’ that is, in having no history.”²²⁶

Whether or not stereotypes of the sort de Tocqueville and Burckhardt raised carried some grain of truth, Americans seemed to have willingly furthered the impression by their own posturing, stretching at least as far back to Franklin’s cultivation in France of a natural man persona (see again Chapter 1, *supra*). Moreover, as the first full cohorts of professional historians in the U.S. assumed academic posts in the later nineteenth century, the historiography that did arise reflected the warp and woof of the underlying culture. As history study attained legitimacy in American society, its themes and tenor, much like whiggish history in Britain, tended to point to the ambitious achievements of the home country, but in the American case, even more to the special character of the brawny young democracy, its own nascent historicizing freer of European-derived theory in attempting to assess that same intersection of character and national history.

“American Indifference to Basic Sciences during the Nineteenth Century,” *Archives Internationales d’Histoire des Sciences*, No. 5 (1948).

²²⁶ Jacob Burckhardt, *Judgments on History and Historians* (Boston, 1958). Harsher yet is an anonymous offering that reflects perhaps typical disdain: “While the mediocre European is obsessed with history, the mediocre American is ignorant of it.” *History News Network*, George Mason University.

The notion of a decided historical departure from European approaches in several measures crested with Frederick Jackson Turner, whose 1893 essay “The Significance of the Frontier in American History”²²⁷ suggested how the peculiarities of westward expansion generated a distinctively American set of capabilities and outlook. To Turner, steeped in the evolutionary concepts of his scientific era, the multi-generational struggle to occupy and tame the savage wilderness (and its hostile inhabitants²²⁸) both required and forged a new type of citizen. Unique environmental challenges arising in each new stretch of frontier called for individualized, localized adaptations and ingenuities far removed from those available in European ideas and practices. Turner’s “Frontier Thesis” was a story of westering Americans literally and figuratively turning their backs to the Atlantic. His interpretation of how a novel set of circumstances and responses fostered a singularly enterprising, dynamic and formidable United States became known as the doctrine of “American Exceptionalism.” Numerous ensuing commentators have variously applied the doctrine (not always approvingly) to American attitudes, demeanor, institutions, ends and means, even a sense of morality and destiny.²²⁹ For his part, Turner, long a central mover in the AHA, during three decades as a history professor at Wisconsin and Harvard trained scores of graduate scholars who eventually filled

²²⁷ First presented before the American Historical Association during the Chicago World's Fair. Turner later published the essay in the AHA Annual Report and then as Chapter 1 in Frederick Jackson Turner, *The Frontier in American History* (New York, 1921).

²²⁸ Although Turner fit the description of a Progressive, he did not completely ignore how along with initiative and democracy, westering brought to the forefront a great deal of crudeness and violence. However, his overall tone was too triumphal for later commentators, who assailed Turner’s glossing over of the extraordinary cruelties in the subjugation of native Americans.

²²⁹ One could reasonably argue that the notion of American exceptionalism stretches at least as far back as the early Massachusetts settlement and a highlight from “A Model of Christian Charity,” the 1630 sermon John Winthrop delivered before disembarking the ship *Arbella*: “for wee must Consider that wee shall be as a Citty upon a Hill, the eies of all people are upon us.”

numerous professorships in American history programs countrywide, such that frontier and exceptionalist imagery and nomenclature retained currency for several decades.²³⁰

Where the American historical approach, considered generally, did align with (some of) its European counterparts, i.e., in an admiration of inductivist scientism, the anti-speculative teleology that emerged in the U.S. bore a decidedly American stamp. Henry Adams, as AHA president, in 1894 called for an upbeat departure from the more dour European brand: “Darwin led an intellectual revival much more hopeful than any movement that can now be seen in Europe . . . [where scholars reject] the form of cheerful optimism which gave to Darwin’s conclusions the charm of a possible human perfectibility . . . if a science of history were established to-day on the lines of its recent development I greatly fear it would take its tone from the pessimism of Paris, Berlin, London and St. Petersburg”²³¹ Adams believed American progressives could be hopeful about the scientific ideal in history: “Those of us who have had occasion to keep abreast of the rapid progress which has been made in history during the last fifty years must be convinced that the same rate of progress during another half century would necessarily raise history to the rank of a science.”²³² European historiography was simply not sufficiently optimistic.

²³⁰ According to one scholar, at the time of Turner’s death in 1932, about 60% of the leading history programs in the U.S. were still offering undergraduate courses similar to Turner’s “History of the West” course listing at Wisconsin in 1895-96. Allan G. Bogue, “Frederick Jackson Turner Reconsidered,” *The History Teacher*, Vol. 27, No. 2 (Feb., 1994), p. 195.

²³¹ Henry Adams, 1894 AHA presidential address, entitled “The Tendency of History.”

²³² Ibid. The enthusiasm Adams showed for scientific history led him to print and distribute a work in which he stretched to analogize to the second law of thermodynamics and the principle of entropy to support a new “theory of history.” See *A Letter to American Teachers of History* (Washington, DC, 1910). Despite those pretensions to finding objective laws, Adams was a notorious anti-Semite.

Further evidence of the cross-pollination of (supposed) national attributes and American historiography was the selection of Theodore Roosevelt as 1911-12 AHA president. Despite his standing as a former U.S. president, Roosevelt was beyond just an honorary choice. Part of older tradition of alternating hats between historian and statesman, Roosevelt had issued a number of serious works, including *The Naval War of 1812*, heavily reliant on primary sources and still considered a standard study of that U.S.-U.K. conflict.²³³ Yet in that same book Roosevelt, by lauding the “. . . stubborn, desperate, cool bravery that marks the English race on both sides of the Atlantic”²³⁴ revealed an Anglo-American essentialism typical of his day. And a later work, the four-volume *Winning of the West*, in both its title and theme of adventure and heroism, vividly hued (Roosevelt encouraged literary vibrancy within “scientific” history writing²³⁵) echoed much of the theme and self-congratulatory tone of Turner’s westering account.²³⁶

Roosevelt was a prime driver of the Progressive agenda of his era, albeit selectively; he was somehow able to reconcile on the one hand using the presidential “bully pulpit” for trust-busting and nature conservation while on the other glossing over the vicious subjugation of Native Americans and the downsides of creeping American imperialism. A sense of exceptionalist destiny²³⁷ – visionary America as the model

²³³ Theodore Roosevelt, *The Naval War of 1812* (Annapolis, 1987 [1882]).

²³⁴ *Ibid.*, p. 21.

²³⁵ “. . . [T]he theory now is that science is definitely severed from literature and that history must follow suit . . . Not only do I refuse to accept this is true for history but I do not even accept it is true for science.” Theodore Roosevelt, 1912 *AHA Presidential Address*.

²³⁶ The writing dates 1889-1896 bracketing the 1893 publication date of Turner’s frontier essay, although Roosevelt covered a generally earlier time bracket (1769-1807).

²³⁷ As for destiny more particularly, and consistent both with nineteenth century American exceptionalism and the bent to push westward, was the notion captured in newspaper editor John Sullivan’s 1845 phrase

vigorous democracy – apparently sufficed as some sort of covering excuse. In his AHA Presidential Address, Roosevelt predicted future historians would rate the U.S. as “the arch-typical civilization of this age” with its “strange capacity for lofty idealism which must be reckoned with by all who would understand the American character.” But of course “lofty idealism” without the counterbalance of deep reflection left scant room for qualms about the muscularity of approach. In that vein, Roosevelt’s oft-cited “man in the arena” oration (1910) again privileged action over speculative reflection (“It is not the critic who counts The credit belongs to the man who is actually in the arena”).²³⁸ No room there for continental navel-gazing.

To the extent the Turner-Roosevelt school was typical, by the early twentieth century American historiography reflected the merger of isolationism and strangely “progressive” anti-intellectualism persisting in the underlying society: “For *the life of thought*, even though it may be regarded as a form of human activity, *is also a medium* through which other values are refined, reasserted, and realized in the human

“Manifest Destiny” – less a policy than a general concept, and never universally adopted by the citizenry (inter alia, for anti-imperialism and anti-slavery reasons), its proponents nonetheless suggested not just the right but arguably the moral duty to redeem humanity in the image of what would be a sea-to-sea ideal democracy. For them, manifest destiny justified the acquisition of vast stretches of formerly Mexican and British territories. As Sullivan phrased it in *New York Morning News* (December 27, 1845): “And that claim is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federated self-government entrusted to us.”

²³⁸ From a speech delivered 23 April 1910. The fuller passage is: “It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly; who errs and comes short again and again; because there is not effort without error and shortcomings; but who does actually strive to do the deed; who knows the real enthusiasm, the great devotion, who spends himself in a worthy cause, who at the best knows in the end the triumph of high achievement and who at the worst, if he fails, at least he fails while daring greatly. So that his place shall never be with those cold and timid souls who know neither victory nor defeat.”

community.”²³⁹ So mused Richard Hofstadter (an American History scholar), who in tracing intellectual and educational matters in America from the first European settlers through Jacksonian democracy and until about 1960 underscored the enduring reach of the Turner-Roosevelt construct: “In the original American populist dream, the omnicompetence of the common man was fundamental and indispensable.”²⁴⁰ And:

During the nineteenth century . . . when most business and professional men attained eminence without much formal education . . . intellectual and cultural pursuits were called unworldly, unmasculine, and impractical. In spite of the coarse and philistine rhetoric in which this contention was very often stated, it had a certain rude correspondence to the realities and demands of American life. This skepticism about formally cultivated intellect lived on into the twentieth century.²⁴¹

As for speculative theories and other continental ideologies, through the first decades of the new century, “Americans continued to congratulate themselves on their ability to get on without the benefit of what are commonly called ‘foreign isms,’ just as they had always congratulated themselves on their ability to steer clear of European ‘corruption’ and ‘decadence.’”²⁴² Extending Hofstadter’s logic, American historiography of the period (presumably, part of the “life of thought”) could hardly keep from being a “medium” both reflecting and transmitting the isolationist, “progressive” and atheoretical bent of U.S. society generally.

²³⁹ Richard Hofstadter, *Anti-Intellectualism in American Life* (New York, 1963), p. 28 (italics added).

²⁴⁰ *Ibid.*, p. 34.

²⁴¹ *Ibid.*, pp. 33-34.

²⁴² *Ibid.*, p. 43.

(3) The forgotten cycle: New-century activist relativism

History is doubtless
An orchard bearing several trees
And fruits of different tastes.
James Harvey Robinson

Hofstadter's critique was all too typical for the 1960s in making only passing reference to an earlier era in which historiographers had vigorously called into question teleology, positivism and triumphalism in history. Although neat date borders in historiography, as with many fields, are rarely possible, the rough period 1910-1940 witnessed some dramatic shifts as progressivism and relativism in history reached full bloom, at least in some influential corners, then began to fade and sag under the combined weight of their own excesses and internal contradictions. Economic depression and the horrors of two global wars of unprecedented destructiveness choked out most of any remaining optimism otherwise implicit in positivist and progressivist agendas.

But first, progressivism in history at its late peak would leave the door ajar for instrumentalism, later to throw it open in welcome, to its own peril. Leading the final great wave of (pre-instrumentalist) American progressives was John Franklin Jameson, co-founder of the AHA (1884) and the first professional historian selected as AHA president (1907). While not a prolific writer, his had wide influence. In it, Jameson downplayed continentally-derived political theory and values, instead casting the Revolution largely as a struggle for power and ruling leverage between economic interest groups.²⁴³ That theme was much in line with American progressive historiography of the era, including Charles Beard's 1913 work, *An Economic Interpretation of the*

²⁴³ His best-known work on that theme was John Franklin Jameson, *The American Revolution Considered as a Social Movement* (Princeton, 1940 [1926]).

Constitution of the United States, which, as the title suggests, argued the private economic interests of a cohesive class of elites had been more central to the Constitution than the legacy of Enlightenment political liberalism that permeates the language therein.²⁴⁴ In this respect, Jameson and Beard were each consistent with Turner's earlier postulate of a common man, western versus eastern ethos in American history (their language, however, was considerably less triumphalist). And despite their social and economic history approach, neither historian was overtly Marxist, and neither abandoned the possibility of historical objectivity, although Beard, 1933 AHA president, wrestled with the issue for much of his later career. Jameson less so; he characterized the discovery of objective historical facts as making "good bricks" such that an "architect" (presumably some later historian) could profitably configure them.²⁴⁵

But within that same last wave of progressives loomed key figures whose open bent for advocacy eventually contributed, however inadvertently, to the fall from dominance. For progressivist historiography had been most persuasive where it claimed to eschew the artifices of European speculative theory and the myopia of class biases, so as to enable a newly objective approach, something akin to judicialism. As earlier shown, history writing had always included some element of advocacy. The initial decades of the twentieth century, however, seems to be the first time a cluster of prominent historiographers (in America at least) openly adopted and ratified the use of history as an agenda-supporting tool, the very antithesis of judicialist history.

An early proponent of the new approach was the polymathic John Dewey (1860-

²⁴⁴ Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York, 1913).

²⁴⁵ See footnotes 46 and 53, *supra* as to J. Franklin Jameson letter to Henry James, 31 October 1910.

1952). Dewey's extensive writings included pragmatist musings on philosophy and history, particularly as those fields touched on Education, which in his view should be organized and operated with "progressive" egalitarian principles and ends (chiefly, the construction of an ideal, participatory democracy).²⁴⁶ Dewey's overt endorsement of presentism and instrumentalism in history reflected no little dash of scientific positivism.²⁴⁷ To solve vexing problems in the present both scientist and historian propose a hypothesis and seek evidence tending to demonstrate its strength and utility. Hence, we do not merely observe and learn from history; we employ it towards the ends desired. History *for* something.

Several interrelated concepts wind through Dewey's formula as to the writing and use of history: pragmatism, presentism, instrumentalism, selectivity, judgment, utility and transformation.²⁴⁸ As a pragmatist, Dewey focused less on epistemological idealism than on the purposive behavior towards the ends-in-view. That presentist orientation – how to address the challenges of the current and foreseeable times – influences how one employs the available tool set, history included. Dewey adopted a common double-

²⁴⁶ Dewey's wooden and stilted phraseology tended to render his message rather nebulous, not helped by Dewey's tendency to employ end-goal abstractions more than the mechanical details of the process. His *Democracy and Education: An Introduction to the Philosophy of Education* (New York, 1916) suggests the educative goal should be preparation for participatory democracy – progressive education would deliver social efficiency and social mobility, civic efficiency (good citizenship) all salubrious to greater democracy. Many experiences are educative, but some threaten more harm than good: "Selection aims not only at simplifying but at weeding out what is undesirable" (p. 20). Few of these terms are well defined. One result has been voluminous commentary, some of it sharply critical (particularly in education), as to the exact nature of Dewey's progressivist aims and means.

²⁴⁷ For Dewey, any progress via science or its social science quasi-equivalents was anything but automatic; it would ensue only through the hard work of practical problem-solving. "Adjusting to the environment means not passive acceptance of the latter, but acting so that the environing changes take a certain turn." John Dewey (1917), "The Need for a Recovery of Philosophy," reprinted in *The Philosophy of John Dewey*, ed. J.J. McDermott (Chicago, 1981), p 62.

²⁴⁸ For a lengthier discussion, cast with some of these terms and tones, see Joseph L. Blau, "John Dewey's Theory of History" in *Journal of Philosophy*, vol. 57, No. 3 (Feb. 1960), pp. 89-100.

definition for history: “History is that which happened in the past *and* it is the intellectual reconstruction of these happenings at a subsequent time.”²⁴⁹ The latter aspect, intellectual reconstruction, is (or for Dewey should be) an “instrumentalist” element (i.e., tool) to help achieve the ends-in-view.

It is but a short step to conclude (as I discuss at greater length in Chapter 3, *infra*), that “[a]ll historic evidence is necessarily selective.”²⁵⁰ And that selection, a function of the historian’s strategic judgment, qualitatively alters the original occurrence: “As soon as the event takes its place as an incident in a particular history, an act of judgment has loosened it from the total complex of which it was a part, and has given it a place in a new context, the context and the place both being determinations made in inquiry, not native properties of original existence.”²⁵¹ The historian, then, decides what is worthy of inclusion (or exclusion), and thereby changes – determines – an aspect of history itself, such that a historical work is as much a formative as reflective exercise: “The writing of history is itself an historical event . . . which in its occurrence has existential consequences.”²⁵²

Dewey’s presentism lent easily to an endorsement of a variant of “standpoint” theory, predating by several decades the now familiar debate as to that approach, although in his case seemingly limited to generational rather than group identity

²⁴⁹ John Dewey, *Logic: The Theory of Inquiry* (New York, 1938), p. 23 (italics mine).

²⁵⁰ *Ibid.*, p. 235 (italics in original). For Dewey, the process was three-fold: the original selection (in the era studied) of which events to record and attempt to preserve; another tied to public memory, i.e., the traditions and folk-memory values of intervening generations; a third by the historian as influenced by the demands of the current era. All three simultaneously engage at the time of writing. See Blau, “John Dewey’s Theory of History,” pp. 99-100.

²⁵¹ *Ibid.*, p. 236.

²⁵² *Ibid.*, p. 237.

clustering. Because each generation looks to the past for clues as challenges unique to its own time, “new standpoints for viewing, appraising and ordering data arise.”²⁵³

Despite asserting a “one best approach” forward, Dewey remained more reformer than revolutionary. He was unable, or unwilling (or both), to articulate much of a theory of conflict – just how did he imagine a progressivist consensus about history would arise to surmount nationalistic fervor and persistent class, race and gender inequities, even *within* a single generation, without some clash of divergent interests? Many of Dewey’s writings issued after the onset of World War I hostilities, in the domestic social context of Jim Crow, union agitation, frustrated suffragism, even anarchy – how was such naïveté still then possible? Dewey also seemed mindless of the potential harms from historical instrumentalism once adapted to polemics in a manner (distortive propaganda) and to ends (including totalitarianism) he no doubt would have deemed nefarious.

In any case, Dewey’s circle came to include highly placed professional historians of the era, among them Charles Beard and professor of European history James Harvey Robinson. In 1919, the trio joined some other prominent academics²⁵⁴ to found the New School of Social Research (partly in reaction to censorship and repression at Columbia University in the context of nationalistic fervor still strongly echoing post-war). With Robinson as its first director, the New School looked to integrate critical Continental philosophy and American leftist thought, including much of the progressive approach and agenda. Robinson proceeded to champion a reformist, progressivist “New History,” so

²⁵³ Ibid., p. 233.

²⁵⁴ Including economist Thorstein Veblen, philosopher Horace M. Kallen and several former professors at Columbia University.

labeled after his earlier collection of historiographical essays published under that title.²⁵⁵ Therein, he indicated the approach would be overtly instrumentalist (“[t]he present has hitherto been the willing victim of the past; the time has now come to exploit it in the interests of advance”) and multidisciplinary (“it will avail itself of all those discoveries that are being made about mankind by anthropologists, economists, psychologists, and sociologists . . .”).²⁵⁶

The New History grew prominent enough that the AHA selected Robinson as its 1929 president. In his official AHA address that year he left no doubt about his continued instinct to deprivilege²⁵⁷ professional historians:

As we look back thirty years we find historians rather pedantic and defensive. They are humble enough now. They do not aspire to a noble isolation but seek help from quarters undreamed of when I began to teach. We readily admit that anyone may view historically anything he wishes and we bless him for his wisdom if he does so. We escape the possibility of attacks by merely leveling our circumvallations and permitting those who will to wander freely about our realm and help themselves – we wonder, indeed, if we have, or ever have had, any legitimate sovereign rights to defend.²⁵⁸

The “other quarters” from which historians sought help by Robinson’s time had emerged in the preceding few decades of seismic developments in a number of fields, together pointing to the contingent or *conditional* nature of reality, especially at the less readily perceived substrata. They quickly and considerably complicated what had seemed the

²⁵⁵ James Harvey Robinson, *The New History: Essays Illustrating the Modern Historical Outlook* (New York, 1912). See also an earlier work issued with Beard, his most notable student – James Harvey Robinson and Charles A. Beard, *The Development of Modern Europe: An Introduction to the Study of Current History* (Boston, 1907).

²⁵⁶ Both quotes from Robinson, *The New History*, p. 24.

²⁵⁷ Perhaps the adamancy of that stance originated in the break from the Columbia establishment, but he had already given notice of his cross-disciplinary bias in *The New History*, *ibid.*

²⁵⁸ James Harvey Robinson, 1929 *AHA Presidential Address*.

straightforward march of science in the wake of Darwinism. In psychology and behavioral studies, Sigmund Freud's and Carl Jung's exploration of unconscious aspects (repression, denial, sublimation, and projection) and conflicting desires within the psyche, and Ivan Pavlov's experiments and writings as to conditioned reflexes, association and learned response²⁵⁹ indicated a subterranean realm profoundly affecting everyday behavior, and thus comprising a major explanatory variable in human conduct.²⁶⁰ In physics, Einstein's work on special and general relativity²⁶¹ undercut the seeming absolute quality of Newton's laws of motion and universal gravitation by showing how the *situation of observers* (here their velocities) rendered *relative* their measurements of various other quantities. Mutability in science stretched also to quantum mechanics, where Bohr's idea of "complementarity" was an attempt to reconcile his observations about the wave-particle duality in light with Heisenberg's uncertainty principle.²⁶² In the written, visual and aural arts, Symbolists rejected realism, naturalism and matter-of-fact description, instead focusing less on the thing represented than on the

²⁵⁹ See Ivan P. Pavlov, *Lectures On Conditioned Reflexes* (London, 1928); Ivan P. Pavlov, *Conditioned Reflexes* (London, 1927).

²⁶⁰ For a nearly exhaustive collection of Freud's writings, see *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, eds. J. Strachey and Anna Freud, 24 vols. (London, 1953-1964).

²⁶¹ Einstein showed that space-time itself is curved, not rectilinear. As for the Special Theory of Relativity (1905) and the General Theory of Relativity (1915), see Albert Einstein, *Relativity: The Special and General Theory* (New York, 1920). The term "theory of relativity" seems to have sprung from Max Planck's 1906 expression "relative theory" (*Relativtheorie*) by Max Planck in 1906.

²⁶² "The quantum-mechanical principle, formulated by Heisenberg, that measuring either of two related quantities, as position and momentum or energy and time, produces uncertainty in measurement of the other." *Webster's College Dictionary* (Random House Kernerman, 2010). See Werner Heisenberg, "Ueber den anschaulichen Inhalt der quantentheoretischen Kinematik und Mechanik" *Zeitschrift für Physik* 43 (1927):172-198, English translation in J.A. Wheeler and W.H. Zurek, eds., *Quantum Theory and Measurement* (Princeton, NJ, 1983), pp. 62-84, and Neils Bohr, "The Quantum Postulate and the Recent Development of Atomic Theory," *Nature* (Supplement) 121 (1928):580-590. The imperfect consensus as to quantum mechanics the two physicists (and others) forged is now generally referred to as "the Copenhagen interpretation."

effect it produces, and relying on the realm of imagination and dreams as a better means of expression.²⁶³ That school somewhat overlapped and blended into the succeeding Modernists, wherein literary figures (including Marcel Proust, James Joyce and Virginia Woolf) began to abandon the third-person all-knowing narrative voice – so dominant in history writing – in favor of an interior reflective dialogue of uncertain accuracy, echoing the narrator’s individualized ends and even self-delusions or perceptual shortcomings. Painters and sculptors also elevated the role of an interior vision in their uneven path away from Impressionism and its claims of objective and thus truthful reproduction.²⁶⁴

All these movements took root in an environment where technological developments over the same few decades were delivering a vertigo-inducing pace of hyper-industrialization and modernization, and by such tumult, the twin banes of dislocation and alienation.²⁶⁵ Inescapable, of course, was how World War I, in shattering the wobbly but seemingly “rational” balance of powers in Europe that had enabled the Hundred Years’ Peace,²⁶⁶ also laid wreck to much of the prior faith in rational progress in

²⁶³ A “Symbolist Manifesto” issued in 1886 included this summary statement: *Ainsi, dans cet art, les tableaux de la nature, les actions des humains, tous les phénomènes concrets ne sauraient se manifester eux-mêmes; ce sont là des apparences sensibles destinées à représenter leurs affinités ésotériques avec des Idées primordiales.* (“In this art, scenes from nature, human activities, and all other real world phenomena will not be described for their own sake; here, they are perceptible surfaces created to represent their esoteric affinities with the primordial Ideals.”) Jean Moréas, “Le Manifeste du Symbolisme,” *Le Figaro*, 28 September 1886. As for key personalities, although classification borders as to art movements tend to be fluid and sometimes controverted, figures often identified with Symbolism are Baudelaire, Mallarmé, Verlaine and Appolinaire in verse, Poe, Chekhov and Dostoyesky in prose, Wagner and Debussy in music, Rodin in sculpture, and Klimt, Moreau, Kahlo and Munch in painting, among several others in each field.

²⁶⁴ “The most conspicuous characteristic of Impressionism in painting was an attempt to accurately and objectively record visual reality in terms of transient effects of light and colour.” “Impressionism.” *Encyclopædia Britannica. Encyclopædia Britannica Online.* Encyclopædia Britannica Inc. <http://www.britannica.com/EBchecked/topic/284143/Impressionism>.

²⁶⁵ This was a period of marked urbanization and standardization, fundamentally altering prospects for millions of farmers and craftsmen and their families.

human affairs, i.e., in scientific approaches that would naturally deliver, à la Condorcet and progeny, the blessings of peace and prosperity. By the time of Robinson's 1929 speech, speculation and hedonism in America and hyper-inflation on the Continent were such that very few (Dewey one exception) could maintain the optimism so central to the progressivist construct. In all, the few decades before Robinson's address had indeed delivered astonishing shifts in reality and, for the purposes here, in the means of perceiving and describing it.

Two years after Robinson, Carl L. Becker delivered his bombshell 1931 AHA presidential address – “Everyman His Own Historian” – soon widely recognized as having rung the death knell for scientific historiography, done in, as Becker shows (without expressly so stating), by its own hand, or rather by its own *instrument*. For crossing the fine line toward open relativism in history was (and is) in large part a function of presentist instrumentalism. Building on Croce's notion that “all living history . . . is contemporaneous,” Becker opined that historical positivism must yield to presentism, instrumentalism, and hence relativism: “It must then be obvious that living history, the ideal series of events that we affirm and hold in memory, since it is so intimately associated with what we are doing and with what we hope to do, cannot be precisely the same for all at any given time, or the same for one generation as for another.”²⁶⁷ Instrumentalist history ultimately doomed scientific progressivism, because

²⁶⁶ Whether the characterization of the period 1815-1914 (from the final fall of Napoleon to the outbreak of WWI hostilities) as particularly “peaceful” is contestable as to scale, scope and modes of measure, at least some historians attribute the significantly lower rate of battleground deaths in that span to a remarkably durable political balance of powers, albeit greatly aided by other factors such as a stable monetary regime. See, e.g., Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, 2001), arguing that breakdowns in the arrangements were the proximate causes of the Great War. But, as elsewhere, causal directionality remains a problem.

the latter exalted the discovery of universally applicable laws, while the former was/is inherently idiosyncratic.

Becker aimed to demystify the history profession and puncture the illusions of some of its practitioners. He first reduced history to its lowest terms by showing how the average person (“Mr. Everyman”) is naturally and necessarily conversant with the field basics (here the knowledge of some meaningful pattern from historical facts) in that one daily relies on memory, then enhances it by resorting to records (“research”), and interprets the whole according to some purpose. Becker then extended the analysis to professional historians, arguing they likewise undertake an inquiry not via pure inductivism, in the manner of empirical science as then idealized, but rather as resources and needs dictate: “Each of us [i.e., each historian by profession] is subject to the limitations of time and place; and for each of us . . . the pattern of remembered things said and done will be woven, safeguard the process how we may, at the behest of circumstance and purpose.”²⁶⁸

The personification of the prior dominant discourse of scientism that Becker meant to rebuff was Fustel de Coulanges, epitomized by the latter’s reproach to his admiring students: “It is not I who speaks, but history which speaks through me.” (Section 1, *supra*). For Becker, supposing facts would somehow speak for themselves “was perhaps peculiarly the illusion of those historians of the last century who found some special magic in the word ‘scientific.’ The scientific historian, it seems, was one who set forth the facts without injecting any extraneous meaning into them.” [But]:

²⁶⁷ Carl. L. Becker, “Everyman His Own Historian,” 1931 *AHA Presidential Address*.

²⁶⁸ *Ibid.*

After fifty years we see that it was not history which spoke through Fustel, but Fustel who spoke through history . . . what the admiring students applauded on that famous occasion was neither history nor Fustel, but a deftly colored pattern of selected events which Fustel fashioned, *all the more skillfully for not being aware of doing so*, in the service of Mr. Everyman's emotional needs – the emotional satisfaction, so essential to Frenchmen at the time, of perceiving that French institutions were not of German origin.²⁶⁹

Becker then distanced himself from the “facts as good bricks” imagery that Jameson, the last great progressive, had favored:

However ‘hard’ or ‘cold’ they may be, historical facts are after all not material substances which, like bricks or scantlings,²⁷⁰ possess definite shape and clear, persistent outlines. To set forth historical facts is not comparable to dumping a barrow of bricks. A brick retains its form and pressure wherever placed; but the form and substance of historical facts, having a negotiable existence only in literary discourse, vary with the words employed to convey them.²⁷¹

From there it was only a short jump to argue that historical writing, as distinct from history itself, invariably is an exercise in relativism:

Let us then admit that there are two histories: the actual series of events that once occurred; and the ideal series that we affirm and hold in memory. The first is absolute and unchanged – it was what it was whatever we do or say about it; the second is *relative*, always changing in response to the increase or refinement of knowledge.²⁷²

That increase or refinement of historical knowledge results from the historian's strivings in line with a particular purpose, therefore a particular filter. But even there, a historian's private purpose-filter ultimately must fit with broader public demand. If progressivism in the Turner through Dewey mode represented some blend of positivism and populism, Becker's boiling away of positivist notions of full and comprehensive objectivity seemed

²⁶⁹ Ibid. (italics added). I revisit the issue of self-awareness, or lack thereof, in Chapters 3 and 5, *infra*.

²⁷⁰ A scantling, in this context, is also a smallish unit of building material, here a piece of lumber used as an upright in constructing a wall, like a “2x4” stud.

²⁷¹ Carl. L. Becker, 1931 *AHA Presidential Address*.

²⁷² Ibid. (italics in original).

to isolate populism as the centering factor in history writing:

But we do not impose our version of the human story on Mr. Everyman; in the end *it is rather Mr. Everyman who imposes his version on us . . .* If we remain too long recalcitrant Mr. Everyman will ignore us, shelving our recondite works behind glass doors rarely opened. Our proper function is not to repeat the past but to make use of it, to correct and rationalize for common use Mr. Everyman's mythological adaptation of what actually happened.²⁷³

Unread historians, then, are destined to etherize into utter irrelevance more quickly than they would naturally otherwise, i.e., where their works meet the quotidian but real (or at least subjectively perceived) needs of the population as a whole. Historians are thus structurally bound to audiences that force certain approaches (however unwittingly they may do so). In this view, history is always consumed as “living history” – tied to some purpose – else rarely (or never) consumed at all.

Attention to the influence of the audience on historical writing was not entirely new. In the prior century Alfred de Vigny had remarked: “One might almost reckon mathematically that, having undergone the double composition of public opinion and of the author, their history reaches us at third hand and is thus separated by two stages from the original fact.”²⁷⁴ But after Dewey's utilitarianism and Becker's Mr. Everyman, it was harder for historians to defend against disdainful wave-offs by the likes of the ever bristly but nonetheless influential Henry Ford:

I don't know much about history, and I wouldn't give a nickel for all the history in the world. History is more or less bunk. It is a tradition. We want to live in the present, and the only history that is worth a tinker's damn is the history we make today.²⁷⁵

²⁷³ Ibid. (italics mine). Becker was not alone in this position; nor was it particularly American -- British historian Allen F. Pollard (1869-1948) sounded a like note: “History, in a democratic age, tends to become a series of popular apologies, and is inclined to assume that the people can do no wrong.” *Active History*.

²⁷⁴ BrainyQuote, URL = <http://www.brainyquote.com>.

²⁷⁵ *Chicago Tribune*, May 25, 1916. Ford was a rough contemporary of Dewey and the relativists.

The tenor of such a discourse drift understandably alarmed historians of most stripes (not just displaced progressives) – here was a view of history not as the past elegantly wrought to deliver rich lessons for the present and future, but as a servant for the rough needs and raw aspirations of contemporary actors, whether political or commercial (or both). Was it not then just a short step to history as mere propaganda? (More on that issue shortly below.) The growing conundrum was that historiographical progress, in terms of any workable consensus, would be hard to achieve should everyone adopt and employ instrumentalist means.

However coincidentally, just two years after Becker's address the AHA lent the presidential podium to the esteemed and more moderate Charles Beard, whose 1933 speech seemed an attempt to claw back some of the last breath of progressivism by taking a middle position between Jameson and Becker. On the one hand, Beard acknowledged that relativism in history

. . . is in keeping also with the obvious and commonplace. Has it not been said for a century or more that each historian who writes history is a product of his age, and that his work reflects the spirit of the times, of a nation, race, group, class, or section? . . . Every student of history knows that his colleagues have been influenced in their selection and ordering of materials by their biases, prejudices, beliefs, affections, general upbringing, and experience, particularly social and economic; and if he has a sense of propriety, to say nothing of humor, he applies the canon to himself, leaving no exceptions to the rule.²⁷⁶

On the other hand, Beard remained an older-style “progressive” in the sense he believed new historiographical approaches would continue to supercede outmoded versions, with unbridled relativism merely the latest in the chain, eventually also to be set aside:

²⁷⁶ Charles A. Beard, 1933 *AHA Presidential Address*.

[T]he apostle of relativity is destined to be destroyed by the child of his own brain. If all historical conceptions are merely relative to passing events, to transitory phases of ideas and interests, then the conception of relativity is itself relative historical thought is, accordingly, returning upon itself and its subject matter. The historian is casting off his servitude to physics and biology, as he formerly cast off the shackles of theology and its metaphysics. He likewise sees the doctrine of relativity crumble in the cold light of historical knowledge.²⁷⁷

Beard's dethroning of physics and biology as historiographical models seems out of place and premature – elsewhere in the same essay he revealed he was not yet ready to abandon either dominant mode of historians' self-view, scientist or judge:

But members of the passing generation will ask: Has our work done in the scientific spirit been useless? Must we abandon the scientific method? The answer is an emphatic negative. During the past fifty years historical scholarship, *carried on with judicial calm*, has wrought achievements of value beyond calculation.²⁷⁸

Scientific and judicialist instincts once more cohabitated, but now also in the acknowledgment, however grudging, of continued relativity means and ends (“historians recognize formally the obvious, long known informally, namely, that any written history inevitably reflects the thought of the author in his time and cultural setting”). In all, Beard's formula was more *pastiche*, a little of everything held in tension in some unexplained manner, requiring as much hope as proof of an upward gradient toward an ideal historiographical order: “The historian who writes history, therefore, consciously or unconsciously performs *an act of faith*.”²⁷⁹

Beard was not speaking directly of religious faith, but his choice of terminology was intriguing at a period when the quasi-religious ideologies²⁸⁰ of fascism and

²⁷⁷ Ibid.

²⁷⁸ Ibid. (italics added for emphasis).

²⁷⁹ Beard accordingly had entitled his address “Written History as an Act of Faith.”

²⁸⁰ Daniel Bell described how ideology could provide a religion substitute. See, e.g., Daniel Bell, *The End*

communism and their authoritarian leaders amassed sufficient military clout to challenge the teleology of liberal democracy otherwise dominating the western social, political and historical consciousness. The Age of Ideology was (and remains) a tremendous challenge to historians. Right on its cusp came a set of critical observations about prior historiography that served equally well as a cautionary tale for the era to come.

(4) Underexamined retrenchment in the Age of Ideology

Tightly contemporary with the AHA addresses by Becker and Beard, and at the outset of the great world economic depression, with the disheartening example of World War I in recent memory and the power of totalitarian regimes consolidating and rising in Germany, Japan and the USSR, progressivism in historical writing met a final formidable critic, in this instance one from back across the Atlantic. Herbert Butterfield, a Cambridge philosopher of history, explored in his *The Whig Interpretation of History* (1931) the tendency in history writing everywhere toward “dividing the world into the friends and enemies of progress.”²⁸¹ While Butterfield’s use of the term “whig” arose from socio-political movements specific to Britain,²⁸² the author directed his points about history writing universally. For historians from any and every social tradition, there was an unconscious strategy “to praise revolutions provided they have been successful, to emphasise certain principles of progress in the past and to produce a story which is the

of Ideology: On the Exhaustion of Political Idea in the Fifties (Cambridge, MA, 1962).

²⁸¹ Herbert Butterfield, *The Whig Interpretation of History* (London: 1951 [1931]), p. 5.

²⁸² Chiefly encompassing the shift to a constitutional monarchy with growing limitations on the powers of the crown, consistent with rational enlightenment and greater personal and religious liberty, all which in the whig historical view (imperfectly captured in Whig Party platforms) had causally resulted in unprecedented measures of justice and prosperity, worthy of envy and emulation throughout the globe.

ratification if not the glorification of the present.”²⁸³

Butterfield argued that historians had become by his time so steeped in the conceptual ethos of progressive liberalism that they had lost mindfulness of how much their assumptions drove their screening and organization of the evidence: “Whig history in other words is not a genuine abridgment, for it is really based upon what is an implicit principle of selection.”²⁸⁴ One resulting distortion is the choice of human figures on whom to focus:

If we see in each generation the conflict of the future against the past, the fight of what might be called progressive versus reactionary, we shall find ourselves organizing the historical story upon what is really an unfolding principle of progress, and *our eyes will be fixed upon certain people who appear as the special agencies of that progress.*

Similar treatment extends to the question of causal links:

[T]he whig historian can draw lines through certain events, some such line as that which leads through Martin Luther and a long succession of whigs to modern liberty; if he is not careful he begins to forget that this line is merely a mental trick of his; *he comes to imagine that it represents something like a line of causation.* The total result of this method is to impose a certain form on the whole historical story, and to produce a scheme of general history which is bound to converge beautifully on the present – all demonstrating throughout the ages the workings of an obvious principle of progress²⁸⁵

Butterfield duly receives credit for having critically examined the historiographical implications of the Protestant liberal democratic values he himself shared.²⁸⁶ He was not a full-blown relativist. Nonetheless, his call was for a greater sense of reflective humility

²⁸³ Butterfield, *The Whig Interpretation of History*, p. v (preface).

²⁸⁴ *Ibid.*, p. 25.

²⁸⁵ *Ibid.*, pp. 45-46 (italics added) and p. 12 (italics added), respectively.

²⁸⁶ Less successful, for one of many possible examples, was Acton: “Progress in the direction of organized and assured freedom, is the characteristic fact of Modern History, and its tribute to the theory of providence.” Inaugural Lecture on the Study of History, Cambridge, June 11 1895, reproduced in John Acton, *Lectures on Modern History* (London, 1906).

for historians: “It is not easy to resist the temptation to personify and idealise history In its practical consequences it means the exaltation of the opinions of the historian.”²⁸⁷ To this end, Butterfield joined many prior commentators in raising judicialist imagery, though in his case to deny the historian that parallel: “And it is typical of him that he tends to regard himself as the judge when by his methods and his equipment he is fitted only to be the detective.”²⁸⁸

But the main target for Butterfield was unexamined and thus unacknowledged ideology. The continued potency of his overview is in his demonstration that historiographical distortion could occur as much in the progressive tradition as in what liberals tend to count as ideologies, i.e., those *other* teleological constructs at the extremes. Americans and (many) Europeans in the first half or more of the twentieth century were not inclined to see western-style liberal democracy as an ideology. It was understandably much easier to view the totalitarian fascism and communism on the distant right and left as justifying the center position, or excluding liberal democracy altogether from any such continuum as qualitatively distinct.²⁸⁹ It was in the underlying conviction that history itself had traceably, even inevitably, pointed to that near optimal state of social/political/economic arrangements already arrived, or well and securely on

²⁸⁷ Butterfield, *The Whig Interpretation of History*, p. 114.

²⁸⁸ Ibid., p. 107. Others have employed the detective analogy (see Chapter 1, *supra*), and the overall tone of *The Whig Interpretation of History* is more in line with the civil litigation analogy at the heart of this essay. Indeed, in the penultimate page of that essay Butterfield suggests a view of the historian as a biased expert witness, a point I treat further in Section 7, *infra*.

²⁸⁹ American in particular tended to see the thrust and parry of interest groups and the norm of compromise and incrementalism (or muddling through) as normal politics. On political pluralism in the United States, see Robert A. Dahl, *A Preface to Democratic Theory* (Chicago, 1956) and Robert E. Dahl, *Who Governs?: Democracy and Power in an American City* (New Haven, 1961). As for bureaucratic incrementalism, see Charles E. Lindblom, “The Science of Muddling Through” in *Public Administration Review*, Vol. 19, No. 2 (Spring 1959).

its way, that infected history writing with a form of whiggism. And to the extent whiggish teleology in history writing (in any society) did (and still does) unconsciously reflect and promote something akin to ideology, it risks degenerating into propaganda.

Tremendous violence, destruction and suffering have attended the ideologic wars stretching over the last four score years.²⁹⁰ And beyond the grievous loss of life and property, these struggles inflicted, as wars always have – ideology aside – a toll on the accuracy of chronicles and other records of events. Some attribute the maxim “In war, truth is the first casualty” to the Greek tragedian Aeschylus (525-456 BC), although without written trace (better provenance attaches to Philip Snowden in 1916).²⁹¹ Some of the bias has been attributed to the double-edged sword of patronage either public or private: “Whosoever, in writing a modern history, shall follow truth too near the heels, it may haply strike out his teeth.”²⁹²

Historians themselves have long been prominent among those opining on the matter. Edward Gibbon in the eighteenth century, for example, lamented: “The voice of history . . . is often little more than the organ of hatred or flattery.”²⁹³ Indeed, propaganda during World War I – i.e., even before fascism or communism had forged themselves into unmistakably powerful polemical forces – issued disturbingly often from historians.

In retrospect the pattern is not so surprising. For considerably predating the emergence of what we tend to think of as ideology (for the purposes here I borrow the

²⁹⁰ Although one could imagine other time frames, here I mark the violence-aided rise of Mussolini and Hitler, and the bloody Spanish Civil War, as the approximate start of the stated era.

²⁹¹ From Snowden’s introduction to E.D. Morel, *Truth and the War* (London, 1916): “‘Truth,’ it has been said, ‘is the first casualty of war.’”

²⁹² Walter Raleigh, *The History of the World* (London, 1614), Preface.

²⁹³ Edward Gibbon, *The Decline and Fall of the Roman Empire* (London, 1776), Volume 1, Chapter 10.

notion of a left-right scale, however oversimplified, as articulated most fully after the first world war) was the more visceral dynamic of *nationalism*. Historians were not immune. Space does not allow a dedicated discussion here, but a provocative argument suggests itself in the rough concurrence of the rise of history as a profession and the keening of romantic nationalism, especially in the Euro-American context. The great Ranke, for example, saw the nation-state as a vital element in history as it revealed God's grand design. Although particularly taken with Prussian attributes, Ranke's patriotic bent was more constrained than most (I have already established, *supra*, that not all historians fit the pattern). Novick described the more prevalent trend:

Ranke – and in this he was followed by the vast majority of European and American historians before 1914 – limited his investigations to the history of states; it was these “thoughts of God” that were “immediate” to him in every epoch. (Ranke differed from his contemporaries and immediate successors only in the ecumenism, the absence of narrow nationalism, with which he pursued this program.) So long as history was restricted to the political realm, it was a nationalist/patriotic imperative to “love the past” of one's institutions.²⁹⁴

The exigencies of World War I reinforced such instincts. And the leap from nationalism to propaganda, alas, was short. Not all historians took it, of course. Exhortations were anything but absent: “For history must be our deliverer not only from the undue influences of other times, but from the undue influence of our own, from the tyranny of environment and the pressure of the air we breathe.”²⁹⁵ But a fairly large number apparently succumbed to such influence. In his 1929 AHA presidential address, and speaking as much to American historians as to their British, French and German colleagues, James Harvey Robinson reflected ruefully how progressive scientism had

²⁹⁴ Novick, p. 99 (parentheses original).

²⁹⁵ John Acton, *Lectures on Modern History* (London, 1952 [1906]). p.33.

badly failed within the discipline during the Great War:

Beginning with 1914 the old ways of historians were put to a fearful test. How did these old ways bear the test? Very badly, as I think we must all admit. Did such knowledge as historians had arduously accumulated of the past serve to make them wiser than their fellows? Hardly. In all countries they were unable to overcome their native susceptibility to the prejudices of their particular tribe. They applauded the old battle cries. They blew trumpets and grasped halberds. They gulped down propaganda which in a later mood they realized was nauseous. They were, in short, easily sold out, for their studies had not prepared them to assess the sudden emotional crisis much better than the man in the street.²⁹⁶

While Robinson emphasized the more primal instincts, a subtler influence (though of untestable weight relatively) may have been Dewey-style presentism and instrumentalism so openly tolerated, even encouraged, in that era of history writing. The same approach and tools aimed at helping to build a better society through participatory democracy could also serve as propagandistic elements. Dewey had given some hint to that potential danger in stating (echoing Nietzsche to an extent, however purposefully): “We generalize and idealise the past egregiously. We set up little toys to stand as symbols for centuries and the complicated lives of countless individuals.”²⁹⁷

Novick provided several examples of how historians from the combatant nations in World War I largely failed to avoid the misleading simplifications Dewey mentioned. In his view, at first the most grievous cases were European, in particular German: “The first dramatic example of the cooperation of scholars in wartime propaganda was ‘To the Civilized World,’ a 1914 manifesto signed by virtually every leading German scholar and scientist – Albert Einstein was the important exception – endorsing the most outrageous false German assertions on the origins and conduct of the war.” American historians

²⁹⁶ James Harvey Robinson, 1929 AHA Presidential Address.

²⁹⁷ John Dewey, *Characters and Events: Popular Essays in Social and Political Philosophy*, Vol. 2, ed. Joseph Ratner (New York, 1929), p. 515.

claimed to be appalled at how the founding culture of professional history could have strayed so far, so quickly: “We have learned much from the German scholars about historical ‘objectivity’ and the niceties of historical criticism; what we receive when we look for an application of these principles to contemporary events, is a clumsy compilation of fictions, irrelevancies, and vulgar appeals to what are apparently conceived to be American prejudices.”²⁹⁸

Those prejudices were not entirely imagined, and the stakes (American intervention) were quite high, eventually proving decisive. “Of the two opposing pulls on [American] historians – attachment to Germany, where so many had studied, and the Anglophilia which the profession had in recent years done so much to promote – the latter was by far the most powerful.”²⁹⁹ The degree to which historians closed ranks astonished, as did the speed: “With the American declaration of war on Germany, doubts about the righteousness of the Allied cause all but disappeared within the profession. Virtually all shared the patriotic enthusiasm which, overnight, became *de rigeur*.”³⁰⁰

Frederick Jackson Turner saw the question of participation in the war effort as either opportunity or peril for historians, on the one hand (with the mobilization of the scientific community in the war effort in mind) “for the greatest usefulness and for a corresponding increase in public estimation,” but on the other “if it [the profession] does not rise to this national emergency the sound teaching of history will receive a set-back

²⁹⁸ Novick, p. 114 and 115, respectively, in the latter instance quoting an Arthur O. Lovejoy letter to the editor, *Nation* 99 (24 September 1914), p. 376.

²⁹⁹ Novick., p. 112.

³⁰⁰ *Ibid.*, p. 416.

from which it will not recover in this generation.”³⁰¹ After all, intoned prominent historian Arthur M. Schlesinger, Germany had “used her schools for an ignoble purpose . . . we must not be behind her in the use of that weapon for . . . a very noble purpose.”³⁰²

Teaching history as a “weapon” – surely instrumentalism at its extreme – lent an academic gloss to crude but widely disseminated imagery (in both the U.K. and America) of “the Hun” as a dreadful stand-in for the characteristics of the German populace collectively: “We have seen a race preeminent for its technical skill, reverting in its ideas of international morality to its ancestors of the wild German forests, to men like those described by Caesar, who measured their national glory by the extent of wasted country that surrounded their territory.”³⁰³ Historians’ too-ready responsiveness to the public mood during the war lent to the overall context and backdrop for Becker’s otherwise startling 1931 claim (again, “we do not impose our version of the human story on Mr. Everyman; in the end it is rather Mr. Everyman who imposes his version on us”).

One reasonably supposes that a substantial part of historians’ personal being is affected by – is interwoven with – the historical, social and political rhythms of their natal societies and those in which they dwell (if differing). It follows that when national and global politics took on an increasingly ideological character as the twentieth century further unfolded, so did history writing inevitably reveal – or conceal – a doctrinal cant. As Paul K. Conkin and Roland N. Stromberg remind us, “[h]istorians are themselves

³⁰¹ Ibid., p. 117-118.

³⁰² Ibid., p. 117 (ellipses as provided by Novick).

³⁰³ Ibid, p, 123, citing to William D. Gray, “The Great War and Roman History,” *History Teacher’s Magazine* 9 (1918), pp. 138-139.

products of history.’’³⁰⁴ The purpose of the few pages to follow is not to provide a detailed overview of historicized propaganda emanating from totalitarian regimes at the extremes (space limitations allow only a brief overview) but rather how *western* historians – despite Butterfield’s caveats – tended to see their own discourse as somehow untainted, i.e., somehow not affected by an alternative ideology.

Although ideologies are nominally extra-national in some key aspects, political and military figures during middle fifty or so years of the century found ways to maximize and harness the power of doctrine by cross-pollinating it with nationalistic patriotism. Commentators Daniel Bell, et al., collectively explored how the ideologies that so dominated world affairs during those decades could be thought of as religion substitutes, in that they offered a similar line of totalizing constructs: a teleology of purposeful efforts and behaviors within neatly packaged descriptions of past deprivations, present sacrifices and future realization; dynamic psycho-social reinforcement via songs, slogans, symbols and participation in mass rituals; charismatic leaders incarnating the message and thus appropriately venerated and non-revolving (consider the personality cults upholding Hirohito, Hitler, and [to anti-communists] the unholy trinity of Marx, Lenin and Stalin, later Mao); hierarchies and other mechanisms to maintain order and discipline, and; identifiable enemies both internal and external.³⁰⁵

The peculiar seating of abstract, universalist doctrine within nationalist appeals at

³⁰⁴ Paul K. Conkin and Roland N. Stromberg. *Heritage and Challenge: The History and Theory of History* (New York, 1971).

³⁰⁵ The various commentators here tended to emphasize differing aspects of the overall description in the text above. The literature here is rich and of course not absent of controversy. One insightful starting point is Daniel Bell, *The End of Ideology: On the Exhaustion of Political Idea in the Fifties* (Cambridge, MA: 1962). Another is the collective work of political historian Theodore H. White, whose many observations included that “[p]olitics in America is the binding secular religion.”

the intersection of greatness and grievance yielded the most incendiary mix conceivable. If it is true that “[n]o modern idea has affected history more than the passion of nationalism,”³⁰⁶ and that “[h]istory is the projection of ideology into the past,”³⁰⁷ then French poet, essayist and philosopher Paul Valéry proved studiously prescient when in 1931, with the dark clouds of total war now bunching just over the horizon, he wrote:

History is the most dangerous product which the chemistry of the mind has concocted. Its properties are well known. It produces dreams and drunkenness. It fills people with false memories, exaggerates their reactions, exacerbates old grievances, torments them in their repose, and encourages either a delirium of grandeur or a delusion of persecution. It makes whole nations bitter, arrogant, insufferable and vainglorious.³⁰⁸

Such was the temper in militaristic – and increasingly militarized – Imperial Japan and Nazi Germany. In the former, quasi-historical material reminded citizens how the nation had not suffered a military defeat since retreating from Korea in 1597, how it had steadily modernized in the nineteenth century, and how it had stunned the world with a quick and decisive victory in the 1905 Russo-Japanese War.³⁰⁹ These depictions drove home the theme of rightful Japanese leadership in Asia, and the likely opposition from barbaric and cruel foreigners – mostly Westerners (especially Americans) with a legacy of intrusion into Japan – outsiders having grossly mischaracterized vicious Japanese incursions into Manchuria and China.

³⁰⁶ Charles R. Poinssatte, *Understanding History Through the American Experience* (Notre Dame, 1976).

³⁰⁷ Military historian John Keegan, quoting an unnamed source.

³⁰⁸ *L'Histoire est le produit le plus dangereux que la chimie de l'intellect ait élaboré. Ses propriétés sont bien connues. Il fait rêver, il enivre les peuples, leur engendre de faux souvenirs, exagère leurs réflexes, entretient leurs vieilles plaies, les tourmente dans leur repos, les conduit au délire des grandeurs ou à celui de la persécution, et rend les nations amères, superbes, insupportables et vaines.* Paul Valéry, *Regards sur le Monde Actuel* (Paris, 1931). Valéry regularly issued aphorisms on a number of topics, history included.

³⁰⁹ For an overview of such releases, see Barak Kushner, *The Thought War: Japanese Imperial Propaganda* (Honolulu, 2006). The humiliating Russian defeat was at least a small factor in the eventual fall of the Tsars and rise of the hyper-ideologic Russian Bolsheviks.

Fascist Germany even more epitomized the ideo-political historicism Valéry had described. The resentment in Germany over draconian and humiliating peace terms, the suspicion that Weimer-period hyperinflation was a close result, the desire for social and economic order to mitigate the harsher aspects of capitalism,³¹⁰ the sense of frustrated glory after the meteoric rise of the consolidated nation in the preceding decades, together fostered German susceptibility to an offering of some unifying historical legend. Hitler and the Nazis (including propaganda chief Joseph Goebbels, who held a doctorate in nineteenth century literature) mastered the art of political theatre, adapting Wagnerian mythic themes to totalizing narratives promising the dawning of a Third Reich, with that glorious future endangered by instant conspiracies of internal and external enemies (Jews and Bolsheviks, the U.K. and U.S. their unwitting patsies). Few have ever matched their deftness in orchestrating anger, fear, hatred, ambition, prejudice, ritual, pretense and spectacle – with psycho-historicism lending a back script to explain present opposition and the need for unified sacrifice to secure the future triumph – all the hallmarks of mass society ideology. As Jacques Ellul, French philosopher and Professor of History and the Sociology of Institutions, further explained: “[Propaganda] proceeds by psychological manipulations, character modifications, by creation of stereotypes useful when the time comes; the two great routes that this sub-propaganda takes are the conditioned reflex and the myth.”³¹¹ Despite all their railings against “degenerate” trends in the conceptual arts, the Nazis adapted Modernist insights all too well in bending German myth-history utterly

³¹⁰ The National Socialists, somewhat ironically, shared with their avowed Bolshevik enemies an antipathy for capitalism as practiced in much of the West; Hitler’s political strategy was in part an appeal to both proletariat and bourgeois elements in some rough balance.

³¹¹ The scholar’s great study of the topic is Jacques Ellul, *Propaganda: the Formation of Men’s Attitudes* (New York, 1977 [1965]).

to the demands of their teleology and politics.³¹²

Indeed, what Fascism of the period shared with its mortal foe Communism was the treatment of history as purposeful stimulus, as impetus to the desired behavior. First, the sense of some compelling and relevant past is, as A.M. Schlesinger, Jr. noted, an integral building block of collective identity: “For history to the nation is as memory is to the individual.”³¹³ Fellow historian William J. Bosenbrook explained how the next step is one of creative substitution and amendment: “In mass societies, myth takes the place of [“legitimate”] history.”³¹⁴ Otherwise, the past that “lies upon the Present like a giant’s dead body” (as Hawthorne depicted it)³¹⁵ would prove inescapable, and with ideological constructs, while the past, present and future may be interlinked within an upward continuum, the essential appeal is the promise of a qualitatively, even transcendently, distinct future, but enabled rather than restricted by history (again, as cast mythically). Benedetto Croce spoke to that liberating aspect thusly: “The writing of histories – as Goethe once noted – is one way of getting rid of the weight of the past.”³¹⁶ Croce likely meant his statement to reflect the meliorative effects of catharsis, but here it fits with the dogmatist’s tendency to escape the ponderous negativity of a nation’s history simply by recasting it, albeit too often falsely.

³¹² For a detailed discussion of the dynamics in Nazi Germany specifically, see Jay W. Baird, *The Mythical World of Nazi War Propaganda* (Minneapolis, 1975).

³¹³ A.M. Schlesinger, Jr., “Folly’s Antidote” in *New York Times*, Jan. 1, 2007, Op-Ed page.

³¹⁴ I inserted the bracketed qualifier in recognition of the inherently contestable question as to which history version contains fewer and less critical distortions. See William J. Bosenbrook and Hayden V. White, eds., *The Uses of History* (Detroit, 1968).

³¹⁵ Nathaniel Hawthorne, *The House of Seven Gables* (Boston, 1851, Chicago, 1903), p. 228.

³¹⁶ Benedetto Croce, *History as the Story of Liberty* (London, 1949 [1941]), p. 44.

What then for the professional scholar in such a climate? Bracketing the gargantuan clashes of World War II were the ideologically driven civil wars in Spain and China, the latter succeeded by the Cold War, itself manifesting in a series of proxy hostilities in Korea, Vietnam and their ilk. Gravely imperiled were entire peoples, nations, societies, even civilizations, and their respective centering belief structures. Was it possible for historians, themselves also citizens under duress, to reach some rough working consensus on historiographic approach?

In 1938, just on the front edge of World War II, historiographer Allan Nevins (eventual AHA president) cautioned: “History is never above the melee. It is not allowed to be neutral, but forced to enlist in every army.”³¹⁷ Americans in general, grappling with the great depression and after the Great War again inclined to reject close communion with the Old World depravity, were most reluctant to reemerge from relative isolation. Unsettling reports about Stalin’s increasingly ruthless version of Bolshevism offset to some degree the inroads Socialism had carved in the western body politic. A grudging acknowledgement of how Mussolini (and by extension Hitler) “made the trains run on time” (this in the context of economic dislocation throughout the west), and no little measure of anti-Semitism, further contributed to hesitation in throwing in with one side or the other. German (and Japanese) outrages eventually forced the issue. Certain members of the scholarly community then sought to ensure unwavering support by policymakers to the total defeat of the Nazi régime.

They did so via a history-based appeal, more specifically, by arguing that in this case marked historical *discontinuities* need be weighed. One notable example is the

³¹⁷ Allan Nevins, *The Gateway to History* (New York, 1938).

efforts by the Marxist-leaning Frankfurt School, hosted in exile at Columbia University, from which a number of key analysts – Herbert Marcuse and Otto Kerchheimer, but especially Franz Neumann – worked with the OSS (the CIA predecessor) to assess the Nazi threat. Professor William E. Scheuerman summarizes the Frankfurters’ pitch:

[T]he Allies needed to stop viewing Nazi Germany through the old lenses molded during World War I. Only if the United States grasped how contemporary realities broke with familiar historical precedents could it win the peace and lay the groundwork for a new German democracy. Neumann and his team excoriated U.S. policymakers for relying on anachronistic wartime images of Germany as “Prussian” and dominated by a military elite, as though the country were still ruled by the Kaiser. Backward-looking propaganda might gin up public support for the war in the Allied countries, but it falsified the realities of the Nazi power structure.³¹⁸

Without a shift in historical perspective, “the Allies would fail to appreciate the ways in which the Nazis had made it unlikely that ordinary Germans would accept the kind of humiliating surrender they had suffered at the end of World War I.”³¹⁹ But in fact, the German citizenry did not, as the Frankfurters had historically extrapolated (and hoped), follow surrender with a left-socialist uprising. Scheuerman explains the miscalculation: “The Frankfurt intellectuals’ Marxist faith in working-class resistance and militancy kept them from fully grasping the extent of Hitler’s successful obliteration of even the barest rudiments of political opposition.”³²⁰

The Frankfurt School case illustrates the difficulty of maintaining historical neutrality when the world stakes are so high, especially when academics themselves perceive some non-trivial “role” in the drama, as we often do. As Becker noted even

³¹⁸ William E. Scheuerman, “The Frankfurt School at War: The Marxists Who Explained the Nazis to Washington,” *Foreign Affairs* (June/August 2013), pp. 171-176.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*, p. 174.

before the war, the identity and needs of both history consumer and history producer are not isolated factors. The Allied victory had its own historiographical effects. Most predictable, perhaps, was the suspicion that “[h]istory is the propaganda of the victors.”³²¹ In this instance two victor sets had emerged, the Soviets as well as the West, with considerable consequences for history writing. On a patriotic, nationalistic basis, a lasting divide arose in gauging and recounting the relative importance of certain fact patterns, even where the facts themselves remain mostly uncontested. The saturated treatment, for example, of either D-Day heroics or of the staggering Russian sacrifices at Stalingrad is microcosmic for Western front versus Eastern front emphases generally.³²²

Tensions and maneuverings at the Yalta and Potsdam conferences underscored the likely bipolar nature of post-war geopolitics and surrounding discourse. The Allies during the war period had largely averted their gaze from the extent of Stalin’s atrocities. Victory in Europe removed the Nazis from the picture, but with the Soviets ruthlessly occupying large swaths of Eastern Europe (behind the so-called “Iron Curtain”³²³), ideological differences in the succeeding East-West rivalry quickly returned to the foreground. While early National Socialist doctrine in Germany had strong anti-capitalist elements, Hitler’s faction prevailed partly by courting bourgeois sectors. The USSR under Stalin was much more emphatically Marxist-Leninist, therefore even more

³²¹ This quote, often misattributed to Winston Churchill, issued from Ernst Toller, a left-wing German playwright much given to colorful proletarian phraseology, and who for six days in 1919 served as President of the transitory Bavarian Soviet Republic. Disillusioned, Toller committed suicide in 1939. *The International Educational Quotations Encyclopaedia* (Buckingham, 1995).

³²² Russians continue to refer to World War II as the Great Patriotic War, their war monuments and other memorials understandably highlighting the 20 million lives lost overall. Also a point of emphasis is the long and frustrating wait for the Western Allies to open a second front, which latter effort has long played a central role in American historical treatments of the European war.

³²³ From a March 5, 1946 speech Churchill delivered at Westminster College in Fulton, Missouri.

ideologically hostile to capitalist democracies. The Maoist communist régime seizing power in China in 1949 was also strictly doctrinaire, and all the more hostile to the U.S. because of its backing of the defeated Nationalists (Kuomintang) under Chiang Kai-shek.

*The past is never dead. It is not even past.*³²⁴ William Faulkner penned that line in 1951, as the reality of an enduring Cold War struggle began to set in, the potential ubiquity and degree of violence representing for many observers an existential threat. The USSR and China developed atomic weapons, and bloody conflicts in Korea and Indochina ushered in a long string of proxy wars, several in countries newly established with the demise of colonial empires, and therefore susceptible to anti-Western appeals. Because totalitarian political (and economic) repression closely correlated with mid-century communist-socialist governments, and because the pattern of expansion and “internationalist” rhetoric together fit reasonably well with “domino theory” concerns, many Westerners came to fear the eventual global erasure of liberal democratic freedoms. History-based arguments gave little succor – long centuries of non-democracy under autocratic Russian tsars and Chinese emperors, the violence of the Bolshevik and Maoist seizures of power, the perpetuation of one-party rule headed by dictators, the ghastly toll of Soviet collectivization (the Cultural Revolution in China was yet to come), Red Army savagery in obliterating Berlin – many Western historians defensibly believed these incidents to be illustrative of, even precursor to, the menace facing all of civilization. Yet, from the other perspective, it had been Western powers that meddled in Asia and then wreaked atomic devastation there, that backed cruel anti-democratic rightist régimes worldwide, that thrice in modern history (i.e., since the French Revolution) invaded

³²⁴ Enunciated by character Gavin Stevens in William Faulkner, *Requiem for a Nun* (1951), Act 1, Scene 3.

Russia with gargantuan armies, that brutally fire-bombed Dresden.³²⁵ All this history was both baggage and tool, and however reasonable in retrospect, each side was convinced of the other's essentially monolithic nature and intent to dominate.

And by the time of the Cold War, the decades-long cumulative toll on what one might consider “normal history” was profound. Louis Gottschalk, in delivering the 1953 AHA Presidential Address, related how that seemingly perpetual crises had affected attitudes about the relevance of certain realms of previously esteemed historical studies. Himself a specialist in eighteenth century European history, Gottschalk sensed far less receptivity to the nuances of the French Revolution than to the more recent Russian Revolution which, having spawned the internationalist totalitarian Communism then broadly encountered, was more immediately salient for most consumers. The American public (including graduate students in History), he bemoaned,

was not greatly concerned whether Marat developed as a radical early or late, whether Lafayette found his liberal ideas in the atmosphere of eighteenth-century France or in the American Revolution, or whether Napoleon was executor or executioner of the French Revolution. A society that is fearful of annihilation and tormented by threats to its free institutions probably cares little whether many a problem of that sort . . . is settled one way or the other, or not at all.³²⁶

Gottschalk in some manner was grappling with the implications of what Becker two decades prior had so gallingly proposed – that history would follow the dictates of public concern. Because historians are also members of the public, subject to any set of public crises, how thoroughly was any replacement to “normal history” steeped with Western liberal values, however unspoken?

³²⁵ And, of course, the “Western” state of Germany had committed the horrors of the Holocaust, but because the Russians had their own longstanding record of anti-Semitism, historical propaganda on that point was relatively sparing.

³²⁶ Louis Gottschalk, 1953 *AHA Presidential Address*.

Novick generalized the response of the history profession in the period as “the defense of the West” which bred “a convergent culture” in history writing. That culture evidenced itself largely in what it purported to *oppose* – the incursion of ideology into history. After the defeat of the Fascists, the danger was mostly from Marxist incursions. And with few exceptions, western historians saw no parallel danger from the collectively adopted assumption that the tenets of liberal democracy did not equate to an ideology, but rather the opposite. As French-American historian Jacques Barzun in 1954 declared: “Totalitarianism is ideology . . . Democracy of the American brand is anti-ideology.”³²⁷

A minority of historians took the approach that the struggle against the dark forces of totalitarianism was so desperate that all professionals – their colleagues also – must answer the call to fight fire with fire: “The antidote to bad doctrine is better doctrine, not neutralized intelligence.” So enjoined Conyers Read, the AHA president in 1949, entitling his Presidential Address that year “The Social Responsibilities of the Historian.” Read argued that because totalizing concepts such as religion had long predated modern ideologies, they reflected an essential human need, ripe for exploitation by totalizing constructs other than those the historian might (or should) prefer:

In the end, we assure ourselves, the truth will prevail. But what about in the meantime?³²⁸ . . . If historians, in their examination of the past, represent the evolution of civilization as haphazard, without direction and without progress, offering no assurance that mankind’s present position is on the highway and not on some dead end, then mankind will seek for assurance in a more positive alternative whether it be from Rome or from Moscow.³²⁹

³²⁷ Jacques Barzun, *God’s Country and Mine: A Declaration of Love Spiced with a Few Harsh Words* (Boston, 1954), pp. 90-91.

³²⁸ These two sentences bring to mind the classic rejoinder attributed to John Keynes, pointed at Monetarists who argued against intervention during the great Depression because in the long run balance-of-trade imbalances and thus domestic economies would self-correct: “. . . in the long run, we are all dead.”

³²⁹ Conyers Read, 1949 AHA *Presidential Address*.

Thus, and borrowing heavily from the pragmatists of prior decades, Read endorsed the “social control” of history efforts, so that the underlying society and its core values might survive. As the Cold War moved to center stage the threat of annihilation of liberal democracy, historians had a responsibility to lend their particular skills to the battle:

[W]ords are weapons, often the most dangerous type of weapons. Dr. Goebbels understood that, Mr. Molotov understands it Total war, whether it be hot or cold, enlists everyone and calls upon everyone to assume his part *The historian is no freer from this obligation than is the physicist.* We can never be altogether free agents, even with our tongues and our pen. The important thing is that we shall accept and endorse such controls as are essential to the preservation of our way of life.³³⁰

Among those “controls” – which presumably were to be informal – was the distinction between the lay public and the professional historian, who had a critical gatekeeper role of sorts as to the more squeamish aspects of national history:

We may speculate as long as we like about the concepts of progress among the intellectuals, but there is no doubt whatever about its prevalence among the rank and file. . . . We shall still, like the doctor, have to examine social pathology if only to diagnose the nature of the disease. *But we must realize that not everything which takes place in the laboratory is appropriate for broadcasting at the street corners.*³³¹

And his contemporaries, dignity assailed, issued the expected set of protests, claiming a more refined and nuanced view of the historian’s proper role in periods of seismic shift. The distinction often proved more cosmetic than real. For the most part, historians of the era accepted the notion of a grand struggle for freedom, and that they were on the angels’ side in it. Lineage alone proved their rightful position, with their long liberalist heritage including Voltaire’s 1737 proposition: “History can be well written only in a free

³³⁰ Ibid. (italics mine).

³³¹ Ibid. (italics mine).

country.”³³² But the potential syllogism therein remained incomplete, for what constituted a free country remained debatable, as did the question of whether freedom necessarily *would* result in good history writing.

Moreover, it was not just Goebbels and Stalin (and Read) who endorsed the notion of words as armament. “Honest history is the weapon of freedom” typically averred influential historian A.M. Schlesinger, Jr., among the most tireless and widely cited champions of western liberalism over the second half of the twentieth century. Throughout the Cold War he tended toward martial language suggesting on the one hand an alignment of doctrine and betrayal, and on the opposite hand democracy and truth:

The history of the twentieth century is a record of the manifold ways in which humanity has been betrayed by ideology Surely the basic conflict of our times, the world civil war of our own day, is precisely the conflict . . . between ideology and democracy.”³³³

Interestingly, Schlesinger served in the same OSS as the Frankfurt School group, whose relevancy and welcome faded with Hitler’s elimination and the rise of Soviet communism as the new chief threat.³³⁴ He was hardly alone. In the World War II-Cold War stretch, a sizeable number of professional historians agreed to work with intelligence agencies (OSS and CIA), the State Department or the military. “Intellect has associated itself with power as perhaps never before in history” remarked renowned liberalist scholar Lionel

³³² Voltaire, Letter to Frederick the Great, 27 May 1737.

³³³ Arthur M. Schlesinger, Jr., “The One Against the Many,” in Schlesinger and Morton White, eds., *Paths of American Thought* (Boston, 1963).

³³⁴ The OSS disbanded at the end of the war, its analyst wing eventually incorporated into the CIA in 1947, by which time the Frankfurt School scholars had moved on, however willingly. Recent scholarship suggests that prominent contributor Franz Neuman in fact had passed secret documents to the Soviets, a fact not helping to dissuade claims that ideology trumped all in the period. See again William E. Scheurman, “The Frankfurt School at War: The Marxists Who Explained the Nazis to Washington,” *Foreign Affairs* (June/August 2013), especially pp. 175-176.

Trilling in 1952.³³⁵ Novick noted certain resulting ambiguities as to voice: “It is not always easy to distinguish between official and unofficial scholarship in this area, as historians moved in and out of government service.”³³⁶

But as a rule, such historians believed in their own analytical objectivity, and that it was a valuable asset for decision-makers needing unvarnished assessments, however discomfiting. In this context, “[o]lder notions of an adversarial posture between intellect and power were abandoned as ‘immature.’”³³⁷ Novick looked to sociology for language to help explain how historians justified their departure from the prior logic of objectivity, so dependant on disinterest. The analogy was the physician’s ability (“normative objectification”) to isolate heated struggle against an “enemy” from cool reflection as to actual conditions and best practice:

[T]he physician is not less objective because of his or her commitment to the patient and against the germ. Medical objectivity could be said to rest on the explicitness of this value commitment, which constrains the physician to observe and report things about the patient that neither may want to know. From the early forties through the early sixties the normative objectification implicit in the consensual acceptance of the Free World vs. Totalitarianism framework was the guarantor of the objectivity of scholarly labors against the totalitarians.³³⁸

The result, in effect, was to put the genie of inter-war relativism back into the bottle, to be placed on a remote and dusty shelf, lest it be an inconvenient reminder:

³³⁵ Lionel Trilling, contribution to symposium “Our Country and Our Culture,” *Partisan Review* 19 (1952), pp. 319-320, as cited in Novick, pp. 301-302.

³³⁶ Novick, p. 305.

³³⁷ *Ibid.*, p. 304. One might read Novick’s statement here as a backward projection of later Foucauldian analyses, though in the negative. Similarly speculative is the question of how much academicians during the McCarthy “Red Scare” era in particular may have curtailed or otherwise massaged their writings, consciously or less so, in order to avert censure.

³³⁸ Novick 303, paraphrasing Alvin Gouldner, “The Sociologist as Partisan,” *American Sociologist* 3 (1968), pp. 113-114.

The disparagement of ideology and the concomitant celebration of American empiricism were among the forces which in the postwar years returned historiographical thought in the United States to older norms of objectivity. Though they had rarely used the word “ideology,” the relativists’ central argument was that historiography was inevitably ideological. The attack on ideology in scholarship and in society . . . struck at the basis of the relativist position. It helped to relegitimize that powerful factualist current in American historiography, that horror of the preconceived notions, which the interwar relativists had challenged but never defeated.³³⁹

Those “older norms” lay, as already discussed, at the nexus of judicialism and scientism, with their “preconceived notions” about the ability to remain utterly neutral in amassing, collating and interpreting the evidence. Historical “judgment” this time around sounded a considerably more trans-Atlantic tone than the previously typical isolationist theme of rejecting any lasting effects of European kinship (although that older strain of thought and expression never fully disappeared). The great joint struggles against totalitarianism inspired reflection as to historical commonalities in the western democracies in their origin, path and, for a few commentators, even (and still) a shared teleological purpose.

Some historians thus hinted at the equivalence or congruence of American history with western history writ large. Otherwise, “by treating the American past in isolation, historians were helping to raise up a ‘nation of chauvinists.’”³⁴⁰ Better to recognize Europe and America as near siblings, especially under the dire circumstances:

. . . moved by the same rhythms, stirred by the same impulses, inescapably involved in the same crises. Sharing the past with the peoples of Western Europe, bound to them by a thousand daily ties, we go forward with them to a common destiny.

[and]

³³⁹ Ibid., p. 300.

³⁴⁰ Eric Foner, 2000 *AHA Presidential Address*, in turn quoting Herbert E. Bolton, *Wider Horizons of American History* (New York, 1939), p. 2.

Humanity has fumbled through the centuries toward truth and freedom as expressed in modern science and democracy, American style Meaningful history . . . is the record of the progress of reason and liberty; and the place it happened was Greece, Rome, western Europe and latterly the United States.³⁴¹

College curricula followed this vein with the prominent inclusion of Western Civilization courses previously (and recently) not standard in core studies.³⁴²

Moreover, to the extent this latest historiographical variant revived aspects of a judicialist approach – the historian’s “judicious” weighing and treatment of evidence – the new context was now an increase of moral judgment on heinous historical crimes, including those by recent and current national enemies. This against the backdrop also of legal judgments sought against Nazi officials in the Nuremberg trials and their progeny, which proceedings relied heavily on historical findings. Those societies deeming themselves heirs to the Western Civilization tradition (including, as noted above, America now more than ever) were particularly keen to distinguish its authentic heights in the liberal democracies – “truth and freedom,” “reason and liberty” – from its nadir in Fascism and the Holocaust, Germany having represented a disastrous and glaring failure in and for the West. Historians could hardly be expected to treat the issue with utter dispassion: “abstention from moral judgment, rather than manifesting disinterested neutrality, was, in its context, a profoundly conservative political judgment.”³⁴³

³⁴¹ Garrett Mattingly, “A Sample Discipline – The Teaching of History,” address delivered to the Princeton University Bicentennial Conference, *The University and Its World Responsibilities*, 20 February 1947; William H. McNeill, “History for Citizens,” *AHA Newsletter* 14 (March 1976), p. 5.

³⁴² Historian Gilbert Allardyce traced this trend in “The Rise and Fall of the Western Civilization Course,” *AHR* 87 (1982), p. 717. My first history course in college was entitled exactly that – *Western Civilization* – with the textbook of the same label sporting a photo image of an exquisitely imposing Greek statue.

³⁴³ Novick, p. 27. Novick was discussing Ranke’s nineteenth century approach, but the point applied to the position of mid-to-late twentieth century historians assessing the wreckage of the day, and the threat of more, given the intense geo-political/ideological face-offs.

Yet the same strand of imperfect neutrality plagued the reputation of the Nuremberg proceedings from the outset. The judges were all appointed nationals of the powers (U.S., U.K., France, Soviet Union) governing the trials, each of those entities having incurred mighty losses from the war. The tribunal created new categories of crimes (“crimes against peace,” “wars of aggression,” “war crimes” and “crimes against humanity”) to apply to the Nazis’ prior actions, a dubious application of then-dominant notions of “positive law.”³⁴⁴ But because the acts as established were so horrific, the (live and captured) perpetrators so well identified, and the moral culpability so clear, a sense of “rough justice, but justice done” appealed to public opinion and helped to gloss over flaws both substantive and procedural. However, numerous commentators, among them several legal historians, have long found troubling such etchings of “victor’s justice.”³⁴⁵

But more generally prevailing mid-century was the western liberals’ blindness to how much, in arriving at and casting moral and political judgments, they bore deep biases in a similar manner as their Fascist and Marxist “ideological” counterparts, though the biases themselves of course differed greatly. To help explain such myopia, Novick looked back to Karl Mannheim’s grand interwar reflection, *Ideology and Utopia*:

³⁴⁴ Briefly, “positive law” is the realm of human-made rules to ensure safety, efficiency and tranquility in societies, the enforcement of such laws – if necessary, by punishment for their violation – given over to the state and refereed and administered through the court system, in which judges play a critical role. The legitimacy of punishment for convicted criminals flows from the fact of pre-existing laws. Legal scholars of the period expressed analytical discomfort with how the Nuremberg defendants, for whom they had no personal sympathy, stood subject to punishment under *ex post facto* laws, expressly prohibited in Article I, § 10 of the U.S. Constitution.

³⁴⁵ Copious literature treats the Nuremberg complexities and shortcomings. A starting list might well include: Michael Biddiss, “Victor’s Justice? The Nuremberg Tribunal,” *History Today* 45:5 (1995); Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*. (Chapel Hill, NC, 1998); Guénaél Mettraux, ed., *Perspectives on the Nuremberg Trial* (Oxford, 2008); Kim C. Priemel and Alexa Stiller, eds., *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (New York, 2012).

The *denial* that dominant thoughtways were ideological, that they were other than the plainest common sense, was, in Mannheim's view, *the greatest strength of ideologies* – the key move in the subordination of intellect to power. Postwar historians' insistence that their work was free of ideological taint provided a textbook illustration of the truth of Mannheim's assertion.³⁴⁶

Traditional liberalist leanings, where overt, were not in and of themselves problematic for their many admirers (or for the numerous in our era who still defend them). The knottier issue for history writing arose – and remains – where the historian claims a positive law type of judicialist disinterest³⁴⁷ but at the same time reserves the right to pass natural law type moral and political judgment. Moreover, one might reasonably suggest the paradox that such a mixture of moral judgment and political judgment is where ideology ripens, bringing the liberalist historian back to the initial difficulties of isolating analysis from doctrine and oft unspoken teleology.

Generally attendant to the “defense of the West,” then, a full generation passed between the initial impact of Butterfield's *The Whig Interpretation of History* in the early 1930s and its reemergence as an important historiographical touchstone for graduate trainees. In the interim (and the time borders are not perfectly crisp), a degree of underexamined neo-Whiggism plagued the field, later bringing much derision.

In the same decades historians seemed to have tied their aversion to open ideology to a relatively uncritical (re)coronation of science and technology, i.e., the scientific impulse in historiography. In this view, doctrine, as theorist Talcott Parsons

³⁴⁶ Novick, p. 301 (italics mine), citing to Karl Mannheim, *Ideology and Utopia*. (London, 1936).

³⁴⁷ A question arises as to whether the fully neutral arbiter idealized in judicialist historiography actually exists in the real world, a topic I discuss in more detail, *infra*. It would seem that an imperfectly neutral judiciary would be an imperfect model for historians, another reason historians should be careful about claiming equivalence between the two professional callings.

noted in 1959, is incompatible with good science: “The essential criteria of an ideology are deviations from scientific objectivity.”³⁴⁸ Indeed, the fundamental norms of science, in sociologist of science Robert Merton’s slightly earlier (1942) formulation, are “universalism, commun[al]ism, disinterestedness, organized skepticism,” such elements notable also in “their congeniality to a liberal-democracy society, their incompatibility with totalitarianism.”³⁴⁹

Thus, what had arisen was a remarkable parallel between western historians’ perceptions and western scientists’ perceptions as to the dynamics of their scholarship. As education reformer and Harvard president James B. Conant in 1950 expressed it: “Scholarly inquiry and the American tradition go hand in hand . . . science and the assumptions behind our politics are compatible.”³⁵⁰ Not merely parallel, the two professions showed some considerable overlap, most obviously in the subfield of the history of science. For example, Conant in the 1950s taught courses in the history and philosophy of science and early influenced Thomas Kuhn’s shift of primary focus from scientific labors in theoretical physics to the history of science (I revisit the historiographical impact of Kuhn’s work shortly below).³⁵¹

³⁴⁸ Although known primarily as a sociologist, Parson was also a theorist of world history and very much an anti-totalitarian defender of western liberal traditions, even American exceptionalism. Quote from Talcott Parsons, “An Approach to the Sociology of Knowledge,” *Transactions of the Fourth World Congress of Sociology* (Milan, 1959), p. 25; as cited in Novick, p. 299.

³⁴⁹ Actual quotes are by Novick, p. 296, summarizing key elements in Robert K. Merton, “Science and Technology in a Democratic Order,” *Journal of Legal and Political Sociology* 1 (1942).

³⁵⁰ James B. Conant, “Scholarly Inquiry and the American Tradition,” *Educational Record* 31 (1950), p. 282.

³⁵¹ In Kuhn’s recounting: “It was James B. Conant, the president of Harvard University, who first introduced me to the history of science and thus initiated the transformation in my conception of the nature of scientific advance.” Kuhn, *The Structure of Scientific Revolutions* (Chicago, 1970 [1962]), p. xiii.

But certain overarching realities already in play in the mid-to-late 1950s would show the pretended neat harmony had always been more imagined than actual. First, although its defenders emphasized that western science was “autonomous, empirical, and objective,” in fact:

Laissez-faire opposition to the coordination and mobilization of science was being rendered anachronistic at the very moment it was being voiced. During World War II, and permanently thereafter, “gangster science” – highly organized, mission oriented research – became the dominant mode of scientific research.”³⁵²

Second, in the face of westerners’ attempted linkage of political and scientific repression in the totalitarian ideo-states, and thus the view that, most importantly, Soviet science could not possibly equal that in the “free” West,³⁵³ came the shock of the successful Sputnik venture:

After the launching of the first Soviet space satellite in 1957, the proposition that “totalitarian science” was technically inferior to “free science” became harder to sustain. By the 1960s . . . the invidious comparison of Western and Soviet science had ceased to be a dominant theme in cold war polemics.³⁵⁴

Third, while some of the key epistemology of the era – Karl Popper’s in particular – carried an agreeably anti-Marxist edge (affirming that “ideologies” were “enemies” of good scholarship³⁵⁵) and thus won favor with many western objectivist scholars in all

³⁵² Novick, pp. 293-294.

³⁵³ A leading voice for that conclusion was Society for Freedom in Science co-founder Michael Polanyi. Scientific thought, in his view, was “nowhere oppressed so comprehensively as in the USSR, and this is due precisely to the fact that the thrust of violence is guided here by Marxism, which is a more intelligent and more complete philosophy of oppression than is either Italian or German Fascism.” Michael Polanyi, “The Rights and Duties of Science,” in *The Contempt of Freedom: the Russian Experiment and After* (London, 1940), p. 21.

³⁵⁴ Novick, p. 295.

³⁵⁵ This was an important theme for the philosopher of science and epistemology. See Karl Popper, *The Open Society and its Enemies* (Princeton, 1945, 1966). Popper later acknowledged that his mid-1940s writings on open and closed societies were part of his “war effort.” Karl Popper, *Unended Quest* (London, 1976), p. 115.

fields, a closer look was problematic for historians of a judicio-scientistic bent. Popper's development of a "demarcation criterion" to distinguish truly scientific propositions from thinly veiled metaphysics turned on the concept of "falsifiability." For Popper, any genuinely scientific claim required its proponents to specify the evidence that would falsify it, and to what extent – the degree of acceptance of the truth or validity of the claim was a function of resistance to falsification attempts. Actors in most of the social sciences and humanities, including therefore most (if not all) historians, very quickly ran up against the near impossibility of meeting such standards – they simply did not have access to the same tool set as those in the natural sciences to test claims of objectivity.

Fourth, for some non-monistic philosophers, historians' judicialist and scientific instincts were unavoidably in serious conflict – the moral evaluation, even condemnation, that is sometimes a key aspect of the historian's task cannot occur without highlighting behavior which is distinctly human, i.e., which has a moral dimension and thus not susceptible to fixed laws. Devoting a portion of his great intellect to the philosophy of history, Isaiah Berlin in a 1954 essay demarcated the two modes of inquiry:

The invocation to historians to suppress even the minimal degree of moral or psychological evolution which is necessarily involved in viewing human beings as creatures with purpose and motives . . . seems to me to rest upon a confusion of the aims and methods of the humane studies with those of natural science. It is one of the greatest and most destructive fallacies of the last hundred years.³⁵⁶

In Berlin's view, while historians have the tools to assess not only the fact of differing values, but also their relative strengths as applied to a range of historical behavior, they cannot claim their methods in so doing (and here Berlin is in line with Popper) are actually scientific.

³⁵⁶ Sir Isaiah Berlin, *Historical Inevitability* (London, 1954), p.53.

Finally, the question of the objectivity of *science itself* arose part and parcel with the deep and roiling interrogations that by the early 1960s began to encompass all epistemological pursuits for the remainder of the century. History was among the disciplines most susceptible to such challenge.

(5) The fall of the House of (purely objective and positivist) Science

The Sputnik crisis triggered a wave of renewed American interest (tinged with Cold War panic) in all things “scientific,” accelerating government investment in research and, in a decided break in practice, as a major focus in even basic education, earlier and more robustly than ever. College attendance rates steeply rose, with graduate departments churning out new professionals in the natural sciences and social sciences, the latter ever emulating and aspiring to the former. In that vein, and given the strong neo-scientific pulses already evident in historiography by 1960 (as discussed in the preceding section), university history departments increasingly affiliated with social sciences over arts and humanities.

“Modernization” became the dominant western prism, tool and goal of development theory aiming to ease the transition of economically underperforming nations, including former colonies and other “Third World”³⁵⁷ countries, out of their

³⁵⁷ According to some accounts, it was the historian Alfred Sauvy (also an anthropologist and demographer) who coined the term in a 14 August 1952 article in the French journal *L'Observateur*. See Leslie Wolf-Phillips (1987). "Why 'Third World'?: Origin, Definition and Usage," *Third World Quarterly*, 9(4): 1311-1327. Its Cold War origins pointed to a conceptualization of the globe neatly divisible between countries aligned with either NATO (the First World) or the Soviet Bloc (the Second World), with the seemingly unaligned countries, many of them new, falling into a third “leftover” grouping. Although still often seen and heard, the term is now broadly considered laden with pejorative assumptions and thus anachronistic. Other description candidates (some of them also externally imposed) have arisen – the non-aligned countries, core-periphery, the Global South – each reflecting to some degree the biases inherent in dependency theory, neo-colonial theory, variation of classical liberal theory, and the like.

supposed tradition-rooted poverty and thus toward the marvels of modern order and prosperity. One of the key proponents of modernization theory, W.W. Rostow, had taught American and economic history at Oxford, Cambridge and MIT before issuing his landmark 1960 work, *The Stages of Economic Growth: A Non-Communist Manifesto*, the two halves of the title revealing Rostow's essential positivism and ideologic bias.³⁵⁸ Rostow "discovered" his five stages of modernization by extrapolating the historical experience of development in some of the largest economies, with the most important variations to illustrate key points being (to little surprise) those of Great Britain and the United States. Borrowing from structuralism, lending momentum to social evolutionism, the theory drew fire not only for its perceived disrespect for traditional ways,³⁵⁹ but for its basic historicism of a sort – the end is known at the outset – too close of kin to teleology. But the very predominance of this genre of modernization theory, and some early cases showing real development promise, suggested to some that a new Golden Age of positivism was unfolding at the intersection of natural and social science.

But the borrowing had remained unidirectional, social constructs tailcoating on the natural. Could one imagine a reverse flow of influence? What if natural science itself, or at least the process of building a field of scientific knowledge, could be shown to be susceptible to *social* factors? The implications for broad swaths of epistemology might be profound, for natural science by the early 1960s was so thoroughly employed as

³⁵⁸ Which he suggested was an anti-bias ("Non-Communist"). But note that modernization would proceed on terms and with norms presumably favoring alignment with the West. However, despite endorsing some aspects of classical liberal trade theory, Rostow believed central governments played a critical role in guiding social economies through the necessary adjustments. Walt W. Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge, 1960).

³⁵⁹ For certain detractors, Rostow's problematic subtext was that many traditions were at heart irrational and thus unscientific, working to perpetuate backwardness.

a foundation in social science endeavors that serious cracks in the former threatened to tumble whole edifices in the latter. But the existence and implications of possible bidirectionality had remained underexamined:

One of the most striking aspects of sociology of science before the 1960s was its scrupulous, almost phobic, avoidance of any sociologically informed discussion of the content of science. Just as historians of science, who concentrated exclusively on the content of science, shunned the social dimension, sociologists of science avoided content.³⁶⁰

Thomas Kuhn focused on just that vacant intersection in recasting the history of science as one not based purely on the steady and rather smooth accretion of objective knowledge, universally recognized, but rather one also amenable to – or better described within – sociologic analysis, where group and personal perspectives (and interests) are normal factors, and where contestation and disjuncture are thus inevitable. First trained in theoretical physics, Kuhn steered his post-doctoral work to history, more particularly, the history of science as mediated by such factors as the workings of perception and the sociology of the scientific community. By 1962, when he published his landmark multidisciplinary study, *The Structure of Scientific Revolutions*,³⁶¹ Kuhn had taught courses in the history of science for nearly a decade. Accordingly, the book commenced with the aptly titled “Introduction: A Role for History,” underscoring the centrality of history in Kuhn’s mode of analysis. It was in Kuhn’s deep review of what were then current histories of science that he had noted the deficiency cluster he moved to address. Chiefly, science textbooks were (and remain) primarily pedagogical – because the history

³⁶⁰ Novick, p. 297.

³⁶¹ Thomas S. Kuhn, *The Structure of Scientific Revolutions*. Kuhn’s study is regularly listed among the most important intellectual works ever. See, e.g., Martin Seymour-Smith, *The 100 Most Influential Books Ever Written: The History of Thought from Ancient Times to Today* (Secaucus, NJ, 1998).

therein was mostly to chronicle in some orderly fashion the incremental development and passing along of what (at publication fdate) counted as scientific “fact” or “knowledge,” they were strikingly unreflective and uncritical in historiographical terms. Kuhn believed it necessary to introduce an extra-scientific perspective, even daring to label his approach part of “a *historiographic revolution* in the study of science,” itself an example of “the *new historiography*.”³⁶²

The key point, for the purposes here, is that the creation and acceptance of knowledge in the natural sciences is to an important extent a function of *social* factors, themselves arising from the intersection of settings and *communities*. First is the cluster of historical and personal circumstances (political, religious, technological, resources, personal motivation, knowledge and talent) that condition the given initial course of inquiry and interject a degree of arbitrariness in the direction of further investigation:

Observation and experience can and must drastically restrict the range of admissible scientific belief, else there would be no science. But they cannot alone determine a particular body of such belief. An apparently arbitrary element, compounded of personal and historical accident, is always a formative ingredient of the beliefs espoused by a given scientific community at a given time.³⁶³

Second, the more mature scientific fields encompass educational institutions and figures that also serve as channels of initiation (and screens against passage) into professional practice. Rigorous training in field fundamentals includes standard explanations as to such matters as: the entities and other elements composing the universe; how those things interact; how scientists can perceive them and their interactions; what questions and techniques for further exploration are legitimate. This “received wisdom” of

³⁶² Ibid., p. 3 (italics added for emphasis).

³⁶³ Ibid., p. 4.

established findings and approaches, in Kuhn's view, influences new entrants to science to abide in arbitrarily tight conceptual boxes out of which they peer through arbitrarily narrow windows. Again, Kuhn did recognize the impossibility of admitting all possible scientific beliefs, but pointed to human and social arbitrariness as key in the contours of restriction that do emerge.

Finally, as for ongoing inquiry in established fields, Kuhn identified why other social and personal realities at times lead scientists to hesitate to embrace important new findings, and therefore why the supposed dynamic incrementalism of accepted scientific knowledge is in reality far less smooth and unbroken than often imagined and depicted. According to Kuhn, once a theory gains broad endorsement, follow-up observations of potentially related phenomena mostly employ that theoretical lens to screen and assess the data. Kuhn labeled such activities "normal science." Scientists build reputations, achieve academic standing and earn promotions on the basis of marginal contributions to the accepted body of knowledge. Numerous observations over time, however, eventually turn up anomalies that the underlying theory does not well explain. At first scientists tend to dismiss these inconsistencies as unimportant or even perhaps inaccurately recorded. But a notable increase in frequency and quality of anomalous observations will enough threaten certain scientists' career and reputational interests that active resistance results. It is at times acrimonious, less surprising once considering the stakes involved:

Normal science, the activity in which scientists spend almost all of their time, is predicated on the assumption that the scientific community knows what the world is like. Much of the success of the enterprise derives from the community's willingness to defend that assumption, if necessary at considerable cost. Normal science, for example, often suppresses fundamental novelties because they are necessarily subversive of its basic commitments.³⁶⁴

³⁶⁴ Ibid., p. 5.

Eventually the incidence rate of these “subversive” anomalies will mount to the point that defending the “basic commitment” requires a level of complexity outweighing the descriptive value of the theory (as in Ptolemaic astronomy by the time of Copernicus³⁶⁵). That condition inspires some scientists to conduct “the extraordinary investigations that lead the profession at last to a new set of commitments.”³⁶⁶ Kuhn famously called this type of departure a “paradigm shift” in the given field.

In Kuhn’s historiographical lexicon, paradigm shifts are essentially *revolutions*, with all the jagged, halting, lurching disruption and displacement on a personal and group scale the term suggests.³⁶⁷ And as with socio-political revolutions – a common topic in general histories – reactionary elements predictably emerge in the transitional period.³⁶⁸ Historical assessment of paradigm shifts therefore must consider the social dimensions of the natural science community, a sort of society after all, or perhaps a set of society

³⁶⁵ Here Kuhn was speaking to the great pains astronomers took to defend the “basic commitment” of a geocentric rather than heliocentric known universe: “[P]redictions made with Ptolemy’s systems never quite conformed with the best available observations. . . . Given a particular discrepancy, astronomers were inevitably able to eliminate it by making some particular adjustment in Ptolemy’s system of compounded circles . . . [but the] complexity was increasing far more rapidly than its accuracy and . . . a discrepancy corrected in one place was likely to show up in another.” Ibid, p. 68. Without such a crisis, the theological and other social constraints pressing on Copernicus may not have allowed adequate space for his alternative proposition.

³⁶⁶ Ibid., p. 6

³⁶⁷ Kuhn’s language, seen through the prism of later readers, suggests some parallel to the inevitable collisions and frictions described in tectonic plate theory, their pressures and counterpressures delivering fearsome subductions, temblors, eruptions and other disturbances before settling into temporary resolution, only to have pressures soon again mount. The theory was under serious development at the time of Kuhn’s writing, having since Alfred Wegener’s 1912 initial writings on continental drift undergone its own paradigmic cycle pitting rear-guard “fixists” against “mobilists,” the accounts not well settling until a series of papers published in 1965-67, i.e., shortly after Kuhn’s first edition.

³⁶⁸ “At that point the society is divided into competing camps or parties, one seeking to defend the old institutional constellation, the others seeking to institute some new course.” Ibid., p. 93. Moreover, much in the way social-political revolutions deliver mixed blessings, a new scientific paradigm will better explain some critical phenomena, but perhaps explain other things not as well as the older construct, thereby providing fodder for continued resistance.

clusters,³⁶⁹ in turn comprised of a number of individuals who share some zone of group interests. In noting researchers' personal and interest group biases and needs, Kuhn was not suggesting, nor am I now, that personal and professional interests are *the* principal forces in accepting, rejecting or proposing a fit between fact and theory in the natural sciences or, by extension, in history. However, the frequency and potential influence of such factors is not minor and inconsequential.

For all the reasons above, the agents breaking through theoretical stickiness tend to be relative newcomers. After some years formally in a field, the typical scholar has “assimilated a time-tested and group-licensed way of seeing.”³⁷⁰ Change catalysts are thus most often persons “so new to the crisis-riddled field that practice has committed them less deeply than most of their contemporaries to the world view and rules determined by the old paradigm.”³⁷¹ While it is precisely that fresh perspective that allows the field to avoid stagnation, the price is contestation, “the only historical process that ever actually results in the rejection of one previously accepted theory or in the adoption of another.”³⁷²

The idea of *conflict* as an inevitable and likely even essential element in the normal rhythms of science was a real departure from the long prevailing model of positivist accretion. But Kuhn grappled also with the mode and manner of resolving the chaos-fueled dispute. The transition from impasse requires engagement with the full

³⁶⁹ “A paradigm governs, in the first place, not a subject matter but rather a group of practitioners. Any study of paradigm-directed or of paradigm-shattering research must begin by locating the responsible group or groups.” Ibid, p. 180 (1969 explanatory Postscript).

³⁷⁰ Ibid., p. 189 (1969 explanatory Postscript).

³⁷¹ Ibid., p. 144, speaking perhaps about himself to some degree.

³⁷² Ibid., p. 8.

relevant sector, in hopes of winning the assent of a stable majority:

There is no neutral algorithm for theory-choice, no systemic decision procedure which properly applied, must lead each individual in the group to the same decision. In this sense it is the community of specialists rather than its individual members that makes the effective decision.³⁷³

And the avenue or means for such broad conversion? “That process is *persuasion*.”³⁷⁴

Here I pause briefly to note what I will in Chapter 3 develop more thoroughly, i.e., that Kuhn’s rule of competitive attempts to persuade a specific audience is deeply consonant with and thus supports the litigation analogy central to this thesis. For the more immediate purposes of tracing influences on 1960s (and beyond) historiography, Kuhn represents a break from aspirations of finding something akin to absolute “truth” – even in the natural sciences. Although one can mark “progress” by an increased ability to address certain limited problem sets, “no theory ever solves all the problems with which it is confronted at a given time.”³⁷⁵ Moreover, because “no two paradigms leave all the same problems unsolved”³⁷⁶ progress as to one puzzle cluster is not the same thing as a broader positivist movement toward Truth:

The developmental process described in this essay has been one of evolution *from* primitive beginnings . . . but nothing that has been or will be said makes it a process of evolution *toward* anything But need there be any such goal? . . . Does it really help to imagine that there is some one full, objective, true account of nature, and that the proper measure of scientific achievement is the extent to which it brings us closer to that ultimate goal?³⁷⁷

³⁷³ Ibid., p. 200 (1969 explanatory Postscript).

³⁷⁴ Ibid.

³⁷⁵ Ibid. p. 146.

³⁷⁶ Ibid., p 110.

³⁷⁷ Ibid., pp. 170-171. By no means was Kuhn equating lesser certainty with lack of utility. His view was substantially in line with John Stuart Mill’s musings about the utility of moral science, despite the inability to demonstrate its perfection: “It is true that similar confusion and uncertainty, and in some cases similar

The implications for history at large (especially the neo-scientific history approach then prevailing) were unmistakable. Kuhn in fact expressly acknowledged he had synthesized his notions about non-cumulative breaks largely in reference to other history fields:

Historians of literature, of music, of the arts, of political development, and of many other human activities have long described their subjects in the same way. Periodization in terms of revolutionary breaks in style, taste, and institutional structure have [sic] been among their standard tools. If I have been original with respect to concepts like these, it has mainly been by applying them to the sciences, fields which had been widely thought to develop in a different way.³⁷⁸

That full circle route had convinced Kuhn of some abiding parallels as to the matter of legitimate problems and methods: “[My inquiries] make me doubt that practitioners of the natural sciences possess firmer or more permanent answers to such questions than their colleagues in social science.”³⁷⁹ But that sense of equivalence was hardly comforting for disciples of teleology and/or positivism in history, having so steadfastly relied on and aspired to the great ideal of utter objectivity in the natural sciences, or as one imagined them before Kuhn. If the natural sciences had an unavoidable social element that arguably undercut certainty, how much more is certainty compromised in the “social” sciences, and particularly history, with its long humanities heritage?

Incremental growth of understanding, again, had been a standard theme of scientific historiography in the twentieth century: “A complete assemblage of the smallest facts of human history will tell in the end” (Bury) required the historian to be a molder of “building bricks” (Jameson), in line with history as “an accumulative science,

discordance, exist respecting the first principles of all the sciences, not excepting that which is deemed the most certain of them, mathematics, without much impairing, generally without impairing at all, the trustworthiness of those sciences.” See John Plamenatz, *Mill's Utilitarianism with a study of The English Utilitarians* (Oxford, 1949), p. 163.

³⁷⁸ Kuhn, p. 208 (1969 explanatory Postscript).

³⁷⁹ *Ibid.*, Preface, p. x.

gradually gathering truth through the steady and plodding efforts of countless practitioners” (Gordon Wood), toward the end that “[e]verything must be recaptured and relocated in the general framework of history, so that . . . we may respect the unity of history which is also the unity of life”³⁸⁰ (Fernand Braudel).

Kuhn’s book about science and history forced the rethinking of both fields. Social, cultural, communitarian factors would thereafter be more overtly identifiable as key ingredients not only in the given method of inquiry, but also in the subject matter selected and the assessment of “factual” results. Some “lens” the inquirer inherits, finds or otherwise acquires – purposely or not – would now be understood to drive perception and interpretation, calling into serious question the neutral objectivity once supposed innate to science, and perhaps to the judiciary (and by self-applied aspired extension, to scientific-judicialist historians):

No natural history can be interpreted in the absence of at least some implicit body of intertwined theoretical and methodological belief that permits selection, evaluation, and criticism. If that body of beliefs is not already implicit in the collection of facts – in which case more than “mere facts” are at hand – it must be externally supplied, perhaps by a current metaphysic, by another science, or by personal and historical accident.³⁸¹

This was not the pre-Cold War, proto-relativist Becker (“everyman his own historian”) making such claims, but rather a historian trained in science and thoroughly steeped in the knowledge establishment (Harvard and MIT). Kuhn’s essay soon became a major touchstone as a variety of social, political and intellectual factors ushered in two

³⁸⁰ Summarizing the “whole history” approach of his wing of the Annales School; “. . . despite the difficulties, the fundamental paradoxes and contradictions . . .” is the excised part of Braudel’s quote. Fernand Braudel, *Memory and the Mediterranean* (New York, 2002).

³⁸¹ Kuhn, pp. 16-17.

generations now of *Sturm und Drang* in history writing.³⁸² We might reasonably consider this presently continuing period as one where a Kuhnian paradigm crisis in the field still looms unresolved, in this case involving a shift *away* from Euro-Amero-Androcentric objectivism, but not yet obviously *toward* a stable replacement paradigm, i.e., one acceptable to most of the historian community. Greatly delaying any such resolution, however, has been a lack of accord, in our age of identity politics, as to the whole notion of who comprises a “community,” and who may legitimately speak to its history.

(6) The social-personal turn: Corrective, standpoint, agenda, impasse

History is a novel for which the people is the author.
Alfred de Vigny

The French romanticist seemed in that statement to presage by one hundred years what has developed into the most remarkable stream in history writing over the last fifty, i.e., the rethinking of whose voice and perspective properly gets to interpret and recount historical facts (and suppositions). But “the people” the unrepentant royalist de Vigny mentioned may not have recognized post-1960 histories, which increasingly employed a touchstone other than some imagined whole populace organized around and acquiescent to the tastes, interests and operative myths of a narrower band of elites.³⁸³ Instead, *plural* and *disparate* communities became among the chief points of reference. There had been

³⁸² The phrase, translating roughly into “storm and stress,” originally referred to a late eighteenth century movement in German literature and arts that had adopted Rousseau’s disavowal of neoclassical literary restraint in favor of expressing turbulent emotions. In this respect, one might see much of the historiographical turmoil of the last half century as an analogous rejection (or at least strong interrogation) of scientific impulses stretching back to the Enlightenment era.

³⁸³ De Vigny (1797-1863) was born into the nobility and resented the erosion of fortunes the Revolution brought to such families. Once a close friend of fellow romanticist Victor Hugo, he distanced him once Hugo grew too “republican” in orientation and writings. The disdainful term “ivory tower” is said to have originated in reference to De Vigny’s tendency to opine while cloistered from the general populace.

previous smatterings of the historically undervoiced, but (by definition) never an outpouring on this scope and scale.

The orientation and ubiquity of what I here collectively label *social history* raised observations of a second age of standpoint relativism, distinct from the first (the Beard-Becker-Dewey interwar school) not only quantitatively but also *qualitatively* as to authorship, subject matter, insistence, impact and durability. Because a thorough overview of the reasons why the second wave far eclipsed the first would consume volumes, I briefly mention here only a few telling differences. First, in the earlier period the attempted dethroning of science in history writing faded under the dire exigencies of global war and related ideologic standoffs, whereas after Kuhn the sovereignty of scientism felt rather more compromised, and more so in history practice than in the “other” social sciences.³⁸⁴ Second, with the dissolution of empires in the aftermath of World War II, the number of nation-states quickly multiplied,³⁸⁵ such that geopolitics – long a favored topic in history writing – had considerably altered in nature and dynamics. Parallel to, and partly out of, the expansion of nations came an expansion of voices and perspectives challenging standard local, regional and global histories. Third, it may be the very essence of the scholar to seek new challenges. Writing in 1962 (the same year as Kuhn) Hofstadter seemed to forecast the tone of the emerging era:

³⁸⁴ When I was a graduate student in Political Science in the late 1980s, quantification was still all the methodological rage; one professor openly joked how the discipline was suffering from “physics envy.”

³⁸⁵ The original member states in the United Nations totaled 51 in 1945, that number nearly doubling to 99 by 1960, then further swelling to 159 by 1985, with most of the increase over the four-decade period representing ex-colonies. Much (but not all) of the increase since is tied to the breakup of Soviet Bloc countries. See *United Nations Member States* (URL = <http://www.un.org/en/members/growth.shtml>). Not all entities share the U.N. metric to count nation-states, such that the present number of countries falls somewhere between 192 and 196.

[E]asy truths are a bore, and too many of them become half-truths. Whatever the intellectual is too certain of, if he is healthily playful, he begins to find unsatisfactory. The meaning of his intellectual life lies not in the possession of truth but in the quest for new uncertainties . . . the intellectual is one who turns answers into questions.³⁸⁶

Finally, the demographics of the producers and consumers of such answers-turned-questions began to take a dramatic shift, in turn further altering the nature of the questions. College and university enrollment in the U.S., under two million in 1940, surged to approximately six times that figure forty years later, with the steepest decade incline (120%) during the 1960s.³⁸⁷ Enrollment growth disproportionately came in the more affordable public institutions,³⁸⁸ more accessible also with many new campuses built, such that millions of students from what had been largely untapped portions of the social-economic spectrum now encountered the presumably more reflective curricula of higher education (the private college sector also admitted increasingly diverse student bodies). Along with changes in sheer numbers and economic standing were striking shifts in the mix of student gender and, after much civil rights activity (including desegregation struggles), of student race/ethnicity. The demographics of the professoriate also began to alter, although with some notable lag effect. And the proliferation of graduate programs in virtually every department oriented great numbers of students in skills of, and predisposition to, social critique. History departments, like most others, grew less typically white, male and less privileged in background. Similar diversification, though slower, was unfolding in the other western democracies.

³⁸⁶ Hofstadter, *Anti-Intellectualism in American Life*, p. 30.

³⁸⁷ U.S. Department of Education; present numbers are about 20 million, or ten times the 1940 figure.

³⁸⁸ Until fairly recently, not only were tuitions and other college costs much lower than at present, but financial aid was far more skewed to grants over loans.

But it is hard, if not impossible, to sort through the “causal directionality” of influence between a changing mix of investigators on the one hand and changing social currents on the other. During the 1960s and 1970s (and beyond) a great cascade of tumultuous events – too numerous and ponderous to dissect here³⁸⁹ – were viewed through new and distinct prisms, or actively altered those prisms, or (probably) both at once. Perhaps there is no need to disaggregate. What seems clear is that the world had become far different than in the time of Becker’s relativism. And for whatever basket of reasons, less investment in the establishment for one (and others discussed further below), the new scholars generally seemed more skeptical, even cynically interrogative and accusatory in treatment and tone.

Looking back from the vantage point of 1994, Appleby, Hunt and Jacobs named what they believed the key driver of that overarching posture: “Our central argument is that skepticism and relativism about truth, not only in science but also in history and politics, have *grown out of the insistent democratization* of Western society.”³⁹⁰ If so, it was not the classic liberalist and individualist view of democracy, for a good number of the new cohort had found wanting the even application of that ideal. The most glaringly obvious example, of course, was the appalling legacy of first slavery and then formal and

³⁸⁹ A beginning list might include, in no particular order of importance (or claim of completeness): the Bay of Pigs debacle, the Cuban missile crisis, the Kennedy assassination and ensuing spate of conspiracy theories, the events surrounding the Civil Rights Act and movement, the Vietnam quagmire with its terribly unpopular draft, carpet bombing, Agent Orange, and Pentagon Papers scandal, riots (or “civil unrest”) in major American cities (and in Paris *mai* 1968), campus sit-ins and other demonstrations, a nuclear deterrent policy of mutually assured destruction, the Cultural Revolution, the space race and lunar landings, broad lifestyle and drug experimentation, the Black Panthers and similar movements, music and film boundary-stretching, the Middle East wars, the Prague Spring, the Kent State shootings, the Watergate scandals, etc., etc., etc. Again, the main point here is not to be exhaustive, but rather to reflect on how the cacophonous combination of such events might have lent to an erosion of legitimacy as to authority and fact certainty.

³⁹⁰ Appleby, Hunt and Jacob, *Telling the Truth About History* (New York, 1994), p. 1 (emphasis added).

informal Jim Crow. Those and other failings of the larger community had pressed down on persons according to various group assignments,³⁹¹ such that some group members, once in a position to publish historical/sociological commentary, rather naturally focused their research and writings on materials vindicating³⁹² group perspectives. Here we see a decided departure from Dewey's view of cleavages *between* generations taken as a whole (see Section 3, *supra*); historians of a variety of leanings – not just the Marxist oriented – now increasingly favored analyses of cleavages existing and functioning *within* single generations, even single societies. In that respect even Kuhn's sense of a fairly cohesive "community" (of field scholars in his case) with a consensus view began to seem inadequate. What emerged in professionalized history circles was no such single community, but several, with no particular common end (save perhaps the similarity of attempting to persuade readers as to the merits of a given argument).³⁹³ A possible parallel from political science thinking then current is Robert Dahl's theory about how the polity in a democracy is more a shifting amalgam of interest groups, all of them "minorities" in terms of voting power, but who express their "relative intensity of preference" about the given issue at hand.³⁹⁴

³⁹¹ Whether the assignation is from without or within is of course an intriguing and important issue, too complex and dense to address at any length here.

³⁹² Readers may recall how efforts centering that concept stretch back at least as far as the 1792 publication of Mary Wollstonecraft, *A Vindication of the Rights of Women* (London, 1988).

³⁹³ As Novick described, the profession had become (quoting William Bouwsma), "little more than a congeries of groups, some quite small . . . which can speak only imperfectly to each other" (*That Noble Dream*, p. 573); the number of sub-specialties bore out that statement – "[b]y the early 1980s there were seventy-five specialist historical organizations affiliated with the AHA; many more, including some of the most important, with no formal affiliation" (*Ibid.*, p. 580).

³⁹⁴ Robert A. Dahl, *A Preface to Democratic Theory* (Chicago, 1956), esp. pp. 134-35. Dahl spoke to the insufficiency of either the "Madisonian" view of democracy (compromise between majority and minority) or the "Populistic" view (majority rightly controls) to describe and account for what Dahl believed was an

It is not that “traditional” histories and modes of treatment (including those celebrating a liberal individualist ethos) died away, or even declined in absolute numbers. It was rather that the surge in graduate program enrollment resulted in a tremendous spike of overall productivity in history writing, of which a very significant portion overtly discussed the historical origins and patterns of differentiated realms of power and privilege.³⁹⁵ “The past has always been the handmaid of authority,” observed historian J.H. Plumb.³⁹⁶ It was precisely to that verity that the well-known African proverb spoke: “Until the lion has a historian of his own, the tale of the hunt will always glorify the hunter.”³⁹⁷ A new wave of history writers willingly shouldered that task, and in so doing drew on and responded to – and in turn helped sponsor – a society-wide questioning of authority in its every guise.

As I revisit further below, even language itself eventually would come under deep suspicion and thus be subject to deep interrogation. In the shorter term, vocabulary for many became a powerful tool (and, also discussed later, one of the main prizes in the fight as well as a means of measuring progress). An example of language-as-tool lies in the distinction between the term “revisionist” history (ostensibly straightforward but oft used rather pejoratively) and an alternative – “corrective” history, which instead suggests fault in prior handling. One way to think about such descriptors is to try to arrange them

enduring *absence* of any stable majority across issues. In his suggested theory of democracy, policy outcomes were a function of alliances between interest groups of varying intensities of preference on the given issue, with any such alliances and preference measures shifting with the new issues at hand.

³⁹⁵ Novick’s final chapter in *That Noble Dream* explored at some length the tie between the “exponential growth in the quantity of scholarly historical works” as it was “paralleled by the expansion of history’s scope” especially as to “social, cultural, or intellectual issues.”

³⁹⁶ *History News Network*, George Mason University.

³⁹⁷ *Ibid.*, cited as “anonymous.”

along a sort of “continuum of contestation” in history writing. At one endpoint might sit the *affirmative* school in effect verifying prior approaches, followed on one side by its near cousins, the additive or *supplementary* and *complementary* approaches to history, then a central range representing *remedial* and *integrative* efforts, next to them a zone for *revisionist* and then *rejectionist* modes, with finally the opposite (from the original) endpoint representing some *separatist/supplative* construct suggesting displacement.

●—————●
affirmative supplementary complementary remedial integrative revisionist rejectionist supplative

As with many things touching on human knowledge fields, we expect blurred borders between such categories. All of them constitute some form and degree of advocacy, however conscious, as histories always had previously. But as the last half century unrolled, the overarching notion of differentiated *standpoint* grew ever more overtly influential. Kuhn had described how researchers from competing schools pursue their craft in what amounts to different perceptual realms:

Practicing in different worlds, the two groups of scientists *see different things* when they look *from the same point* in the same direction. Again, that is not to say that they can see anything they please. They are looking at the world, and what they look at has not changed. But in some areas they see different things, and they see them in different relations one to the other.³⁹⁸

As the italicized phrases above suggest, Kuhn acknowledged important distinctions arising despite scholars making observations “from the same point.” But later standpoint historians began to state claims based on observations *from different points* than their colleagues, with the separate and distinct bases of reference the (near) exclusive province

³⁹⁸ Kuhn, p. 150 (italics added).

of particular demographic categories. Such an approach had been far less imaginable in the days of Kuhn's training, when white males (mostly from a narrow band of ivied institutions) saturated and thus defined the relevant circles.

But ringing long before Kuhn's time was a note that has returned as the signature refrain of the present era: "It should be known that history is a discipline that has a great number of approaches."³⁹⁹ While the illustrious Ibn Khaldūn of Tunis, now broadly considered one of the founders of historiography, sociology and political economy (he also studied law and served as a high judge), worked over 600 years ago, his words remain notable for a number of interwoven reasons.⁴⁰⁰ First, much of the scholar's work centered on the concept of *'aṣabīya*, a term alluding to basic shared bonds and purposes, and variously translated as "social cohesion" or "group solidarity" (and sometimes "tribalism"), all part of an explanatory theory of social conflict. Because one can read the term as connoting a sense of group loyalty even where circumstances might suggest otherwise, it sometimes is negatively associated with racism or other forms of raw partisanship,⁴⁰¹ certainly familiar concerns and charges in our times. Second, because in Ibn Khaldūn's view *'aṣabīya* is the fundamental motive force of history, it is not surprising to find in his writings hints as to how groups sponsor and adhere to unifying axioms (including religious ideology) and, more subtly, how history telling can be an

³⁹⁹ *History News Network*, George Mason University. Life span recorded as 1332-1406.

⁴⁰⁰ Allen Fromherz, however, reminded us that although certain striking parallels exist, one must use caution in projecting contemporary values and modes of intellectual review onto a medieval scholar writing under very different traditions. Allen James Fromherz, *Ibn Khaldun: Life and Times* (Edinburgh, 2007).

⁴⁰¹ See commentary in Shelagh Weir, *A Tribal Order* (Austin, 2007), especially p. 191.

avenue to promote and consolidate social position.⁴⁰² Third, and relatedly, in the above elements of social group conflict, his approach foreshadowed by several centuries the movement in history/historiography witnessed rather dramatically in the 1960s and thereafter. Finally, one of the most critical aspects of that relatively recent thrust was the inclusion – even centering – of previously marginalized figures and populations, some of them in turn from previously marginalized regions, as in the non-Euro-American origins of Ibn Khaldūn himself. Part of the necessary process for former European colonies in converting to nation-state status was to reclaim some historical self-comprehension.

*Woe unto the defeated,
whom history treads
into the dust.*⁴⁰³

The “wind of change”⁴⁰⁴ sweeping away the old colonial order also whisked up the dust of the defeated, now to recirculate as prime material for new histories. Already by 1962, Hofstadter would observe a broad new thrust in intellectual exchange: “Everywhere there are deep convictions, or at least vigorous discourse . . . about colonialism, racism, nationalism, imperialism.”⁴⁰⁵ He seemed to miss, however, one of the central points for many historians, i.e., that the time had passed for Euro-Americans to be the exclusive drivers, or even the prime drivers, of the terms of those conversations, in large part

⁴⁰² At least one prominent biographer believed Ibn Khaldūn deferentially elevated the history of the Berbers in order to help preserve a conscious history of his ancestral people, and in the same token enhanced the autobiographical recounting of his actual heritage in ways helpful to his social status and related career progression. See Muhammed Abdullah Enan, *Ibn Khaldun: His Life and Works* (Jaya, 2007).

⁴⁰³ From Arthur Koestler, *Darkness at Noon*, trans. Daphne Hardy (New York, 1941).

⁴⁰⁴ “The wind of change is blowing through this continent. Whether we like it or not, this growth of national consciousness is a political fact.” In 1960 British Prime Minister Harold MacMillan uttered this phrase in speeches delivered in Ghana and South Africa while touring several British colonies in Africa, signaling the intent of the Conservative government, after years of recalcitrance, to grant independence to such territories, the great bulk of the turnover in fact accomplished that same decade.

⁴⁰⁵ Hofstadter, p. 43.

because the European historical (and psychic) legacy had become both the object of critical focus and, to many, also the burden to be lifted as much as possible from the consciousness. And a significant part of that legacy had been the self-servingly dismissive, disjunctive and thus debasing manner in which Europeans had cast the histories of colonial territories and peoples. African writer Ayi Kwei Armah succinctly bared the essence of the matter:

Pieces cut off from their whole are nothing but dead fragments. From the unending stream of our remembrance, the harbingers of death break off meaningless fragments. Their [historians] bring us this news of shards. Their message: behold this paltriness; this is all your history.⁴⁰⁶

“Re-membering” the shattered continuities to which this passage speaks has proved a difficult task, in part because of artificial colonial borders (including straight lines of longitude and latitude) drawn through tribal territories, broader cultural groupings and continuous natural ecosystems. The difficulty has also been in part due to the legacy of “Europhonism” – the substitution of European languages, names and thus identities over the native. The combination of the above factors in effect dismembered African memory, factually as well as symbolically.⁴⁰⁷

The literature addressing the historiography of the colonial conditions (colonial, post-colonial, neo-colonial) is as vast as the global reach of imperialism itself, and thus not amenable to neat summary here. Some common threads do emerge. For one, if as Goethe rued, history is “a mixture of error and violence,” then those two elements quite

⁴⁰⁶ Ayi Kwei Armah, *Two Thousand Seasons* (Chicago, 1980), as quoted in Kwasi Konadu, *Reading the World: An African Perspective on World History* (New York, 2010), p. 1.

⁴⁰⁷ A recent work examining “Europhonism” and “re-membering” is Ngugi wa Thiong’o, *Something Torn and New: An African Renaissance* (New York, 2009), in which the Kenyan author dissects those concepts and others as part of a call to return to the use of memory and indigenous languages as central elements in the reconstitution of a continent sundered by colonialism, slavery and certain strains of neocolonialism.

naturally were foci of interpretative counter-struggle. First, regarding error of fact (and/or analysis), a strand of historians went beyond merely presenting new material to supplement or complement the Eurocentric works, instead insisting on corrective (*remedial* and/or *revisionist*) accounts. One provocative example here is Cheikh Anta Diop (1923-1986), a historian, anthropologist, physicist and politician who attracted wide attention by arguing the Negroid origin of the Egyptian pharaohs, part of a larger challenge as to prior European understatements about the extent and accomplishments of pre-colonial civilizations, altogether interrogating the Western cultural bias inherent in scientific and historical research.⁴⁰⁸ The logic of this standpoint rendered problematic the expression of any reservations about the cited archaeological and anthropological evidence – when issuing from European or other western sources, it fell under suspicion of ideological blindness to native (and thus inherently more correct) understandings. The full extension of this logic (it is not uniformly asserted) was that only colonial peoples are rightfully positioned to offer historical interpretations about the factual colonial experience, history in the *separatist*, perhaps even *supplantive* mode.

The intensity of such insistence makes more sense when acknowledging the second half of Goethe's adage, the matter of violence in history. Colonial history flows red, no less so and arguably more so than other sordid chapters in human affairs. Accompanying, interwoven with, allowing, and magnifying the gross physical outrages

⁴⁰⁸ Cheikh Anta Diop, *The African Origin of Civilization: Myth or Reality* (New York, 1974). This book was the first English translation of sections of the works *Antériorité des civilisations nègres* and *Nations nègres et culture*. Born in what was then French Senegal, Diop's academic and scientific training took place over many years in Paris, lending close familiarity with European modes of data collection and interpretation, more particularly as focused on African pre-colonial history. A major early influence was Aimé Césaire, a poet and essayist from the French Caribbean (Martinique), also educated in France, who had issued the poetry-prose denunciation *Discours sur le colonialisme* (*Discourse on Colonialism*, 1950, English translation 1953) and *Toussaint Louverture* (1960), a biography of the Haitian revolutionary.

was systematic psychic violence. As Diop elsewhere noted:

Thus imperialism . . . first killed the being spiritually and culturally, before trying to eliminate it physically. The negation of the history and intellectual accomplishments of Black Africans was cultural, mental murder, which preceded and paved the way for their genocide here and there in the world.⁴⁰⁹

The erasure, disruption or other degradation (“negation”) of peoples, artifacts and accounts in essence truncated the sense of historical continuities. Post-colonial attempts to reconstruct them, sometimes also tinged with the particular commentator’s extra-historical goals of economic liberation and nation-building (e.g., Diop’s African cultural unity as a means to throw off colonial vestiges), led to a rejection of much of what western historiography had long held dear. Carlos Alberto Torres explained:

Postcolonialism, a theoretical perspective connected with liberation movements fighting against colonialism and racism, emerged as an attempt to criticize the rational foundations of colonialism and to decolonize “the mind,” as Franz Fanon would say. Postcolonial thought is above all a criticism of the Enlightenment and its legacy of modernity. As does feminism, postcolonialism criticizes the notion of an unqualified reason, universality, the progressive unfolding of history, national sovereignty, and the integrity of a self-identity subject that holds specific, self-reflective interests.⁴¹⁰

The distancing of western norms in history has several effects in academic practice.

Space limits here allow only brief notes about two. One concerns the deeper reliance on oral recountings than traditionally welcomed in the more scripto-centric “Eurasian”

(Euro-American, Chinese and Japanese) approach, as historian Kwasi Konadu labels it.⁴¹¹

⁴⁰⁹ Cheikh Anta Diop, posthumously published as *Civilisation ou barbarie: anthropologie sans complaisance* (Paris, 1991), English edition, *Civilization or Barbarism; An Authentic Anthropology*, trans. Yaa-Lengi Meema Ngemi, eds. Harold J. Salemson and Marjolijn de Jager (Brooklyn, 1991).

⁴¹⁰ Carlos Alberto Torres, *Democracy, Education and Multiculturalism* (Oxford, 1998), p. 121.

⁴¹¹ The relative merit of oral and written sources is a vast topic. For the purposes here, the following excerpt is a reasonably representative sample of post-colonial (particularly African) defenses of oral histories: “The weaknesses associated with oral vehicles for the transmission of bodies of knowledge also appl[y] to written traditions as well. In fact, given the sophistication of certain indigenous archives of

The other effect, as Torres hints just above, concerns a greater emphasis on the importance of group identity than found in individualist approaches still channeling Enlightenment values. However, a difficulty in post-colonial critiques not encountered in its universalist predecessors is the tension between, on the one hand, throwing off colonial shackles – material and psychic alike – through some sense of solidarity among ex-colonial peoples and, on the other, preserving a unique historiographical voice for subset groups with distinctive outlines and thus, arguably, carrying some distinctive historical burdens on some distinctive path to meaningful liberation. By one measure, what seems to bracket this process of internal differentiation is a set of knotty questions as to race/ethnicity. Initially, as part of a higher order abstraction, it is convenient to cluster and “otherize” Euro-Americans as somehow collectively “white” (or at least “not of color”). That stance probably finds roots in the reality that, despite significant racial and ethnic diversity long existing in the west, until quite recently the western power structure and therefore the western “face” – certainly in policy terms – was decidedly white. The simplified notion of a somehow uniformly “white west” (or of westerners, in the peculiar parlance of such discourse, not “of color”) is of course the mirrored other half of a persistent binary by which westerners arguably perceived (and thus treated) all non-westerners, regardless of their myriad distinctions, as an otherized and less civilized whole, as is argued (among several other points) in landmark works on colonialism by

knowledge, the oral method of preservation and transmission can be more reliable than written sources, which may themselves misinform, omit, or engender misstatements perpetuated by subsequent editors or writers who cite these sources. Orality involves a propensity to store and recall volumes of information verbatim and to practice culturally mandated rituals so that the ear and the tongue are trained to keep and speak what is heard rather than distort or interpret the archived oral texts. To distort or reinterpret oral texts based on personal or other inclinations would result in serious consequences.” Kwasi Konadu, *Reading the World: An African Perspective on World History* (New York, 2010), pp. 213-14.

Frantz Fanon (*Black Skin, White Masks; The Wretched of the Earth*) and, slightly later, Edward Saïd (*Orientalism; Culture and Imperialism*).⁴¹²

Legitimate complaints about this binary, however, had a perhaps unintended corollary in historiography and elsewhere. Saïd strenuously argued in *Orientalism* for the recognition of numerous and important distinctions within a region, even where ethnicity and culture seem fairly homogenous. But the very logic of his Orient-Occident axis of analysis instead of the North-South dichotomy others have favored shows the malleability of oppositional perspectives in history. The colonial experience in North America, for example, differed considerably from that in Central and South America and the Caribbean; the path in Southern Asia differed from that in Southeast Asia and the Pacific islands territories; the Middle East from North Africa; North Africa in turn from Central and South Africa.

And here is where the full logic of standpointism in history seems to reinforce the employment of an analytical lens still capable of peering at aspects of colonialism, but more directly focused elsewhere, i.e., on the inescapable matter of race. For it is one thing to point to the shared historical antecedents, patterns and workings of imperialism as it operated globally, quite another to aspire to solidarity on the basis of some narrower commonality, in this case race. A prominent example – only one of several possible – is Diop’s “Black Africa” stylings, which almost by definition marginalized the role of the large non-Black populations in Africa, mostly in the northern and southern zones (and

⁴¹² Frantz Fanon, *Black Skin, White Masks*, trans. Charles L. Markmann (New York, 1967), first published as *Peau noire, masques blancs* (Paris, 1952); Frantz Fanon, *The Wretched of the Earth*, trans. Constance Farrington (New York, 1963); Edward W. Saïd, *Orientalism* (New York, 1978); Edward W. Saïd, *Culture and Imperialism* (New York, 1993). As for western perceptions of relative levels of civilization, Fanon complained, “[t]he colonized is elevated above his jungle status in proportion to his adoption of the mother country’s cultural standards” (from *Black Skin, White Masks*).

from which sprang Diop's aforementioned attempt to effect the reclassification of the ancient Egyptians). Elsewhere, historian Kwasi Konadu has rejected the "meaningless Eurasian versions" of African history as taught in colonial times, instead lamenting the acute absence of world history works by "scholars of African birth or descent."⁴¹³ One (uncertain) read of Konadu's call is a lack of enthusiasm (as with Diop) for commentary on Africa by scholars of Semitic, Afrikaner or other European descent, all fairly numerous on the continent, but all presumably with origins elsewhere. The logical extreme of such a stance is that only native and diasporic black Africans can appropriately be entrusted with relating African history.⁴¹⁴ Thus at the intersection of colonialism and global history we arrive at a standpoint approach in historiography on the basis of race.

Although race-informed critiques drew much of their impetus and explanatory power from global anti-colonial struggles,⁴¹⁵ they quite naturally aimed at challenging the standard received histories of specific societies. America seemed to provide the greatest volume and depth of interrogation. And while the essential logic of standpoint in history extends to any racial group so defining itself (at times as a function of negation, i.e., what one is not), the discussion as to race in the United States, with its appalling record of

⁴¹³ Kwasi Konadu, *Reading the World: An African Perspective on World History* (New York, 2010), pp. 1 (emphasis added) and 6, respectively.

⁴¹⁴ Konadu issued those words from his academic post in America, hence perhaps the importance of his use of the qualifier African "descent."

⁴¹⁵ As Eric Foner noted in his 2000 *AHA Presidential Address*, "[t]he rise of anticolonial movements in Africa and Asia inspired the rapid growth of what would later be called a "diasporic" consciousness among black Americans, which highlighted the deeply rooted racial inequalities in the United States and insisted they could only be understood through the prism of imperialism's long global history." Indeed, it is difficult to decipher the development and maintenance of slavery in the Americas without considering the political economy of the international slave trade as a whole.

slavery and formal and informal Jim Crow, had long foregrounded the African-American experience. First, by the early 1960s there was already a considerable backlog of formidable and engaging black writings, defying disciplinary lines, to digest, weigh and re-express in the fresh context of post-colonial theory,⁴¹⁶ with new works soon to enter in wide circulation.⁴¹⁷ Moreover, the earliest decades of televised news coverage of race issues highlighted footage of civil rights marches, desegregation efforts (and resistance thereto), the run-up to the Civil Rights Act, riots in major cities, the assassinations of Malcolm X and Martin Luther King, Jr., the Black Panther movement, even the public stances taken by sporting figures such as Muhammad Ali and Tommie Smith,⁴¹⁸ the consciousness of all these matters nearly as black and white as the television images (and newspaper photos) of the era.

Nonetheless, the American social and political discourse on race eventually grew more overtly inclusive (and it had never been utterly binary) as to racial/ethnic/cultural groups. As black comedian and social activist Dick Gregory related as to commonality:

⁴¹⁶ For very limited example: the Frederick Douglass triad of autobiographies, *Narrative of the Life of Frederick Douglass, an American Slave* (1845), *My Bondage and My Freedom* (1855) and *The Life and Times of Frederick Douglass* (1881); Sojourner Truth/Oliver Gilbert, *Narrative of Sojourner Truth* (1851); William Wells Brown, *Clotel, or The President's Daughter* (1853); Harriet Jacobs, *Incidents in the Life of a Slave Girl* (1861); Booker T. Washington, *Up From Slavery* (1901); W.E.B. DuBois, *The Souls of Black Folk* (1903); James Weldon Johnson, *The Autobiography of an Ex-Colored Man* (1912); Langston Hughes, *The Negro Speaks of Rivers* (1921); Richard Wright, *Native Son* (1940); Ralph Ellison, *Invisible Man* (1952); James Baldwin, *Go Tell It on the Mountain* (1953); Lorraine Hansberry, *A Raisin in the Sun* (1959).

⁴¹⁷ Including, but certainly not limited to: Martin Luther King, Jr., *Letter from Birmingham Jail* (April 16, 1963); Alex Haley, *Autobiography of Malcolm X* (1965); Eldridge Cleaver, *Soul on Ice* (1968); Maya Angelou, *I Know Why the Caged Bird Sings* (1969); Toni Morrison, *The Bluest Eye* (1970).

⁴¹⁸ Muhammad Ali's decision to drop his "slave name" of Cassius Clay further inflamed millions already offended by his brash assertiveness. And one of the indelible memories from my youth is that of Tommie Smith and John Carlos on the medals podium at the 1968 Summer Olympics in Mexico City, heads bowed and gloved fists raised in protest over racial inequalities in the U.S and in solidarity with activists (he denied a Black Panthers connection). When I had a chance to speak briefly with Mr. Smith twenty years later, he expressed some surprise that the incident could have made such a deep impression on an eleven year-old lad from a mostly white semi-rural area.

“We used to root for the Indians against the cavalry, because we didn’t think it was fair in the history books that when the cavalry won it was a great victory, and when the Indians won it was a massacre.”⁴¹⁹ Coincident with the later stages of the civil rights movement was growing environmentalist sensibility and desire to live in better harmony with nature, and heightening anti-war sentiment and suspicion of the American military as an agent in imperial aggression. These factors arguably contributed both to greater sympathy for Native Americans and greater appetite for rethinking their histories. For whatever combination of reasons, after centuries of studied neglect of – or antipathy toward – less romanticized views of continental settlement and expansion, the popular history market embraced Dee Brown’s *Bury My Heart at Wounded Knee* (1970), its provocative subtitle, *An Indian History of the American West*, signaling a new perspective on the long and wretched series of broken treaties and butcheries from shortly after Columbus’s first landfall on San Salvador to the massacre at Wounded Knee in 1890.⁴²⁰ Academic studies narrowed and intensified the focus on selected topics. For example, historical works like *The Removal of the Choctaw Indians* (also 1970) methodically dissected how misguided good will mixed with devious covetousness to bring about the tragic exodus, and underscored the central role of President Andrew Jackson in the decisive turn to violence.⁴²¹ Tracing the thread back some decades, *The Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* (1973) showed how the naïve romanticism behind

⁴¹⁹ Dick Gregory, quotegarden; URL = www.quotegarden.com/history.html. Similarly from Gregory: “What we’re doing in Vietnam is using the black man to kill the yellow man so the white man can keep the land he took from the red man.” From wikiquote; url=http://en.wikiquote.org/wiki/Talk:Dick_Gregory.

⁴²⁰ Although Brown was not of Native American descent, he extensively quoted numerous tribal leaders. Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (New York, 1970).

⁴²¹ Arthur H. DeRosier, Jr., *The Removal of the Choctaw Indians* (Knoxville, TN, 1970). The Choctaws called Jackson “Sharpknife,” a name DeRosier found both fitting and revealing

“civilizing” efforts inadvertently led to disaster.⁴²² These works were only the front edge of a flood of similar historical scholarship, much of it openly claiming reliance on, deference to, and attempted distillation of a Native American standpoint.⁴²³

Some of this literature was a bridge to how the workings of Manifest Destiny affected the destinies of other peoples already in place on the continent at the time of the great western expansion by Americans, particularly in the west and southwest.

Elizabeth A.H. John, for example, in 1975 wrote of *Storms Brewed in Other Men’s Worlds: The Confrontations of Indians, Spanish and French in the Southwest*, building on probing earlier work (1973) by Edward H. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533-1960*.⁴²⁴ As the two titles suggest, descendants of the *conquistadores* (with their own checkered legacy of encounter with Native Americans) were already deeply established in the region – first part of the Spanish empire, then Mexican territory – when waves of Anglo-

⁴²² Bernard Sheehan, *The Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* (Chapel Hill, NC, 1973).

⁴²³ One paradox in the field, in an era of welcome for standpoint approaches, is the relative paucity (at least through the end of the twentieth century) of historical works by authors of direct Native American descent. Some exceptions include Devon A. Mihesuah, *Cultivating the Rosebuds: the Education of Women at the Cherokee Female Seminary, 1851-1909* (Urbana, 1993) and K. Tsianina Lomawaima, *They Called It Prairie Light: The Story of Chilocco Indian School* (Lincoln, 1994), and more from a sociologic angle, Vine Deloria, Jr., *God is Red: A Native View of Religion* (New York, 1973). Other (non-Indian) writers have channeled statements by Native Americans, such as in Jerome A. Greene, ed., *Lakota and Cheyenne: Indian Views of the Great Sioux War, 1876-1877* (Norman, 1994) and Raymond J. Demallie, *The Sixth Grandfather: Black Elk’s Teachings Given to John G. Neihardt* (Lincoln, 1984). Several others yet have issued works in strong sympathy (in their assessment at least) with Native American standpoint history. One challenge to all above regards historians’ reliance on “typical” documentation, particularly original writings, not generally available in the case of Native Americans, who for the most part were pre-literate until the nineteenth century and beyond. The need (for some the preference) to resort to orally transmitted histories is somewhat parallel with the African case, as touched on briefly in footnote 314, *supra*, and associated body text). Even there, disease, famine and other means of slaughter eliminated much evidence.

⁴²⁴ Elizabeth A.H. John, *Storms Brewed in Other Men’s Worlds: The Confrontations of Indians, Spanish and French in the Southwest* (College Station, 1975); Edward H. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533-1960* (Tucson, 1962).

Americans began to cohabitate the land. War settlements, relentless westward migration and the sort of ruthless machinations arising wherever politics, greed and racial bigotry intersect together worked to transform the Hispanic/Latino profile from one once including the earliest governors, mayors and prime landholders into one accorded distinctly second class status⁴²⁵ for well over a century, that condition extending also to the millions of Latinos newly arriving (a vast number redeparting, often to repeat the cycle). As with other ethnic groups, Latinos beginning in the 1960s increasingly engaged in overt displays of pride in their shared heritage, epitomized (but not limited to) the adoption, especially by the young, of the descriptor “Chicano/a,”⁴²⁶ indicating a particular interest with social, economic and political activism. In addition to well-publicized strikes led by César Chávez, Dolores Heurta, and the UFW (United Farmworkers of America), came the founding of academic organizations such as MEChA (*Movimiento Estudiantil Chicano de Aztlán*) in 1969 and NACS (National Association of Chicano Studies) in 1972, each dedicated to a push for courses and programs in ethnic studies, including, of course, history written from the Hispanic/Latino/Chicano perspective.

⁴²⁵ Certain historical aspects of ethnicity are further noteworthy here. During the period of Spanish sovereignty meaningful political and economic power was concentrated in native-born Europeans and their mostly unmixed descendants, a factor lending to the revolution bringing Mexican independence in 1821. Those economic disparities had extended to the regions that the U.S. would eventually acquire. Thus, most of the Latino inhabitants whom westering Anglo-Americans encountered were *mestizos*, i.e., people of mixed degrees of Spanish and Indian ancestry. According to one historian, the equation of racial animus was that “Indians were a conquered race despised by Anglo-Americans,” and “Mexicans were consistently equated with Indians.” Carey McWilliams, *North from Mexico: The Spanish-Speaking People of the United States*, updated by Matt S. Meier (New York, 1990), p. 190. Finally, the strategy of the Mexican government to encourage American settlement in areas of what is now Texas in order to stimulate the economy regionally ultimately failed for a variety of reasons once the numbers of immigrants reached critical mass. Along with concerns about taxation and local autonomy, a prominent factor in the revolt that would eventually peel Texas away was the new settlers’ fear that Mexico would abolish slavery. Oscar Martínez, *The Handbook of Hispanic Cultures in the United States: History*, eds. Nikolás Kanellos and Claudio Esteva-Fabregat (Houston, 1993), p. 263.

⁴²⁶ “*La Raza*” had been a fairly common collective self-moniker since the mid-to-late nineteenth century.

Perhaps reflecting the profile of academic departments then still mostly white and male, several of the earlier critical studies issued from sympathetic authors without Hispanic surnames (whatever their actual ancestry).⁴²⁷ The emerging trend, however, was increasingly more akin to a standpoint school, along the lines of history articles by, for example, Rodolfo Alvarez ("The Psycho-Historical and Socio-Economic Development of the Chicano Community in the United States" 1973), Juan Gómez-Quiñones ("Toward a Perspective on Chicano History" 1974), and Tomás Almaguer ("Historical Notes on Chicano Oppression: The Dialectics of Racial and Class Domination in North América" 1974).⁴²⁸ Among the vast body of more recent histories in this mode are Alfredo M. Mirandé (*The Chicano Experience: An Alternative Perspective*, 1985) and Gilbert G. González and Raúl F. Fernández ("Chicano History: Transcending Cultural Models" 1994).⁴²⁹ (Later below I discuss yet other works, but in the context of Critical Legal Studies, Critical Race Theory, and feminist historiography.) A great deal of similar work emerged throughout the Western Hemisphere speaking to the tumultuous path for native peoples and blacks in local and regional spheres, i.e., more outside the context of the United States. Space limitations here prevent a closer look.

⁴²⁷ Examples here include: Charles Wollenberg, et al., *Ethnic Conflict in California History* (Los Angeles, 1970); Robert F. Heizer and Alan J. Almquist, *The Other Californians: Prejudice and Discrimination under Spain, Mexico and the United States to 1920* (Berkeley, 1970); Abraham Hoffman, "Chicano History: Problems and Potentialities," in *Journal of Ethnic Studies*, I (Spring 1973), pp. 6-12; Mark Reisler, "Always the Laborer, Never the Citizen: Anglo Perceptions of the Mexican Immigrant during the 1920s," in *Pacific Historical Review* Vol. 45:2 (May, 1976), pp. 231-254.

⁴²⁸ Rodolfo Alvarez, "The Psycho-Historical and Socio- Economic Development of the Chicano Community in the United States," (1973) *Social Science Quarterly* 53 (March 1973), pp. 920- 924; Juan Gómez-Quiñones, "Toward a Perspective on Chicano History," *Aztlán: A Journal of Chicano Studies* 2:2 (Fall 1974); Tomás Almaguer, "Historical Notes on Chicano Oppression: The Dialectics of Racial and Class Domination in North América," *Aztlán* 5:1 (Spring and Fall 1974).

⁴²⁹ Alfredo M. Mirandé, *The Chicano Experience: An Alternative Perspective* (Notre Dame, IN, 1985); Gilbert G. González and Raúl F. Fernández, "Chicano History: Transcending Cultural Models," *Pacific Historical Review* 63:4 (1994), pp. 469-497.

Few persons from ethnic groups other than those above were residing in what became the continental⁴³⁰ United States when Euro-Americans acquired dominance.⁴³¹ Fuller development of the continent, however, relied intensively also on new waves of immigrants from Asian lands. Histories specific to the trials, contributions and triumphs of these populations were next to non-existent until about the 1970s. Many readers first encountered such literature in the 1973 memoir by Jeanne Wakatsuki Houston, *Farewell To Manzanar: A True Story of Japanese American Experience During and After the World War II Internment*, which examined the prejudicial circumstances surrounding the mass internment of Japanese Americans in World War II, and life in such quarters.⁴³² That book and several others underscored the extraordinary story of how, despite such collective mistreatment, some 33,000 *Nisei* (American-born children of Japanese immigrants) served in the U.S. Armed Forces during the war, with a large number voluntarily enlisting from those same internment camps into such units as the highly decorated 442nd Combat Regiment.⁴³³ (The light shone on these military efforts also

⁴³⁰ Hawaii is a different case, with Pacific Islanders nearly the sole prior inhabitants when British and American business and political pull began to prevail. Chinese immigrants began to trickle in during the late eighteenth century, but Japanese immigration did not commence until about 1885, with Filipinos and Koreans mostly arriving later still. Interestingly, residents of Hispanic/Latino heritage now comprise about 9% of the population in Hawaii.

⁴³¹ Because African Americans' labor was a significant factor from practically the very beginning of (post-Viking) European involvement in the Americas, it is reasonable to state there had not been Euro-American dominance apart from them.

⁴³² Jeanne Wakatsuki Houston, *Farewell To Manzanar: A True Story of Japanese American Experience During and After the World War II Internment* (New York, 1973). The memoir as a testament to the immigrant's physical, psychic and cultural transportation/transformation enjoys a long tradition not tied to any specific ethnicity. See, e.g., regarding East European Jewish immigrants, Mary Antin, *The Promised Land* (New York, 1997 [1912]) and, regarding arrivals from Puerto Rico, Esmeralda Santiago, *When I Was Puerto Rican* (New York, 1993).

⁴³³ By some measures the most decorated unit in U.S. military history, the famed 442nd suffered approximately 9,500 casualties and 660 deaths in intense fighting in Europe. Their surviving numbers by this date have almost completely faded. I had the great honor to co-serve on a charitable board with one of

helped – eventually – to bring greater attention to the fact that huge numbers of minorities had served in all American wars.⁴³⁴)

More rigorous histories built on the slow emergence from quiescence on the part of peoples who began generally and collectively to self-identify as Asian Americans.⁴³⁵ The late historian Ronald Takai, for example, explained in his broad ranging *Strangers From a Different Shore: A History of Asian Americans* how transPacific migrants moving Eastward could be seen to comprise a “pioneer” movement in expanding America in much the same spirit and nation-building effect previously associated mostly, if not entirely, with Westward moving Euro-Americans.⁴³⁶ The Chinese immigrants who came first during the California gold rush and then undertook the great perils of work on the transcontinental railroad, lent those labors to the mainland economy “before the arrival of most Jewish, Italian, Polish and Hungarian immigrants.”⁴³⁷ In their footsteps, also responding to market demands for cheap labor, came sizeable waves of entrants from Japan, the Philippines, Korea, Vietnam, Laos, Cambodia, India and many more places to work, for many decades, in the few positions economic segregation allowed – “plantation workers, railroad crews, miners, factory operatives, cannery workers, and farm laborers.”

these gentlemen for some years before his passing. He had seen duty in some very bloody engagements, was tough as nails even in his seventies, an unwavering patriot, and willing if asked to talk about how he and his wife had met in an internment camp and how he and his buddies very much wished to prove their loyalty through military service.

⁴³⁴ An estimated 900,000 black and 500,000 hispanic/latino persons served in the U.S. military during World War II. Similar proportions (275,000 black and 150,000 hispanic/latino) saw duty in Vietnam.

⁴³⁵ Terms like these are rather fluid. For just one example, in the U.K., “Asian” tends to refer primarily to those with origins in the subcontinent, i.e., India or Pakistan mostly, whereas in the U.S. the term more often reflects a heritage stretching back to East or Southeast Asia (China, Korea, Japan, Vietnam, the Philippines, et al.). I cannot in this brief overview capture all the possible nuances.

⁴³⁶ Ronald Takai, *Strangers From a Different Shore: A History of Asian Americans* (New York, 1989).

⁴³⁷ *Ibid.*, p. xii (italics added).

Hostility from competing white workers closed off even some of those jobs, such that “many Asian immigrants became shopkeepers, merchants and small businessmen.”⁴³⁸ Indeed, Takai took pains to show historically that pursuits such as ethnic shopkeeping, part of a lasting stereotype attaching to immigrants from Asian lands, were less cultural traits the immigrants brought with them, and more something learned once in America as a rational economic response to exclusion from the mainstream. For Asian Americans, unlike certain Euro-Americans starting low in the socio-economic pecking (immigrants from Ireland one example) there were no means to blend in with a change of costume, accent or name spelling. Historians tracing and relating the economic, cultural, political and intellectual achievements of Asian Americans thus necessarily grapple with race as a distinctive factor, even where the historiographic mode is supplementary or remedial, rather than something more contestational. And any such choice of approach demands some review of the workings of the law as a potentially major historical determinant.

Indeed, a common factor in standpoint histories (prominently including feminist approaches, addressed shortly below) is the tracing of standpoint group interactions with the legal system in its double-edgedness, i.e., how the legal system – overtly, covertly and even inadvertently – has been elemental to inequality, but also how activists (sometimes aided by historians) have confronted, and leveraged, that same system with varying degrees of success by articulating its greatest promises and hypocrisies. It is thus not surprising that one of the sharper tools of race standpoint since the mid-1970s, Critical Race Theory (CRT), emerged in large part from American law schools, a variation on the already strongly revisionist mode called Critical Legal Studies (CLS).

⁴³⁸ Both quotes, *ibid.*, p. 13.

The long struggles of the McCarthyism, civil rights resistance, Vietnam War overreach and government misinformation all contributed to mistrust of establishment institutions and their authority. For CLS purposes the focus was on authority as embodied in the legal system and its principal actors and how the very structure and mechanics of law too often work to reinforce social hierarchies, even to the point of oppression. In this respect, CLS contested what was then a prominent meta-theory in law, i.e., the “Law and Economics” construct articulated by Richard Posner, et al., interpreting and building on the coherence and utility of laws, with special reference to the historical centrality of property rights (and the related role of law enforcement) in the Anglo-American legal tradition.⁴³⁹ The law, in this view, is concerned with arbitrating conflicting interests in a manner minimizing and allocating burdens so as to maximize calculable benefits, including “to preserve intact the social fabric.”⁴⁴⁰ CLS theorists operated more from the left, noting how a fixation on property rights tended to obscure, interfere with, or even preclude the enjoyment of other rights just as fundamental to human justice, such that the existing “social fabric” was far from ideally knit.

That history and law might be saturated with class dynamics, differentials, privileges and oppressive inconsistencies was of course hardly a new concept – it did not need await CLS, or even Marx, for enunciation. The ancient Greek historian Plutarch recorded how in the sixth century B.C., Anacharis advised the great lawgiver Solon:

⁴³⁹ Two controversial expositions of such theory are Richard A. Posner, “Killing or Wounding to Protect a Property Interest,” 14 *Journal of Law and Economics* 201 (1971) and Richard A. Posner, *Economic Analysis of Law* (New York, 1973).

⁴⁴⁰ Richard A. Posner, “The Economic Approach to Law,” *Texas Law Review* 757 (1975).

*Written laws are like spider webs, and will, like them, only entangle the poor and weak, while the rich and powerful will easily break through them.*⁴⁴¹

In the eighteenth century Enlightenment Voltaire parsed the matter with due mordancy:

*It is forbidden to kill and therefore all murderers are punished. Unless they kill in large numbers and to the sound of trumpets.*⁴⁴²

But he was speaking in an era when one could imagine considerable social fluidity:

*History is filled with the sound of silken slippers going downstairs and wooden shoes coming up.*⁴⁴³

CLS scholars, however, reject much of Enlightenment thought, particularly its notion of reason-centered – i.e., “neutral” and “natural” – principles, and its emphasis on individualism and, it follows, legal rights individually vested. Instead, and echoing some of the legal realism school of the earlier twentieth century, one need examine legal institutions and legal language in fuller social context. What results is historical evidence pointing less to true social mobility than to *stasis* in power and control relationships that formal neutrality simply masks.⁴⁴⁴ It had been to underscore that point that Marx and Engels in 1848 directed their rejoinder to the imagined voice of the bourgeoisie:

. . . your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence for your class.⁴⁴⁵

⁴⁴¹ The essence of that observation echoed for more than two millennia, as we see in words from 1707 by the eminent satirical essayist Jonathan Swift: *Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through.*

⁴⁴² *Il est défendu de tuer; tout meurtrier est puni, à moins qu'il n'ait tué en grande compagnie, et au son des trompettes.* Voltaire, “Rights,” in *Questions sur l'Encyclopédie* (Paris, 1771).

⁴⁴³ Some read this quote more as a metaphor for sexual behaviors between classes than one speaking to actual class mobility. My interpretation is that the language is flexible enough to accommodate either meanings, or even both at the same time.

⁴⁴⁴ For a dense mid-period study of some of the main CLS themes, see Roberto Mangabeira Unger, “The Critical Legal Studies Movement,” *Harvard Law Review*, Vol. 96, No. 3 (Jan, 1983), pp. 561-675.

⁴⁴⁵ Karl Marx and Frederick Engels, *The Communist Manifesto: A Modern Edition* (London, 1998), p. 55.

Legal rights and restrictions, even where facially disinterested, in reality play out very differently according to socio-economic standing:

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

As this biting quip by journalist/novelist Anatole France (1844-1924) yet further illustrates,⁴⁴⁶ cynicism as to law and social disequilibria has a long heritage. The CLS approach is consonant not only with some key aspects⁴⁴⁷ of earlier legal realism, but also with the rough equivalent in historiography from that era, with its similar emphases on social and economic factors. Recall that histories by Jameson and Beard (as discussed briefly in Section 3 of this chapter, *supra*) had examined the class structure and possible economic motives of the Founding Fathers, suggesting that the war of independence and then the new Constitution effected far more a political than social revolution, delivering merely a transfer of the administration of privileges from British to American elites.

Moreover – and probing an issue material to the instant essay – CLS extended the interrogation beyond and behind institutions to touch on the makeup, role and instincts of the *persons* constituting the judiciary. Through the CLS analytical lens, judges appear, unsurprisingly, far from impartial arbiters (and even farther from agents for the sort of “progressive” social change critical legal scholars favor). To start, judges are fully human creatures subject to all the social, political, cultural cross pressures and biases normal to other busy professionals, such factors often largely unexplored in the lack of

⁴⁴⁶ France assumed a tone of “urbane skepticism” in his observations, many of which are expressed in a compilation of aphorisms, *Le Jardin d'Épicure* (Paris, 1923 [1895]).

⁴⁴⁷ But not all. An important distinction concerns the degree to which changes in legal rules (alone) can alter social arrangements, as the legal realists had hoped – CLS commentators tend to emphasize how multi-layered cultural and operational biases in the law work in concert to preserve patterns of domination even where the rules themselves are facially fair.

much time for self-reflection. They toil in inherently conservative institutions, are paid by the ultimate institution, the state, have taken similar educational paths with all the shared inculcation of values, tastes and privileged entrée (“cultural capital”⁴⁴⁸) that path implies, employ the same limited means of problem solving, and were disproportionately white and male (less so only in recent years, as with the entire legal profession). And where the underlying laws themselves are not even facially neutral (as during much of Western history), judges could/can appear as agents of reaction, or at least of social ossification. Further, most non-Federal judges are elected to office, and while it would be unfair to conclude that all elected judges consider voter opinion in their rulings, some disturbing recent reports suggest that at least some do some of the time.⁴⁴⁹ But appointed judges, in the CLS view, are also elemental to the perpetuation of social hierarchy, partly because of the cultural factors mentioned above and partly as a function of partisan politics. One of the victors’ spoils in political races is exactly that power of judicial

⁴⁴⁸ Pierre Bourdieu, *Reproduction in Education, Society and Culture* (London, 1977) and “The Forms of Capital” in J.G. Richardson, ed., *Handbook of Theory and Research for the Sociology of Education* (Westport, Conn., 1986). Bourdieu was one of the leading phrasemakers in this viewpoint. For him, the past is prelude. One’s personal path, family socio-economic status prominently included, strongly slants the probabilities for academic and career success, or the lack thereof. Bourdieu uses analogs of economic capital – including “cultural capital” and “social capital” – and another concept, “habitus,” to suggest how education can allow dominants to maximize their advantage and to reproduce or otherwise perpetuate hierarchical social arrangements. In this respect, then, Bourdieu warns that education can calcify at least as much as it liberates. Some of his more recent critics argue against the implication of “cultural deficiency” on the part of those communities in which families do not readily supply an introduction to the dominant canon in its many guises in literature, music, high emphasis on early academic achievement, and the particular vocabularies and mannerisms of commerce, bourgeois society and the like.

⁴⁴⁹ See, e.g., Andrew Cohen, “Judging for Votes, Not Justice” in the *Los Angeles Times*, December 4, 2013, p. A21, discussing a large cluster of cases in Alabama where judges overrode juries to impose death sentences in cases where the juries had voted for life sentences, with some of the same judges noting their “tough on crime” stances in subsequent judicial elections. A competing view contests the broadly accepted notion that appointed judges, because of their freedom from electoral pressures, show greater job competence, as measured by “skill, effort and independence,” than do elected judges. For a statistical analysis here, see Stephen J. Choi, G. Mitu Gulati and Eric A. Posner, “Professionals or Politicians: The Uncertain Empirical Case For An Elected Rather Than Appointed Judiciary,” University of Chicago Law & Economics, Olin Working Paper No. 357, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper Series.

appointment, and while party and ideological leanings are notable selection factors, because the American two-party system rewards centrality, there is very little room for perceived outliers from the critical school. In sum, and despite good-faith spoken allegiance to professional norms, perfectly neutral, transparent, dispassionate and disinterested judges are not humanly possible (and perhaps not even desirable), less so yet where cleavages and biases associated with class, race and gender (and other matters) are still so pronounced in Western society. The implications for both older and newer strands of judicialist historiography are immense, for the overarching “historian as judge” model hinges on a view of judges no longer well or even broadly supported (I revisit this theme in Section 8, *infra*).

The emphasis in Critical Legal Studies on unspoken and underexamined class biases in the law, then, was consonant with much of standpoint history writing. Yet in two of the major variations – race and gender standpoint histories – an inescapable starting point was the foundational formalization of inequities *overtly within the law*.⁴⁵⁰ Thus, for Critical Race Theory and feminist scholars, even before discussing the hidden implication of legal language, a trove of material lay in expressly racist and sexist laws, as well as in commentary on the supposed “reasoning” behind them. For example, those arguing that legally formalized racism had been foundational rather than incidental could and did point to Thomas Jefferson’s infamous *Notes on the State of Virginia* and other period writings reflecting pernicious racial myths about intelligence, instincts and capabilities.⁴⁵¹ Jefferson and revered first President George Washington, otherwise both

⁴⁵⁰ Stated English essayist and politician Joseph Addison (1672-1719), “[n]o oppression is so heavy or lasting as that which is inflicted by the perversion and exorbitance of legal authority.”

so enamored with rights and liberty, were slave owners. All three branches of the U.S. government, in line with prevailing prejudices, set out rules establishing or otherwise lending imprimatur to legalized discrimination, as just a small sample of very well known instances shows. The U.S. Constitution endorsed the state-level voting requirements that limited suffrage to white, male property owners. U.S. Supreme Court decisions (again, the supposedly “neutral” judicial element) supported differentiated treatment according to race, reaffirming in *Dred Scott v. Sanford* (1857) that African Americans were not citizens, such that they could not contest slaveholders’ nationally enforceable property rights in slaves, and in *Plessy v. Ferguson* (1896) the noxious but convenient Jim Crow fiction of “separate but equal.”⁴⁵² Congress enacted a series of race-specific immigration restrictions: the *1882 Chinese Exclusion Act*, its unobvious title reflecting the underlying theme of official otherness; a second ten-year term via the *1892 Geary Act*; extending it “indefinitely” via the *1902 Scott Act*; a widened scope of such origin restrictions, via the *1917 Immigration Act* (also known as the *Asiatic Barred Zone Act*), covering persons from “any country not owned by the U.S. adjacent to the continent of Asia” along specified longitudes and latitudes; several other Acts tying immigration quotas

⁴⁵¹ “[T]he blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of mind and body.” Thomas Jefferson, *Notes on the State of Virginia* (1781), as quoted in Stephen B. Presser and Jamil Zainaldin, *Law and Jurisprudence in American History*, 2d edition (St. Paul, 1989), p. 125. Jefferson’s elitism extended, though less draconically, even to white males. He argued that public schools should, through “three years gratis” of mass tutoring and then other levels of schooling for increasingly smaller cohorts, sift out the relatively small portion of truly talented persons, a natural aristocracy of sorts: “By this means twenty of the best geniuses will be raked from the rubbish annually” in each zone to undergo even further winnowing toward college. *Ibid.*, p. 127. Blacks and females were, of course, completely outside the formal education scheme.

⁴⁵² *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896). Justice Brown, in summarizing the rationale of the *Plessy v. Ferguson* ruling, declared: “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”

proportionately to the existing population, which of course was mostly Euro-American. As for the remaining branch, Roosevelt's Executive Order 9066 (February, 1942) authorized the relocation of American citizens and resident aliens into internment camps, a burden falling disproportionately on persons of Japanese descent,⁴⁵³ of whom the removal of some 110,000 (approximately two-thirds were citizens) uprooted entire communities. The Supreme Court two years later, in *Korematsu v. United States* (1944), despite applying a "strict scrutiny" standard of review, ruled that the extreme measures of Executive Order 9066 had somehow not violated the Constitution.⁴⁵⁴

And so on, all further illustrating (as I noted in Chapter 1) that law – its context, making, peculiar culture, effects, violation of, and changes to – comprises a large part of history. Critical Race Theory, like CLS, emerged largely from law schools,⁴⁵⁵ and extends its analysis beyond the outrages of historical *de jure* discrimination to include a co-central emphasis on the historical and ongoing *de facto* operations of the law (differentiated enforcement, as reflected in arrests, convictions, sentence severity) and the racialized attitudes behind them (as reflected in ubiquitous "microaggressions"), each

⁴⁵³ "Although it is not well known, the same executive order (and other war-time orders and restrictions) were also applied to smaller numbers of residents of the United States who were of Italian or German descent. For example, 3,200 resident aliens of Italian background were arrested and more than 300 of them were interned. About 11,000 German residents—including some naturalized citizens—were arrested and more than 5,000 were interned." *History Matters*, George Mason University, URL = <http://historymatters.gmu.edu/d/5154/>

⁴⁵⁴ *Korematsu v. United States*, 322 U.S. 214 (1944). While the Supreme Court has never explicitly overturned the *Korematsu* decision, the Department of Justice in 2011, Office of the Solicitor General, admitted error in an official notice effectively eliminating any precedent value of the case as to the internment of American citizens. See Russo Tracy, "Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases" (May 20, 2011). The sixty-seven year interim brings to mind Russian poet Yevgeny Yevtushenko's neat simile: "Justice is like a train that's nearly always late."

⁴⁵⁵ An apparent "co-founder" of CRT, Kimberlé Crenshaw, is a long-time professor at the UCLA School of Law. The approach was already fairly mature when I trained there; I witnessed some rather testy classroom (and hallway) exchanges about who might legitimately be entitled to speak to certain topics and issues.

lingering long after formal legal reform. Among the extensive writings issuing from the CRT perspective are several history works, variously complementary, revisionist or supplantive in mode. A small sampling of titles gives some idea of the range, flavor and tenor: “‘Other Non-Whites’ in American Legal History” (Neil Gotanda, 1985); “The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950-1956” (Mary L. Dudziak, 1987); “Property Rights in Whiteness: Their Legal Legacy, Their Economic Costs” (Derrick A. Bell, Jr., 1988); “Desegregation as a Cold War Imperative” (Mary L. Dudziak, 1988); “The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Traders Chronicle as Racial History” (Michael A. Olivas, 1990); “The Second Amendment: Toward an African-Americanist Reconsideration” (Robert J. Cottrol and Raymond T. Diamond, 1991); “*Rouge et Noir* Reread: A Popular Constitutional History of the Angelo Herndon Case” (Kendall Thomas, 1992); “Whiteness as Property” (Cheryl I. Harris, 1993); “Legal Indeterminacy, Judicial Discretion, and the Mexican-American Litigation Experience: 1930-1980” (George A. Martinez, 1994); “Equal Protection and the Special Relationship: The Case of Native Hawaiians” (Stuart Minor Benjamin, 1996); “Rewriting History with Lightning: Race, Myth and Hollywood in the Legal Pantheon” (Margaret M. Russell, 1996); “The Plessy Myth: Justice Harlan and the Chinese Cases” (Gabriel J. Chin, 1996); *White by Law: The Legal Construction of Race* (Ian F. Haney López, 1996); “Empire Forgotten: the United State’s Colonization of Puerto Rico” (Ediberto Román, 1997); *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (Robert A. Williams, 1997).⁴⁵⁶

⁴⁵⁶ Each of these works is either included in Richard Delgado and Jean Stefancic, eds., *Critical Race Theory: The Cutting Edge* (Philadelphia, 2000) or listed there as “Suggested Readings.”

There has been no neat division, in fact many cross debts owed, between the CRT and Women's studies aspects of CLS, in part because women have been at the cutting edge in each (albeit with the backdrop of women's considerable struggle to gain much of an internal leadership voice in Civil Rights era efforts⁴⁵⁷). But there is also the sense that the women's movement is not simply the latest in a string of other socio-legal struggles such as abolitionism, the New Deal and civil rights, or even other standpoints. Feminist interpretations are unique among standpoint histories in that women, considered together, are not technically a minority group,⁴⁵⁸ and in fact constitute roughly half of all the other standpoint groupings (but again, not necessarily half of the leading voices). Finally, there is the suggestion that gender might be the most "socially constructed" of all such groups, consistent with Simone de Beauvoir's elemental pronouncement: "One is not born, but rather becomes, a woman."⁴⁵⁹

Nonetheless, as with such other groups, historical treatments placing women at the center (solely or shared) have long been sorely lacking. As the great nineteenth century novelist Jane Austen complained about "standard" field works: "History, real solemn history, I cannot be interested in The quarrels of popes and kings, with wars and pestilences in every page; the men all so good for nothing, and hardly any women at

⁴⁵⁷ "White and black women learned what the minority of women active in the organized labor movement had learned much earlier: that women were typically excluded from policy-making leadership roles of even the most radical movement, a lesson that would have to be relearned again and again in the political and peace campaigns of the late sixties." Eleanor Flexner, *A Century of Struggle: The Woman's Rights Movement in the United States* (Cambridge, 1975), p. xxix. One is reminded here of the pithy oxymoron popular historians Will and Ariel Durant offered in application to virtually any "vanguard" element in social rearrangement: "A proletarian dictatorship is never proletarian."

⁴⁵⁸ Mary Wollstonecraft already by 1792 had noted the seeming oddity of women's status equivalence to subaltern minority populations: "Is one-half of the human species, like the poor African slaves, to be subject to prejudices that brutalize them . . . ?" Mary Wollstonecraft, *A Vindication of the Rights of Women* (New York, 1988 [1792]), pp. 144-145.

⁴⁵⁹ Simone de Beauvoir, *Le Deuxième sexe* (Paris, 1949), in English *The Second Sex* (New York, 1972).

all.” Virginia Woolf in the following century refrained: “History is too much about wars; biography too much about great men.” And then the popular yet anonymously sourced *bon mot*: “History is herstory too.”⁴⁶⁰

Though not an absolute rule, what seems to distinguish “women’s history” from traditionally drawn history, just with some women included, is the deep interrogation, rejection even, of patriarchally derived norms as to what is important and thus what gets emphasized. In this light, Catherine MacKinnon described “the impulse behind the discipline of women’s history in many respects”:

“Wait a second. You [men, presumably] may have defined history as wars, empires, governments, and so on, but we were there too.” This insight is effective only if you count what we were there *for* and what we were *doing* there, and only if you can see that other things are going on in society besides those things that men have measured as valuable. Women make history. Quilts are art. Those gardens are expression and creativity. A shorthand way of saying all this is that, men notwithstanding, man is *not* “the measure of all things.”⁴⁶¹

MacKinnon, a leading theorist in law and feminism, typified much of the field in identifying and objecting to the historical andro-centricity of law and history, i.e., their absolute saturation with male modes of classification, assessment and interpretation. Accordingly, feminist standpoint histories tend to highlight the imprint of law in its various workings and effects.

There are at least two themes in the now vast body of women’s history. One, the history of feminism and feminist philosophy, is itself often subdivided into “First Wave,”

⁴⁶⁰ The Austen quote is of character Catherine Moreland in Austen’s posthumously published *Northanger Abbey* (1817); Woolf’s quote is from her collection of essays, *A Room of One’s Own* (1929); the “herstory” quote, origin unknown, is from *Quotegarden*, URL = www.quotegarden.com/history.html.

⁴⁶¹ Catherine A. MacKinnon, quoted in Isabel Marcus et al., “Feminist Discourse, Moral Values, and the Law – A Conversation” in 34 *Buffalo Law Review* 11, 36-49 (1985), p. 25. The writer’s last phrase in the excerpt above may in turn have been in reference to Mary Beard’s much earlier caution, well known to feminists, not to take “man as the measure” of historical significance. Mary Ritter Beard, *Women as a Force in History: A Study of Traditions and Realities* (New York, 1971 [1946]), p. 163.

Second Wave” and “Third Wave” movements (with of course some overlap) and is so rich as to supply an entire specialty. A (necessarily) truncated sample here includes: *The Creation of Feminist Consciousness From the Middle Ages to Eighteen-seventy* (Gerda Lerner); “Reason and Morals in the Early Feminist Movement: Mary Wollstonecraft” (Carolyn W. Korseyer); *The Feminist Papers: from Adams to Beauvoir* (Alice S. Rossi); *Feminism: The Essential Historical Writings* (Miriam Schneir); "Defining Feminism: A Comparative Historical Approach" (Karen Offen); *Separate Roads to Feminism: Black, Chicana, and White Feminist Movements in America's Second Wave* (Benita Roth); *A History of Their Own: Women in Europe from Prehistory to the Present* (Bonnie S. Anderson and Judith P. Zinsser).

The other theme – feminist history – differs from the history of feminism in the choice of subject matter. Here are histories on a variety of topics, whether in the grand sweep or by focused monogram, but recounted from a female perspective. It is a tough balance to achieve a historical reinterpretation where gender issues *per se* are not the sole concern, but where they may nonetheless be a significant explanatory variable. Columbia history professor Susan Pedersen explored the intersection:

If we take feminism to be that cast of mind that insists that the differences and inequalities between the sexes are the result of historical processes and are not blindly “natural,” we can understand why feminist history has always had a dual mission – on the one hand to recover the lives, experience and mentalities from the condescension and obscurity in which they have been so unnaturally placed, and on the other to reexamine and rewrite the entire historical narrative to reveal the constructions and workings of gender.⁴⁶²

Recent history has been so intertwined with the women’s movement – historical in its own right – that the subcomponents are hard to disaggregate. The distinction between the

⁴⁶² Susan Pedersen, “The Future of Feminist History” *AHA Perspectives* (October 2000).

history of feminism and feminist history thus can be more readily cognizable in histories of earlier periods. These works often explore previously hidden strengths and accomplishments, a break Mary Ritter Beard urged some eight decades ago, when she observed: “In their quest for rights they [women] have naturally placed emphasis on their wrongs, rather than their achievements and possessions, and have retold History as a story of their long Martyrdom.”⁴⁶³ While not always triumphal (appropriately), numerous reinterpretations reveal the clever adaptability of women managing to acquire some degree of agency in orchestrating their private realities despite repressive public codes, prominently including the formal law. Relatedly, for women and other invisibles in traditional histories, legal documents and records of court proceedings are often the only documentary traces of their existence and life stories, and also help uncover patterns as to legal reinforcement of social inequalities. One wing of the “new social history,” centered more on the everyday realities of modest personages than on monarchs and generals, is the “microhistory” approach of Carlo Ginzburg, et al.⁴⁶⁴ Having arisen concurrently with second wave feminism, and often commencing with an examination of legal tracings, microhistory has proved highly conducive to feminist history writing, in that it suggests the means to discover a skeleton of hard fact that the skilled historian might flesh out with the revelatory sinew and muscle of social-level evidence.

A central task in writing microhistory is to analyze the oft-scanty documentary trail within the nearly boundless riches of circumstantial evidence (I discuss the latter

⁴⁶³ Mary Ritter Beard, *On Understanding Women*, (Westport, CN, 1969 [1931]). Similarly, author and poet Maya Angelou cautioned: “Self-pity in its early stages is as snug as a feather mattress. Only when it hardens does it become uncomfortable.” As quoted in Mardy Grothe, *I Never Metaphor I Didn’t Like* (New York, 2008), p. 45.

⁴⁶⁴ See Carlo Ginzburg, “Microhistory: Two or Three Things That I Know About It,” trans. John Tedeschi and Anne C. Tedeschi, *Critical Inquiry*, Vol. 20, no. 1 (Autumn, 1993), pp. 10-35.

again in Chapter 3, *infra*) in order to make reasonable inferences. No little tension arises between the need for creative insight and the risk of overspeculation, all the more so where the documents, although “official,” might be less than fully reliable, reflecting their originators’ personal agendas and social biases, again in the way CLS and feminist theories posit. The historian looks to winnow out the dubious aspects, both to isolate the dependable kernel and, especially in critical histories, to interrogate the chaff itself as potentially valuable material for the analysis. In all, microhistory as a tool in feminist or other new social history is a blend of technique, purpose and argument.

One well-received yet controversial history in this vein was *The Return of Martin Guerre* by the much-honored Natalie Zemon Davis, 1987 AHA president, her focus oft described as social history with special emphasis on gender and cultural issues.⁴⁶⁵ The Martin Guerre episode concerned a sixteenth century imposter in the French Pyrenees, whose legal trial was celebrated enough in its own day to inspire follow-up popular treatments, partly for the scintillating themes of intrigue, mistake, hope, identity theft, class, sex, honor/dishonor and justice, and partly because even then it gave rise to several questions about the nature of memory, evidence and probability. Deftly leveraging the favored tools of microhistory (*inter alia*, judicial records, tax rolls, early printed books and pamphlets, religious writings, contracts and other notarial records, folk tales) Davis pressed the uncertain clay of this old case into the contours of the new historiography of identity and agency.

⁴⁶⁵ First published in French in 1982 as *Le Retour de Martin Guerre*; the English version of the book is Natalie Zemon Davis, *The Return of Martin Guerre* (Cambridge, MA, 1983). Presently a professor of Medieval Studies at the University of Toronto, at the time of the *Martin Guerre* publication Davis was a history professor at Princeton University, having also taught at UC Berkeley and elsewhere.

Colleague historians found the contents of the resulting vessel somehow both delightful and disquieting, the book almost filmic in its immediacy but by the same token begging a set of reservations common to all standpoint histories. Did Davis, in order to bootstrap a social history into a feminist (and class) statement, project onto the subjects, and the female protagonist in particular, a sort of late twentieth century attitude and reaction to the socio-economic realities and strictures of the far earlier era? Was Bertrande de Rols, as the court found, really a victim of Arnould du Tilh's claim to be her long-absent husband Martin Guerre, or was she, as Davis suggested, a knowing and adroit agent in a mutually beneficial scheme, one which would secure and even elevate both her social reputation and economic standing? The latter interpretation, however accurate, required some rather assertive suppositions, extending even to the subjects' inner life – yearnings, instincts, desires, motivations, ambitions, intentions, strategies:

Here we come to certain character traits of Bertrande de Rols . . . : a concern for her reputation as a woman, a stubborn independence, and a shrewd realism about how she could maneuver within the constraints placed upon her sex.

She had tried to fashion her life as best she could, using all the leeway and imagination she had as a woman.

[T]he obstinate and honorable Bertrande does not seem a woman so easily fooled, not even by a charmer like [Arnould].

She wanted to live as a mother and family woman at the center of village society. She wanted her son to inherit.

The stubborn woman calculated and made her plans. She would go along with the court case against the imposter and hope to lose it.

She had to manipulate the image of the woman-easily-deceived, a skill that women often displayed before officers of justice any time it was to their advantage.⁴⁶⁶

⁴⁶⁶ Ibid., pp. 28, 6, 44, 60, 61 and 68, respectively.

To her credit, Davis at several points employed linguistic modifiers to acknowledge how she was operating in the nebulous realm of *possibilities* and *probabilities*. Musing as to how her written treatment differed from the earlier-conceived film version (*Le Retour de Martin Guerre*, 1982, for which she had been a historical consultant⁴⁶⁷), she asked: “Where was there room in this beautiful and compelling cinematographic of a village for the uncertainties, the ‘perhapses,’ the ‘may-have-beens,’ to which the historian has recourse when the evidence is inadequate or perplexing?”⁴⁶⁸ Where she offered that type of educated guess, she mostly so indicated:

It is possible, even probable, that the new Martin and Bertrande de Rols were becoming interested in the new religion, in part because they could draw from it another justification for their lives.

If I were to hazard a guess . . . it would be . . .

[I]n his head there must have always been an out . . .⁴⁶⁹

But it was just that sort of speculative inference by standpoint or social historians of any stripe, especially where it was tied to little standard empirical evidence (documents traditionally the most exalted), that led some contemporaries to hesitate. Whether such misgivings constituted more in the way of “reservations” than “reaction” is itself of course partly a question of historiographical orientation.⁴⁷⁰

In any case, traditionalists such as Robert Finlay, while acknowledging that works like *Martin Guerre* could be “imaginatively conceived, eloquently argued and intrinsically appealing,” worriedly questioned, “[i]n historical writing, where does

⁴⁶⁷ One might partially attribute the aforementioned filmic immediacy of the book to this experience.

⁴⁶⁸ *Ibid.*, p. viii.

⁴⁶⁹ *Ibid.*, pp. 48, 56 and 60, respectively.

⁴⁷⁰ Similar, in some manner, to the aphorism, “one person’s freedom fighter is another’s terrorist”—the resulting debate sees much resort to unacknowledged tautology in the attempt to parse definitions.

reconstruction stop and invention begin?”⁴⁷¹ Davis’s claim that “What I offer you here is in part my invention, but held tightly in check by the voices of the past”⁴⁷² only turned the question trail full loop – in history writing, are there any constraints as to the mix of “voices of the past” one might select as a check on the narrative? Voices the new social history enthusiastically explored included (à la Burckhardt) art, literature and music, and (à la Vico) words, rituals, traditions and myths, now also joined by such material as (à la Ginzburg) peasant costume, songs, superstitions, aphorisms, graffiti and carnivals. None of these categories particularly distressed traditionalists, certainly not like the given historian’s suppositions (à la Davis) about the unsubstantiated *thoughts* – the “inner voice” – of historical persons. Did not such practice represent the projection of the historian’s own life struggles, belief systems, agenda, social-political causes or other avocation onto and into the historical period and personages studied? Davis, for one, replied that “simplistic absolutist” critics could be hypocritical on this point – Finlay, for example, had in his own work engaged in the same sort of psychological exploration and literary interpretation that Davis used in *Martin Guerre*.⁴⁷³

Indeed, by the time of the Davis-Finlay debate, variants of psycho-history had garnered considerable attention. In her *Thomas Jefferson: An Intimate History* (1974), for example, Fawn M. Brodie argued against the temptation to disaggregate Jefferson’s illustrious “life of the mind” from his “life of the heart” – instincts, circumstances and passions all cross-condition the rational thought processes behind one’s acts and writings:

⁴⁷¹ Robert Finlay, “The Refashioning of Martin Guerre,” *American Historical Review* 93/3 (June, 1988), pp. 554 and 569, respectively.

⁴⁷² Davis, *The Return of Martin Guerre*, p. 5.

⁴⁷³ Natalie Zemon Davis, “On the Lame,” *American Historical Review* 93/3 (June 1988), referring to Robert Finlay, *Politics in Renaissance Venice* (New Brunswick, NJ, 1980).

The idea that a man's inner life affects every aspect of his intellectual life and also his decision-making should need no defense today. To illuminate this relationship, however, requires certain biographical techniques that make some historians uncomfortable. One must look for feeling as well as fact, for nuance and metaphor as well as idea and action.⁴⁷⁴

That later genetic testing validated Brodie's conclusions about the then controversial idea that Jefferson had fathered offspring with slave paramour Sally Hemings⁴⁷⁵ did not much mitigate traditionalist's discomfort (as Brodie had anticipated) for the "certain biographical techniques" employed – hunches, speculations, passions. All the more so where Brodie, one of the first female tenured History professors at UCLA, did not hold a doctorate, with undergraduate and masters degrees in literature. Even in acknowledging that Brodie's work overall showed assiduous research, detractors fretted (as with Davis) over the implications for the *discipline* (in both senses) of history where practitioners felt free to use passion and the like as explanatory variables. Were there no bounds to the range of tools permissible for the issue-advocate?

Apparently not, for some practitioners, or so recent publications suggest. In *The Fantasy of Feminist History* (2011), for example, Joan Wallach Scott argues that cold reason alone in history writing fails to capture the descriptive richness available with variants of psychoanalysis, particularly fantasy. In this view, "emotional investments" of the sort inaccessible to empirical or even ideological explanation are still sometimes key contributors to the acts and behaviors commentators later narrate as history. Attention to fantasy helps one to grasp the mutability of psyche and identity and how desire infuses or

⁴⁷⁴ Fawn M. Brodie, *Thomas Jefferson: An Intimate History* (New York, 1974), pp. 15-16.

⁴⁷⁵ Brodie first published her research in 1972 in "The Great Jefferson Taboo" an extensively footnoted article in *American Heritage*, that journal departing in this case from its norm of omitting footnotes. In the several years since a Y-DNA analysis in 1998, strong consensus on the issue has emerged. See, e.g., "Forum: Thomas Jefferson and Sally Hemings Redux" in *William and Mary Quarterly*, January 2000.

otherwise modifies the rational motives of historical actors – dwelling alongside mere information in dusty archives the attuned researcher finds, again, “passion.”⁴⁷⁶ Well.

It is not apparent why Scott’s theorizing should apply only to gender studies and/or feminist history. In fact, developments in feminist history writing illustrate the diversity, gradations, conundrums, dilemmas, countercurrents and other reservations common to all the standpoint strains, and in some respects also touching traditionalists. One such concern is that the natural appeal of historical and historiographical problems central to one’s own self-identity may be, as an old adage cautions, double-edged:

“Passion makes the best observations and draws the most wretched conclusions.”⁴⁷⁷

Another, relatedly, is the ghettoizing effect of hyperspecialization of subject matter or technique (or both). Whether such effect is self-inflicted or externally imposed (by those traditionalists, one might claim, still dominating departments and the profession at large) is an ongoing question. Responses to it range between, on one pole, greater emphasis on “integrative” histories and, on the other, the continued use of critical deconstruction to expose historically rooted but still active hierarchies. Louise Tilly, professor of history at the New School for Social Research, in discussing in a 1989 article whether women’s history had yet fully “arrived,” related an illuminating seminar comment by a “crusty old [male] historian” of the French Revolution:

⁴⁷⁶ Joan Wallach Scott, *The Fantasy of Feminist History* (Durham, NC, 2011). Scott is the Harold F. Linder Professor of Social Science at the Institute for Advanced Study in Princeton, New Jersey.

⁴⁷⁷ Johann Paul Friedrich Richter (1763-1825), often writing under the pseudonym Jean Paul, was a favorite of English historian Thomas Carlyle. Though a Romantic, perhaps because of it, Jean Paul recognized the mixed blessings of a passionate attachment to the subject matter and thus the need for some rigorous external check on perceptions: “We learn our virtues from our friends who love us; our faults from the enemy who hates us. We cannot easily discover our real character from a friend. He is a mirror, on which the warmth of our breath impedes the clearness of the reflection.”

“Now that I know that women were participants in the Revolution, what difference does it make?” This encounter suggested to me . . . two increasingly urgent tasks for women’s history: producing analytical problem-solving studies as well as descriptive and interpretive ones, and connecting their findings to general questions already on the historical agenda . . . [i.e.,] writing analytical women’s history and connecting its problems to those of other histories.⁴⁷⁸

For Tilly, only through such critical analysis – work beyond simply integrating women’s history into other history – could women’s history make a difference and perhaps even “change the agenda of history as a whole.”⁴⁷⁹ But Tilly’s underlying confident tone as to at least partial field arrival (measured in professorships and published articles, like with “other histories”) may have to other women seemed problematic, for the very term “arrival” has conservative overtones. Moreover, it glosses over the non-uniformity of agenda and advance to date:

[Women’s history] has been movement history; to a large degree, it has been written out of feminist conviction. All history emerges from a political frame, but relatively few histories have as close a connection with an agenda for change and action as women’s history does.⁴⁸⁰

Which women’s agenda? Extending the question, which other standpoint subgroup’s agenda, action and change? Tilly herself hinted at the matter:

Women, although defined by sex, are more than a biological category; they exist socially and encompass females of different ages, in different family positions, in different classes, nations, communities; they live by different social rules and customs, in environments shaped by beliefs and opinions that follow the structure of power.⁴⁸¹

⁴⁷⁸ Louise A. Tilly, “Gender, Women’s History, and Social History” in *Social Science History* 13(4) (Winter, 1989), pp. 439-440 (italics in original).

⁴⁷⁹ Ibid., p. 440.

⁴⁸⁰ Ibid, pp. 440-441.

⁴⁸¹ Ibid.

The irony in speaking of power structures, once having arrived in one, is the possible susceptibility to the same slowness of perception as other elites in considering (or not) one's relatively privileged and thus arguably less representative voice. "Third wave" feminism aims some of its interrogation at *essentialism* and the degree to which the experience of white, upper middle class women had too long been the reference point. Critics remarked, for example, how women in the professoriate, like men before them, skewed both white and disproportionately from the affluent global North.⁴⁸² Such clustering may have bred some underexamined generalities about agenda, the recognition of which presented its own new challenges: "Eventually we came to understand that there were many feminist perspectives among scholars, none of which we wished to exclude"⁴⁸³ The ensuing debate over the mechanics and implications of identity continues, with one point of discord the issue of how much feminists and other standpoint thinkers have themselves participated in essentialist construction via identity politics:

There is nothing about "being" a female that naturally binds women. There is not even such a state as "being" female, itself a highly complex category constituted in contested scientific discourses and other social practices. Gender, race or class consciousness is an achievement forced on us by the terrible historical experience of the contradictory social realities of patriarchy, colonialism, and capitalism.⁴⁸⁴

CRT analyst Angela P. Harris was among those who observed the compounding effect where gender essentialism extends to race and beyond:

⁴⁸² For a beginning discussion on these twinned points, see Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston, 1988). As applied in the realm of post-Kuhnian understandings of science, see Sandra Harding, *Is Science Multicultural? Postcolonialisms, Feminisms, and Epistemologies* (Bloomington, 1998).

⁴⁸³ Ellen DuBois, et al. (1985), as quoted in Louise A. Tilly, "Gender, Women's History, and Social History" in *Social Science History* 13:4 (Winter, 1989), p. 441.

⁴⁸⁴ Donna J. Haraway, "A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century" in *The Cyberculture Reader*, David Bell and Barbara M. Kennedy, eds. (London, 2000, 2002), pp. 295-296.

A corollary to gender essentialism is ‘racial essentialism’ – the belief that there is a monolithic “Black Experience,” or “Chicano Experience.” The source of gender and racial essentialism (*and all other essentialisms, for the list of categories could be infinitely multiplied*) is the second voice, the voice that claims to speak for all Thus, in an essentialist world, black women’s experience will always be forcibly fragmented before being subjected to analysis, as those who are “only interested in race” and those who are “only interested in gender” take their separate slices of our lives.⁴⁸⁵

This sense of artificial and essentialized categorization met further opposition from persons self-locating at any number of social “margins” or “borders.” While much of the earlier work along these lines focused on gender phenomena straddling national boundaries,⁴⁸⁶ the subfield now includes ruminations as to the uncertain frontiers of nearly any category (nationality, ethnicity, sexuality, gender, aesthetics, language, class, etc.).⁴⁸⁷ Where fully extending this logic, the given commentator can apparently choose to locate at whichever boundary best suiting the intended argument. Thus bell hooks would aver:

I am located at the margin. I make a definite distinction between the marginality which is imposed by oppressive structures (sites of domination and deprivation) and marginality one chooses as a site of resistance – as location of radical openness and possibility.⁴⁸⁸

Difficulties arise, however, when projecting one’s own vision to larger population slices, a conundrum inherent in multiculturalism. As historian Scott observed (two decades

⁴⁸⁵ Angela P. Harris, “Race and Essentialism in Feminist Legal Theory” in Richard Delgado and Jean Stefancic, eds., *Critical Race Theory: The Cutting Edge* (Philadelphia, 2000), p. 263.

⁴⁸⁶ See, e.g., Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza* (San Francisco, 1987).

⁴⁸⁷ It is a theme also in much recent autobiographical literature, such as Esmeralda Santiago, *When I Was Puerto Rican: A Memoir* (New York, 1993).

⁴⁸⁸ bell hooks, “Choosing the Margin as a Space of Radical Openness” in *Yearning: Race, Gender and Cultural Politics* (Boston, 1990). This formula begs the question: resistance against what (and where)? One might consider that the claimed oppressive structure in fact shapes to some extent even the range of resistance locations, such that the chosen act of resistance does not arise in full autonomy.

before her musings on fantasy in history writing, *supra*): “Personal testimony of oppression replaces analysis, and this testimony comes to stand for the experience of the whole group.”⁴⁸⁹ Indeed, by then, the generalizations that had been standard fare in such quasi-historical works as immigrant autobiography⁴⁹⁰ began to strike anti-essentialists as, well, fantastical. However, the question of how in the absence of extrapolation one could hope to convey important human “truths” became a matter of deep concern (and some amusement) touching all the social sciences.⁴⁹¹

At some extended point, then, the same “History writing via a second voice” that overrides essentialism threatens also to self-annihilate. For the freedom the “margins” approach asserts quickly raises questions about (the lack of) limits in positing one’s own multi-consciousness, and some cynicism as to the claimed privilege to opine without “legitimate” opposition – who can oppose who is not fully empathic via lived experience nearly synonymous with the author’s? The “second voice” Harris noted seems much like the weary claims of “a peculiar sensation, this double-consciousness” stretching back at least as far as W.E.B. Du Bois.⁴⁹² Harris and Du Bois spoke to the issue with some lament, whereas hooks, et al., seemed more to claim the possibility of some heightened

⁴⁸⁹ Joan Wallach Scott, “Multiculturalism and the Politics of Identity,” in *October* 62 (Summer, 1992), p. 18.

⁴⁹⁰ A well-known example here is Mary Antin, *The Promised Land* (New York, 1912/1997), which the young author introduces (p. 2) as broadly representative: “My life has been unusual, but by no means unique. And this is the very core of the matter. It is because I understand my history, in its larger outlines, to be typical of many, that I consider it worth recording Although I have written a genuine personal memoir, I believe its chief interest lies in the fact that it is illustrative of scores of unwritten lives.”

⁴⁹¹ As well as some amusement, to lay observers at least. British journalist and critic Nancy Banks-Smith wryly noted the oxymoron bedeviling one such field: “Anthropology is the science which tells us that people are the same the whole world over – except when they are different.” As quoted in Mardy Grothe, *Oxymoronica* (New York, 2004), p. 174.

⁴⁹² “It is a peculiar sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity.” William Edward Burghardt Du Bois, *The Souls of Black Folk* (New York 1989 [1903]), p. 5.

and expanded sense of (multifaceted) perception. That point seems compelling at first glance, but ultimately begs the question, again, as to its extension – can one reasonably assert some triple, quadruple, quintuple or sextuple consciousness (by claiming multiple “marginalities” in being, for example, female, subaltern class, brown, lesbian, physically challenged, border-located, linguistically different)? The issue then becomes not only whether there is anything now that commentators cannot aver, but also whether anyone can (or “may”) contest it. Regarding the implications of identity for history, multiculturalists like Edward Said once saw the right, even the duty, to comment:

With regard to the consensus on group or national identity *it is the intellectual's task* to show how the group is not a natural or god-given entity but is a constructed, manufactured, even in some sense invented object, with a history of struggle and conquest behind it, that is sometimes important to represent.⁴⁹³

Not now, some seem to argue – *only certain intellectuals* can and therefore may offer legitimate insights into the given problem, their qualification to do so a function of . . . what? Belonging (to what)? Lived experience (which)? Solidarity (with whom)? Hence an ongoing internal contradiction bedevils standpoint historians and other intellectuals. In sum, the central tension is that the argumentative and agendizing power of “solidarity” in confronting historical (and continuing) oppression marginalizes, through its natural essentializing dynamic, the subjective lived experience and thus dignity of the individual. And because no “group” is perfectly homogenous, any particular action may have non-uniform consequences for its members (assuming those persons even identify with the given group). Thus identity politics drift toward micro-politics, diluting agenda, and rendering the notion of “solidarity” ephemeral and hard to

⁴⁹³ Edward W. Said, *Representations of the Intellectual* (New York, 1994), p. 33 (italics added).

apply to any given problem at hand.⁴⁹⁴

Cameron McCarthy acknowledged such realities in noting, for example, the multi-vocalism and potential ideological cross-currents in an emerging black-brown bourgeoisie: “Different class interests within minority groups cut at right angles to racial politics.”⁴⁹⁵ Two decades later, things have grown even more complex. In much of the contemporary West (and perhaps elsewhere) generalities about such “groups” have less descriptive power than ever because of, *inter alia*, growing rates of mixed ethnicity, mixed or uncertain sexuality (and gender), and unstable religious and political affiliations, each at times cutting across traditional understandings of socio-economic class. With so many possible locations and margins now claimable, is there still such an animal as a stable, neatly bordered, single standpoint in intellectual endeavor? In retrospect, did any ever truly exist? Or do we simply recalibrate self-identity as needs arise (and circumstances allow) in order to claim legitimacy and thus relevance of voice?

In any case, we might pause for a moment to reflect on the ultimate purpose of the author establishing legitimacy and relevance. In history and other knowledge exercises it is *persuasion* of somebody else⁴⁹⁶ – why else bother? But standpoint historians, because of their very separatism (however strategic), already risk a narrowed audience. The more

⁴⁹⁴ At least one iconoclastic art critic, for example, takes the position that standpointism has weakened the subversive power of artists speaking collectively: “[I]dentity politics tribalized the art underground and broke up the dissonant tone of it – a tribe of women, a tribe of black people, a tribe of gay people. It used to be all of us, together, just down in the dirt.” Dave Hickey, as quoted by Deborah Vankin in “He’s never been shy about dissenting,” *Los Angeles Times*, 5 February 2014, p. D6.

⁴⁹⁵ Cameron McCarthy, “After the Canon: Knowledge and Ideological Representation in the Multicultural Discourse on Curriculum Reform,” *Race, Identity and Representation in Education* (New York, 1993), p. 298.

⁴⁹⁶ While we often think of persuasion as the process of getting another to adopt (or abandon) a view, or to augment or otherwise alter a perspective, for the purposes here the notion of persuasion is broad enough to include the establishing of respect for a point of view or method, even where not adopted, as a means of encouraging further productive discourse on the topic at hand and others.

in effect they are simply (to use an older expression) “preaching to the choir” of the already largely persuaded, the less likely some broader social influence results. That trade-off is yet more pronounced where historians attempt to have it both ways in some fusion of standpoint and anti-essentialist stances – the effective audience shrinks in line with the degree of specificity as to privileged (and de-privileged) perspectives.

Persuasion outside of tight circles occurs not through soliloquy, but in some form of conceptual dialogue, some avenue and manner of fair exchange with other thinkers. It follows that to assert something meaningful is to accept, even invite, meaningful responses, including those in the form of vigorous questioning or, to borrow a term often associated with law, cross-examination. Some of that dynamic exchange is structural to the academy, most obviously in field journals. But in an actual attempt to modify views – a goal beyond mere provocation (which perhaps has its own merits) – some common medium of exchange must exist both for the parties to and the audiences of the given discussion. That medium is seldom a shared world-view, almost by definition. But here we might consider a formula operating in law practice (as discussed at much greater length in Chapter 3), where the better lawyers, in my experience, comprehend and employ an enduring triad of truisms: *there is rarely persuasion without trust; there is rarely trust without fairness; there is rarely fairness without acknowledging and treating the most compelling aspects of the argument seemingly in opposition.* A commentator, historian or otherwise, who follows that approach has a better chance of having the given proposition receive serious consideration.

Do historians instinctively operate in such a manner? My impression is that social commentators of any ilk – even revolutionaries – attempt to persuade via appeals

to some universal and fundamental concept of justice,⁴⁹⁷ with a nod to historical references a part of seeking popular judgment of sorts. The full philosophical implications of that consistency are too vast to explore here. But to the extent some form of judicialism is woven through all intellectualism, historians and others must take care not to skip past the middle step – *trust*, earned by demonstrated fairness and factuality.

As the discussion above has shown, trust seems in short supply in the academy. The extraordinary gains in the post-Kuhn social-personal turn resulted in many commentators caught in the peculiar and awkward position of both repudiating and embracing universals. That alone has been enough to foster a sense of frustrating impasse, particularly where rejections of a common analytical approach have tended also to result in the denial of some commonly understood corpus of facts. I return to the issue of contestability of facts in Section 8, *infra*, and then at length in Chapter 3 to follow.

But first, more disruption and discontinuity. Dual “turns” in linguistics and literary studies worked throughout much of this same period to cast even further doubt on the reliability and even the purpose of historical writing. The ongoing social/standpoint debates, as discussed above, already looked largely intractable. These collateral theories seemed to undercut any remaining possibility of meaningful exchange cast in recognizable terms – with the linguistic turn, the asserted insufficiency of language itself as a holder and transmitter of historical meaning; with the literary turn the suspected triumph of “history as narrative” over historical truth as demonstrated fact.

⁴⁹⁷ Which they believe to be universally recognizable (even where not universally applauded) – “We hold these truths to be self-evident.” Consider also a common phrase in some academic circles, “social justice.”

(7) Turns linguistic and literary

So quick bright things come to confusion.

William Shakespeare

If you aren't confused by quantum physics, then you haven't really understood it.

Niels Bohr

Brilliant insights sometimes have the unintended side effect of creating considerable perplexity, especially when such insights center around the topic of uncertainty to begin with. It is perhaps not so surprising, then, to note an imperfect distinction between the two intellectual movements discussed hereinbelow – the linguistic and literary turns – especially as to their effect on historiography. The notable degree of chronological overlap with each other and with the movements covered in the section just above further complicates any effort to disaggregate. Nonetheless, the practicalities of historiography, as in history itself or any other narrated study, force some artificial division of topic and sequence otherwise confounded. Only sometimes is the choice strategic; often it is simply a matter of unavoidable mechanics.

The linguistic turn suggested that declarations of any type, and especially those (like history) espousing some authoritative voice, are in their very choice of language highly confounded with power dynamics and personal subjectivities. The literary turn, in perhaps equally inflammatory manner, confronted historians with the proposition that their offerings inescapably fell into time worn patterns of story telling, with the ancillary suggestion that history writing had little dimension *beyond* mere narrative. Their blend generated a family of at times elusive and complex abstractions, but provocative enough to cause further deep questioning about truth and utility in history.

One influential aspect of the linguistic turn was to show how meanings in language could be thought of as layers susceptible to being peeled back to reveal a history of differentiated usage and meaning. In this respect, it straddled between honoring and rejecting the central variations of linguistic structuralism that had held sway through much of the twentieth century. In about the late 1950s and thereafter, Claude Lévi-Strauss and other thinkers across several fields adapted Ferdinand de Saussure's earlier work in linguistics and semiotics to posit that modes of human interaction and culture were best understood as elements within larger overarching systems or structures. The debate corridors were predictably labyrinthine, the terminology not easily accessible. One assessment of the key commonalities was as follows: every system has a structure; although structures lie behind the appearance of meaning, they are nonetheless real things; the structure determines the position of each element therein; structuralist laws deal with co-existence rather than with change.⁴⁹⁸

Here it is important to distinguish between the identification and analysis of structures (linguistic structures prominently among them) and the endorsement of their socially ossifying effects. Few thinkers in this area considered themselves reactionary, and thus they struggled to reconcile descriptions of durable realities with the possibility of and mechanism for social, political, theoretical and epistemological change. But any meaningful change was as sticky and halting as the shifts in the underlying language, which in turn both was a driver of the new paradigm and gave evidence of it. Already by 1962, Kuhn had noted how conceptual revolutions involve parties using vocabulary differently, such that incommensurable viewpoints arise:

⁴⁹⁸ Alison Assiter, "Althusser and Structuralism," *British Journal of Sociology* 35 (2) (June, 1984).

Since new paradigms are born from old ones, they ordinarily incorporate much of the vocabulary and apparatus, both conceptual and manipulative, that the traditional paradigm had previously employed. But they seldom employ these borrowed elements in quite the traditional way. Within the new paradigm, old terms, concepts, and experiments fall into new relationships one with the other. The inevitable result is what we must call, though the term is not quite right, a misunderstanding between the two competing schools.⁴⁹⁹

Discussions in this vein underscored that History was one of those disciplines deeply and necessarily sensitive to problems of language, such that the manner of historical exposition merited as much attention as the subject matter: “Once historians wrote to instruct men in right examples and warn against evil ones. Now wiser in their generation they write to instruct other historians in true methodology and to warn against false ones.”⁵⁰⁰ It was in this context and atmosphere that Roland Barthes pronounced: “*Language is never innocent . . .*”⁵⁰¹ It always carries with it, he explained, prior usages that confound the intended present employment.⁵⁰² The resulting confusion was by itself

⁴⁹⁹ Kuhn, *The Structure of Scientific Revolutions*, p. 149.

⁵⁰⁰ Unsigned article in the *Times Literary Supplement*, April 7, 1966. Until about 1970, the T.L.S. followed a practice widespread in previous centuries of anonymous or pseudonymous publication.

⁵⁰¹ The fuller text: “*C'est sous la pression de l'Histoire et de la tradition, que s'établissent les écritures possibles d'un écrivain donné: il y a une Histoire de l'écriture; mais cette Histoire est double: au moment même où l'Histoire générale propose -- ou impose -- une nouvelle problématique du langage littéraire, l'écriture reste encore pleine du souvenir de ses usages antérieurs, car le langage n'est jamais innocent: les mots ont une mémoire seconde qui se prolonge mystérieusement au milieu des significations nouvelles. L'écriture est précisément ce compromis entre une liberté et une souvenir . . .*” See note 705, *infra*.

⁵⁰² Eric Hobsbawm gave the example of a notable phrase in *The Communist Manifesto*: “[W]ith the passage of time, the language of the Manifesto was no longer that of its readers. For example, much has been made of the phrase that the advance of bourgeois society had rescued ‘a considerable part of the population from the idiocy of rural life.’ But while there is no doubt that Marx at this time shared the usual townsman’s contempt for – as well as ignorance of – the peasant milieu, the actual and analytically more interesting German phrase (‘*dem Idiotismus des Landlebens entrissen*’) referred not to ‘stupidity’ but to ‘the narrow horizons,’ or ‘the isolation from the wider society,’ in which people in the countryside lived. It echoed the original meaning of the Greek term ‘idiotes,’ from which the current meaning of ‘idiot’ or ‘idiocy’ is derived: “a person concerned only with his own private affairs and not with those of the wider community.’ In the course of the decades since the 1840s – and in movements whose members, unlike Marx, were not classically educated – the original sense had evaporated, and was misread.” See pp. 11-12 in Hobsbawm’s Introduction to Karl Marx and Frederick Engels, *The Communist Manifesto: A Modern Edition* (London, 1998).

not a new dilemma, as Kuhn had acknowledged in reference to an earlier thinker: “What need we know, Wittgenstein asked, in order that we apply terms like ‘chair,’ or ‘leaf,’ or ‘game’ unequivocally and without provoking argument?”⁵⁰³ In his 1969 Postscript to *Structure*, Kuhn reiterated how linguistic discontinuities were inseparable from lasting revolutions in thought and primacy:

Copernicans who denied the traditional title ‘planet’ to the sun were not only learning what ‘planet’ meant or what the sun was. Instead, they were changing the meaning of ‘planet’ so that it could continue to make useful distinctions in a world where all celestial bodies, not just the sun, were seen differently from the way they had been seen before.⁵⁰⁴

Still, Kuhn was perhaps hopeful of eventual reconciliation, suggesting that scholars “who hold incommensurable viewpoints be thought of as members of different language communities, and that their communication problems be analyzed as problems of translation.”⁵⁰⁵ He then linked “translation” to the possibility, once again (see the short discussion a few pages above) of “persuasion” – a matter I address at some length in Chapter 3, *infra*.

Others were not so sanguine. The 1960s and 1970s were a time of extensive questioning of historical givens, including how even the concept of a “given” might imply the legitimacy of top-down directives. In his *The Order of Things: An Archeology of the Human Science*, an early offering in a series of seminal writings on the problematic linkage between power and knowledge (*pouvoir-savoir*), Michel Foucault examined the history of the natural sciences to reveal (like Kuhn) its human science elements, in this

⁵⁰³ Kuhn, pp. 44-45, citing to Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (New York, 1953).

⁵⁰⁴ Kuhn, pp. 128-129.

⁵⁰⁵ *Ibid.*, p. 175.

case probing how structures of epistemology (*épistème*) tended to dictate how people thought about knowledge and knowing.⁵⁰⁶ Foucault's now familiar triad (in one variation) of "power, knowledge, discourse"⁵⁰⁷ reminds us that precisely because language is a key element – an agent even – in attaining, projecting and preserving dominance, it becomes also one of the chief prizes in a power struggle: *dominants get to dictate what counts as knowledge and thus the terms and direction of the discourse.*⁵⁰⁸ Similarly, Pierre Bourdieu examined the interworkings of "social capital," "cultural capital" and "cultural reproduction" – vehicles by which dominant classes employ the "bourgeois parlance" of the education system (as opposed to the "common parlance" of students from non-elite backgrounds) to perpetuate social and economic hierarchies. In this view, language is a key element in the power to impose meanings and to define which knowledges are "legitimate." Those fluent in dominant linguistic codes and cultural canons (including, one supposes, "proper" interpretations of history) are far more likely to gain approving marks throughout the education cycle, thus magnifying any

⁵⁰⁶ First published in French as Michel Foucault, *Les Mots et les Choses: Une archéologie des sciences humaines* (1966), then in English as *The Order of Things: An Archeology of the Human Sciences* (New York, 1970). Foucault continued the analysis in his *L'archéologie du savoir* (1969), subsequently published in English as *The Archeology of Knowledge* (London, 1972) and as a unifying theme threading throughout a number of other commentaries.

⁵⁰⁷ This three part formulation is broadly employed in classroom discussions and the like. Foucault employed at least one other triad in discussing where "the rules of right that provide a formal delimitation of power [speak] to the effects of the truth that this power produces and transmits, and which in their turn reproduce this power. Hence we have a triangle: power, right, truth." Lecture from 14 January 1976, as recorded in Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings, 1972-1977*, ed. Colin Gordon (New York, 1980), p. 92.

⁵⁰⁸ While Foucault arguably authored the most theoretically thorough and penetrating analysis of such dynamics to that date, the link between power and intellectual conformity has long inspired commentary even by figures mostly associated with the establishment. As to overt linkages: "the jaws of power are always open to devour, and her arm is always stretched out, if possible, to destroy the freedom of thinking, speaking and writing" (founding father John Adams). As to the blindness of power to itself: "Power tends to confuse itself with virtue, and a great nation is peculiarly susceptible to the idea that its power is a sign of God's favor" (Senator William Fulbright).

initial distinctions.⁵⁰⁹

But for Foucault, Bourdieu and others, beyond striving to identify clandestine structures operating socially, it was also a matter of protesting the repressive and ossifying perseverance of such patterns and exploring the possibilities for pattern breaks or other discontinuities. Thus, one finds threading through much of Foucault's work an emphasis also on *resistances* (for which he became widely quoted in much of the interest group literature discussed in Section 6, *supra*).⁵¹⁰ Wherever a form of power is exerted, one finds resistance, and this dynamic might play out locally, in some sub-slice of society, instead of (or simultaneous with) in the society at large, another discontinuity.⁵¹¹ And struggles involve *strategy* on the part of any and all participants in a power situation. For ultimately power exists only in the nominal sense: "Power in the substantive sense, 'le' *pouvoir*, doesn't exist . . . power is not an institution, a structure, or a certain force with which certain people are endowed; it is the name given to a complex strategic relation in a given society."⁵¹²

⁵⁰⁹ See Pierre Bourdieu, *Reproduction in Education, Society and Culture* (London, 1977) and Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (Cambridge, MA, 1984).

⁵¹⁰ Although Foucault rejected the role of spokesperson for the oppressed: the "intellectual's role is no longer to place himself 'somewhat ahead and to the side' in order to express the stifled truth of the collectivity; rather, it is to struggle against the forms of power that transform him into its object and instrument in the sphere of 'knowledge,' 'truth,' 'consciousness,' and 'discourse.'" Michel Foucault and Gilles Deleuze, "Intellectuals and Power: A Conversation" in *Language, Counter-Memory, Practice: Selected Interviews and Essays by Michel Foucault*, ed. Donald F. Bouchard (Ithaca, 1980), pp. 207-208. As to how far Bourdieu went beyond analysis of social reproduction to theories of transformation (through active engagement) see Phillip S. Gorski, ed., *Bourdieu and Historical Analysis* (Durham, NC, 2013).

⁵¹¹ Once again, Foucault seemed to align with Kuhn, who had stated: "There are, I think, only two alternatives: either no scientific theory ever confronts a counterinstance, or all such theories confront counterinstances at all times." Kuhn, *Structure*, p. 80. Foucault in turn opined that "there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised." Interview from 1977, "Powers and Strategies," as recorded in Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings, 1972-1977*, p. 142.

⁵¹² Foucault, *Power/Knowledge*, p. 236.

What did all this esoterica mean for historiography? First, because what counts as knowledge is more a function of power and suppression than of some objectively measurable “improvement,” it was necessary to banish the vestiges of positivism in history, to adopt instead “the radical but unaggressive skepticism which makes it a principle not to regard the point in time where we are now standing as the outcome of a teleological progression.”⁵¹³ Here Foucault was in line with his compatriot Jean-François Lyotard in recognizing the demise of “grand narratives.” Lyotard argued the emergence of a “postmodern condition” in which generally shared perspectives on what constituted reality, much less how to recount it, had mostly evaporated. In that sense, postmodern interpretations tend(ed) to emphasize the incompatibility of beliefs, preferences and aspirations flowing from diverse situated-ness. Overlapping and at times inconsistent or even contradictory “micronarratives” are characteristic here; in history writing they include the approach described hereinabove (and further discussed in Section 8, *infra*) as “micro-history.”⁵¹⁴ Foucault in fact expressly distanced himself from the totalizing and deterministic⁵¹⁵ aspects of such global theories, Marxism among them, including the tendency of their practitioners to indoctrinate knowledge hierarchies.⁵¹⁶

⁵¹³ Ibid., p. 49. Of course, thinkers from Butterfield to Kuhn had already partially explored this ground.

⁵¹⁴ The rejection of “meta-narratives” – the progress of history prominent among them – was (and is) one of the hallmarks of the over-and-under-defined state of postmodernism. Among the major works here is Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans. Geoffrey Bennington and Brian Massumi (Minneapolis, 1984) [*La Condition postmoderne: Rapport sur le savoir* (Paris, 1979)].

⁵¹⁵ Some Marxist scholars, sensitive to vulnerabilities here, have read into the foundational writings a central role for human agency: “The Manifesto has been read primarily as a document of historical inevitability, and indeed its force derived largely from the confidence it gave its readers that capitalism was inevitably destined to be buried by its gravediggers Yet – contrary to wide assumptions – inasmuch as it believes that historical change proceeds through men making their own history, it is not a deterministic document. The graves have to be dug by or through human action.” Introduction by Eric Hobsbawm to Karl Marx and Frederick Engels, *The Communist Manifesto: A Modern Edition* (London, 1998), p. 27.

Second, despite the death of teleology, history writing has continued analytic vitality, should historians understand the greater social-intellectual-political context:

History has no “meaning,” though this is not to say that it is absurd or incoherent. On the contrary, it is intelligible and should be susceptible of [sic] analysis down to the smallest detail – but this is in accordance with the intelligibility of struggles, of strategies and tactics.⁵¹⁷

In this sense, history writing can be seen as strategic (however unwittingly⁵¹⁸) to a struggle (however local). Foucault came to employ baldly militaristic imagery in describing the historical and present workings of power (again, with power defined as “the name given to a complex strategic relation in a given society”). As for such relation, and with a nod to Clausewitz, “should we not analyse it primarily in terms of *struggle*, *conflict* and *war*?”⁵¹⁹ As for the historical recounting of such power relations, “[t]he history that bears and determines us has the form of a war”⁵²⁰ A major task there is to reveal how combatants in such struggles have used language tactically.⁵²¹ Indeed, to

⁵¹⁶ “Rediscovery” of hidden knowledges and their histories was possible only now that “the tyranny of globalising discourse with their hierarchy and all their privileges of a theoretical *avant-garde* was eliminated.” “Which theoretical-political *avant-garde* do you want to enthrone in order to isolate it from all the discontinuous forms of knowledge that circulate about it?” Foucault, *Power/Knowledge*, pp. 83, 85.

⁵¹⁷ Interview from 1977, “Truth and Power,” as recorded in Foucault, *Power/Knowledge*, p. 114.

⁵¹⁸ “It seems to me that power *is* ‘always already there,’ that one is never ‘outside’ it, that there are no ‘margins’ for those who break with the system to gambol in. But this does not entail the necessity of accepting an inescapable form of domination or an absolute privilege” *Ibid.*, p. 141.

⁵¹⁹ Lecture from 7 January 1976, as recorded in Foucault, *Power/Knowledge*, p. 90 (emphasis original).

⁵²⁰ Interview from 1977, “Truth and Power,” as recorded in Foucault, *Power/Knowledge*, p. 114.

⁵²¹ Throughout this discussion I have omitted an aspect of lingualism that might require, if more centrally raised, a treatise of its own – that of historically hegemonic languages. In the West, Latin, French and English immediately spring to mind as examples of how *lingua franca* intersects with military, economic and cultural might (Portuguese, Spanish and to some extent German, Russian and others have also supported spheres of dominance, echoing even in recent events such as Ukraine/Crimea matter). As for strategies thereunder, it is difficult to discern whether the adoption or refusal of such a tongue is in either a coping or resistance mode, or both. For example, despite the strong anti-colonialism of his landmark *Things Fall Apart* (1958), author Chinua Achebe elected to write that book (and other works) in the

“consider discourse as the object of a struggle for power and one of the decisive stakes of power” suggests, as Sol Cohen elaborated, a robust mode of historical research – content analysis of discourses over time reveal and confirm key discontinuities of language which in turn trace power shifts, i.e., the results of the given set of struggles.⁵²²

Third, accordingly, in analyzing the history of struggles, although unified agency is largely illusory, it would be both factually incorrect and counter-strategic to negate or otherwise omit individual agency. Here Foucault’s arcane phraseology risks internal contradiction, for as we saw just above, in speaking of struggle and strategy, he also emphasized “the history that bears us and *determines* us.” The bulk of his writings, however, shows a decided break with hyper-structuralist approaches that privilege great cycles over individual strategic agency. In stressing the need for not one but both of those dimensions, Foucault remained consistent with Fernand Braudel, a seminal historian in the great multi-disciplinary French *Annales* school, which overall did emphasize structuralist effects, though not exclusively. Braudel’s grandest work, for example, *The Mediterranean and the Mediterranean World in the Age of Philip II*, was a

colonizers’ language, a choice variously supported and pilloried. “For an African, writing in English is not without its serious setbacks,” he acknowledged, discussing his reasoning more fully in his essay “The African Writer and the English,” in *Morning Yet on Creation Day* (New York, 1975), pp. 91-103. One could interpret (however accurately) such approach in Foucauldian strategic terms: “the binary division between resistance and non-resistance is an unreal one” (so averred editor Colin Gordon in his Afterword to Foucault, *Power/Knowledge*, p. 257). Some of these themes arise in contemporary debates in Education about “Ebonics,” English immersion approaches, grammar and the like.

⁵²² See Sol Cohen, “Language and History: A Perspective on School Reform Movements and Change in Education” in *Challenging Orthodoxies: Toward a New Cultural History of Education* (New York, 1999), pp. 91-101 (quote excerpt at p. 92), in which he traces the triumph of “progressive education” nomenclature in literature on American schools and schooling. Content analysis is consistent with Kuhn’s observation (Preface, at p. xi) that a historian might trace a paradigm shift – rarely accomplished by a sole person and never overnight, but rather by dozens over some years or even decades – by examining how footnotes and other citations employ the replacement phraseology and literature, an approach very much in line with the “linguistic-literary” turn in historiography I cover in Section 8 below. Of course by 1970 Kuhn’s vantage point no doubt had shifted with the seismic pronouncements of Derrida, Barthes and Foucault, *inter alia*.

multi-dimensional tapestry, its threads stretching both laterally (in claiming one could not comprehend the Mediterranean in isolation from surrounding regions) and diachronically, employing three time cycles – the *longue durée* of the first two (geographical-environmental and social-economic-cultural-civilizational) lending deep explanatory power to the *courte durée* of the third (*histoire événementielle* or “events”), all of which Braudel deemed would emerge more satisfactorily from descriptions of the lives of common people than from sources attaching to traditional elites.⁵²³

For his part, Foucault remained uneasy with the structuralist label, at times openly disavowing any affiliation with the movement, which he found too static and rigid in definition.⁵²⁴ It was also insistent and mechanical in derogating the historical “event” – that which stands outside of laws of behavior and expectation. As for the seeming directive in structuralism to dichotomize the realms of “the thinkable” (structure) and “the irrational” (event), Foucault took exception to treatment of the latter as “an inferior order of history dealing with trivial facts, chance occurrences and so on”⁵²⁵:

One can agree that structuralism formed the most systematic effort to evacuate the concept of the event, not only from ethnology but from a whole series of other sciences and in the extreme case from history. In that sense I don't see who could be more of an anti-structuralist than myself.⁵²⁶

⁵²³ Thus, a much different focus than in Carlyle's reductionist formula (“Universal history, the history of what man has accomplished in this world, is at bottom the History of the Great Men who have worked here.”). Fernand Braudel, *La Méditerranée et le Monde Méditerranéen à l'époque de Philippe II* (*The Mediterranean and the Mediterranean World in the Age of Philip II*, [Berkeley, 1995]). One might suggest some interesting parallels between Braudel and linguist/philosopher Noam Chomsky, in that each emphasized certain universalities in the existence of deep and surface structures.

⁵²⁴ Particularly objectionable for some post-structuralists was Lévi-Strauss's insistence on anthropological binaries: hot-cold, male-female, culture-nature, cooked-raw, marriageable-taboo.

⁵²⁵ This phrase was actually that of an interviewer who posed it as part of a question, which Foucault answered in affirmative and elaborated further thereupon. Interview from 1977, “Truth and Power,” as recorded in *Power/Knowledge*, pp. 113-114.

⁵²⁶ Ibid.

Finally, an appropriate pursuit for the post-structuralist historian is the study of knowledges and knowledge discourses, even (or especially) those oft considered trivial, for there one discovers – or rediscovers – worlds rich with potentialities but either suppressed or characterized as banal, or both (the latter a means for the former). Foucault regularly employed the terms “genealogy” and “archeology” – the stripping away of layers of detritus, having built up and calcified over centuries to mask, entrap and smother “unseen” knowledges. His own research on the unorthodox topic of treatment of the insane, showing how treatment methods historically reflected shifting notions of Reason, illustrates the point: “[T]o make visible the unseen can also mean a change of level, addressing oneself to a layer of material which hitherto had no pertinence for history and which had not been recognized as having any moral, aesthetic, political or historical value.”⁵²⁷

In speaking to the archeology of subjugated mentalities, and especially in the guise of genealogy in history, Foucault joined several thinkers in collectively granting a resurrection of sorts to (some might claim appropriating from) the brooding figure of Friedrich Nietzsche,⁵²⁸ whose writings from a much earlier period meshed with and nourished certain themes in postmodernism. One was Nietzsche’s pioneering of the

⁵²⁷ Interview from 1975, “Prison Talk,” *ibid.*, pp. 50-51. To some extent, Foucault’s discussion of “a change of level” is reminiscent of the “levels of analysis” approach to studying the decision-making process during the Cuban Missile Crisis. See Graham Allison, *Essence of Decision* (Boston, 1971).

⁵²⁸ Foucault drew extensively from Nietzsche’s *The Genealogy of Morals* in constructing his own understanding, i.e., that “genealogy . . . must record the singularity of events outside of any monotonous finality; it must seek them in the most uncompromising places, in what we tend to feel is without history – in sentiments, love, conscious, instincts; it must be sensitive to their recurrence, not in order to trace the gradual curve of their evolution, but to isolate the different scenes where they engaged in different roles.” Michel Foucault, “Nietzsche, Genealogy, History,” trans. Donald F. Bouchard and Sherry Simon, in *Language, Counter-Memory, Practise: Selected Essays and Interviews*, ed. Donald F. Bouchard (Ithaca, 1977), reprinted in Lawrence Cahoone, ed., *From Modernism to Postmodernism: An Anthology* (Oxford, 2003), quote from pp. 241-242.

philosophy of power, his analysis more tied to the philosophic discourse than to production relations as in Marxism. Another was his exhortation to rediscover in ancient mentalities the Dionysian impulses vital to humanity and once existing in fusion with Apollonian rationality and to contest the deprivileging of the former by the ultimately stultifying effects of the latter, with postmodernists extending that model to interrogate contemporary knowledge hierarchies of all stripes. And then there was the challenge to Truth itself, partly mounted in commenting on the *history of truth*:

[T]he very question of truth, the right it appropriates to refute error and oppose itself to appearance, the manner in which it developed (initially made available to the wise, then withdrawn by men of piety to an unattainable world where it was given the double role of consolation and imperative, finally rejected as a useless notion, superfluous, and contradicted on all sides) – does this not form a history, the history of the error we call truth? Truth, and its original reign, has had a history within history from which we are barely emerging⁵²⁹

Put another way, the truth of history is inextricably intertwined with the history of truth.

Hence, later interpreters could see Nietzsche's work as a pre-endorsement of the narrowly situated knowledge analyses discussed at length in Section 6, *supra*.

Conversely, post-foundationalists could read in Nietzsche an emphatic rejection of both the non-perspectival pretensions of prior eras and the mono-perspectival approaches of standpoint history: "There is *only* a perspective 'seeing,' *only* a perspective 'knowing'; and the *more* affects we allow to speak about one thing, the more complete will our 'concept' of this thing, our 'objectivity,' be."⁵³⁰ In this interpretation, the optimal way of assessing the relationship between the truth and history and the history of truth is "to

⁵²⁹ Foucault, *ibid.*, p. 243, acknowledging a passage from Nietzsche's *Twilight of the Idols*: "How the world of truth becomes a fable."

⁵³⁰ Friedrich Nietzsche, *On the Genealogy of Morals*, trans. Walter Kaufmann and R.J. Hollingdale (New York, 1967), p. 119 (emphasis original).

employ a *variety* of perspectives in the service of knowledge.”⁵³¹

One application of such multiperspectivalism (and perhaps thinkers had long employed it, just not so overtly and consciously) was its methodological pluralism, including the cross-disciplinary⁵³² consideration and adaptation of form and expression. A prominent common denominator became the recognition of *narrativity* in analytical expressions – the word “narrative” has grown ubiquitous, and highly plastic, in the last decades. By the early 1960s, as have seen, Daniel Bell had hinted at its role in the lure of ideology as a religion substitute. Looking back from the vantage point of 2001, cultural media specialist Douglas Kellner remarked on its weight even where something closer to pure theory had been the starting point: “There is a narrative component to theory as in Adam Smiths’ or Karl Marx’s theories of capitalism which tell of the origin and genesis of the market economy, as well as describing how it works and in Marx’s case offering a critique and proposals of revolutionary transformation.”⁵³³

Others underscored how even in some of the most doctrinaire studies one can recognize the artistic, i.e., the *literary* dimensions of narrative. As Eric Hobsbawm, a leading historian of Marxism, observes about the striking interplay of content and form in *The Communist Manifesto*:

The new reader can hardly fail to be swept away by the passionate conviction, the concentrated brevity, the intellectual and stylistic force . . . written, as though in a single creative burst, in lapidary sentences almost naturally transforming themselves into the memorable aphorisms which have become known far beyond the world of political debate: from the opening “A spectre is haunting Europe –

⁵³¹ Ibid. (emphasis original).

⁵³² This same era has seen a marked expansion of multidisciplinary studies and centers in the academy.

⁵³³ Douglas M. Kellner and Meenakshi Gigi Durham, “Adventures in Media and Cultural Studies: Introducing the KeyWorks” in Meenakshi Gigi Durham and Douglas M. Kellner, eds., *Media and Cultural Studies: KeyWorks* (Oxford, 2001), p. 3.

the spectre of Communism” to the final “The proletarians have nothing to lose but their chains. They have a world to win.” . . . *The Communist Manifesto* as political rhetoric has almost biblical force. In short, it is impossible to deny its compelling power as literature.⁵³⁴

Thus was revived a focus on the enduring tension in history between the factual and the poetic stretching all the way back to Homer. For the purposes of the historian’s everyday practice, the literary turn includes a reemphasis on the use of literature as important historical research material (similar to Burckhardt, see Section 1, *supra*); in historiography, it concerns the textual analysis of such material, but also the central consideration of literary theory,⁵³⁵ particularly as to the given historian’s rhetorical mode and narrative style and technique.

Operating in, and with, and helping to define a weave of the linguistic and literary turns in historiography was Hayden White, who issued during the 1960s-1980s a widely remarked string of publications about the enduring presence and power of certain rhetorical tropes in history writing. For White, first trained as a medievalist, eventually shifting to historiography through a literary studies lens, the narrative aspects of history practice were much more akin to literature than most historians would like to believe.⁵³⁶ From the nexus of those two fields, then, White proposed a historiography that privileged certain literary conventions as both explanatory and determinative. To his several critics,

⁵³⁴ Introduction by Eric Hobsbawm to Karl Marx and Frederick Engels, *The Communist Manifesto: A Modern Edition* (London, 1998), p. 15.

⁵³⁵ One could reasonably state that a “literary turn” overflowed the field boundaries of history (nebulous already) to cut across a number of other social science disciplines. Anthropologists and ethnographers are among those having explored this terrain. See, e.g., James Boon, *From Symbolism to Structuralism; Lévi-Strauss in a Literary Tradition* (New York, 1972); Dell Hymes, “An Ethnographic Perspective” in Special Issue: What is Literature? *New Literary History* 5:1, pp. 431-457 Clifford Geertz, *Works and Lives: The Anthropologist as Author* ((Cambridge, UK, 1988).

⁵³⁶ White, although long a professor in Comparative Literature, completed his doctoral training and early professional work in History.

White's focus on modes of *emplotment* and *tropes*, while not inherently hostile to the understood need for factual narrative in history, nonetheless overly de-centered data discovery and validation in the historian's traditional effort to convey past facts reliably and meaningfully to the reader. As reviewed at length in preceding sections *supra*, historiographers have long explored the tension in history writing between the antiquarian and Hegelian impulses, i.e., on the one hand the need to uncover, understand, organize and report data, on the other the instinct to connect the past with the present and future with a rich and meaningful chain of explanatory, causal or at least cautionary links.

White questioned whether historians in fact occupy an epistemological middle ground between science and art. If not, historians are incorrect in speaking to some synthesis of science and art in mediating between the past and present. White concluded the latter, employing a tone that a generation of historians (a good portion still writing in 2014) found intolerably irksome. By 1973 he had already tweaked sensibilities, arguing in his landmark *Metahistory: The Historical Imagination in Nineteenth-Century Europe*, that historiographic "poetics" more accurately than "realism" captured the nature of the historian's work. Put in other literary terms, one must assess history writing for "what it most manifestly is: a verbal structure in the form of a narrative prose discourse."⁵³⁷ In either case, scholars should analyze the mode of delivery as much as, if not more than, the fact claims therein.

White opened his follow-up 1978 collection of essays, *Tropics of Discourse*, with a reprint of his 1966 article "The Burden of History," widely taken as gauntlet

⁵³⁷ Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Baltimore, 1973), p. ix.

throwing.⁵³⁸ The studied absence of footnotes in that piece underscores (in my view) the dismissive air of the text, bordering on disdainful, an exposé of sorts of what White deemed the careerist tunnel vision and slumbering intransigence of historians in the face of new perspectives on knowledge:

History is perhaps the conservative profession par excellence . . . most historians have affected a kind of willful methodological naiveté . . . the ordinary historian, wrapped up in the search for the elusive document that will establish him as an authority in a narrowly defined field, has had little time to inform himself of the latest developments in the more remote fields of art and science.⁵³⁹

In speaking of “latest developments,” White may have been channeling Kuhn’s then-recent ideas – “The Burden of History” originally issued just four years after *Structure* – about anachronism in knowledge fields. Although here he did not cite that work, White’s comments about history as a knowledge field were strikingly Kuhnian: “That supposedly neutral middle ground between art and science which many nineteenth-century historians occupied with such self-confidence and pride of possession has dissolved in *the discovery of the common constructivist character of both artistic and scientific statements.*”⁵⁴⁰

Kuhn had expressed that no essential rift between scientists and artists existed while representation had still been the chief aim (Leonardo da Vinci and others, for example, passed easily between the two worlds): “Only when the latter [artists] unequivocally renounced representation as their goal and began to learn again from primitive models did the cleavage we now take for granted assume anything like its present depth.”⁵⁴¹

⁵³⁸ Hayden White, *Tropics of Discourse* (Baltimore, 1978). Chapter 1 earlier appeared as Hayden White, “The Burden of History,” *History and Theory* 5, No. 2 (1966).

⁵³⁹ White, *Tropics of Discourse*, p. 28.

⁵⁴⁰ Ibid. (emphasis added).

⁵⁴¹ Kuhn, *The Structure of Scientific Revolutions*, p. 161.

White thus contested historians' self-view as the ideal "mediators"⁵⁴² between art and science, accusing them of operating instead "in bad faith"⁵⁴³ with an archaic nineteenth century understanding of either pursuit, their work

a combination of *romantic* art on the one hand and *positivistic* science on the other . . . artists and scientists alike are justified in criticizing historians, *not because they study the past*, but because they are studying it with *bad* science and *bad* art.⁵⁴⁴

He openly favored what were (then) contemporary art forms ("action painters, kinetic sculptors, existentialist novelists, imagist poets, . . . *nouvelle vague* cinematographers" – "modern nonobjective artists").⁵⁴⁵ He likewise embraced contemporary science, within which realm he argued history might no longer belong: ". . . the historian can claim a voice in the contemporary cultural dialogue only insofar as he takes seriously the kind of questions that the art and science of *his own time* demand that he ask of the material he has chosen to study."⁵⁴⁶

What would the tools of that dialogue look like in practice? The answer might come, speculatively of course, in deconstructing White's aspirations. Is it possible his observations were only partly accusation, with the remainder a mix of lament and no little

⁵⁴² Another judicialist term, once again suggesting objectivity, or at least neutrality.

⁵⁴³ "In short, everywhere there is resentment over what appears to be the historian's *bad faith* in claiming the privileges of both the artist and scientist while refusing to submit to critical standards currently obtaining in either art or science." White, *Tropics of Discourse*, p. 28 (emphasis added).

⁵⁴⁴ *Ibid.*, pp. 42-43 (italics original).

⁵⁴⁵ *Ibid.*, p. 42.

⁵⁴⁶ *Ibid.*, p. 41, italics original. Indeed, White spoke to the "expulsion of history from the first rank of sciences": "A significant number of philosophers . . . seem to have concluded that, if there is any such thing as a hierarchy of the sciences, history falls somewhere between Aristotelian physics and Linnaean biology – which is to say it may have a certain interest for collectors of exotic world-views and debased mythologies, but not very much to contribute to the establishment of the 'common world' spoken of by Cassirer as finding its daily confirmation in science." *Ibid.*, p. 30-31.

ambition? A clue lies in his remarks about the two distinct vocabularies attaching to the human sciences (including history) and the natural sciences, respectively:

Unlike physics after Newton or chemistry after Lavoisier, history remains a field of study without generally recognized images of the *form* that analyses must take, of the *language* in which findings are to be communicated . . . the mark of a genuine scientization of a given field of study is the establishment in it of a technical *terminology*, its liberation from the vagaries of ordinary educated speech.⁵⁴⁷

Here White did acknowledge Kuhn's observations about the importance of field-specific technical nomenclature. One thus wonders whether White hoped, by forging a new vocabulary for historiography, he would gain renown in the human sciences similar to that accorded Newton and Lavoisier (and, to some extent, fellow post-positivist Kuhn) in the natural sciences. Whatever his mix of incentives, White devoted several years to what seemed an attempt to craft a definitive set of terminology for use in history.

What resulted was a typology of narrative modes and tropes. In *Metahistory* White explored how the work of prominent nineteenth century continental historians⁵⁴⁸ was amenable to a quaternary classification consistent with Classical literary modes of emplotment – Romance, Comedy, Tragedy and Satire. In the series of essays comprising *Tropics of Discourse* he examined how each of those modes typically called for a mode of explanation, one that also reflected the historian's ideological orientation:

We may say, then, that in history – as in the human sciences in general – every representation of the past has specific ideological implications and that, therefore, we can discern at least four types of historical interpretation having their origins in different kinds of ideological commitment.⁵⁴⁹

⁵⁴⁷ Ibid., p. 71 (italics added for emphasis).

⁵⁴⁸ Between *Metahistory* and *Tropics of Discourse*, White commented on Michelet, Ranke, de Tocqueville, Burckhardt, Engels, Buckle, Taine, Croce, Marx and others.

⁵⁴⁹ White, *Tropics of Discourse*, p. 69.

Finally, each such “mode of ideological implication” lends most naturally to one of four “master tropes” of expression. What emerged was a startlingly symmetrical (4 x 4) grid:

<i>Emplotment</i>	<i>Explanation</i>	<i>Ideology</i>	<i>Trope</i>
Romance	Idiographic	Anarchist	Metaphor
Comedy	Organicist	Conservative	Synecdoche
Tragedy	Mechanistic	Radical	Metonymy
Satire	Contextualist	Liberal	Irony

Perhaps sensing how post-structuralists of all stripes (and “pre-structuralist” historians⁵⁵⁰) would protest the seeming rigidity of this taxonomic box, White characterized his new historical nomenclature as qualitatively distinct from the technical terminology that natural scientists employed – his classification of trope emplotment was not a genuine “law of discourse,” but rather had only “the status of a model which recurs persistently in modern discourses about human consciousness.”⁵⁵¹ And further softening words:

I have never denied that knowledge of history, culture, and society was possible; I have only denied that a scientific knowledge, of the sort actually attained in the study of physical nature, was possible. But I have tried to show that, even if we cannot achieve a properly scientific knowledge of human nature, we can achieve another kind of knowledge about it, the kind of knowledge which literature and art in general give us in easily recognizable examples.⁵⁵²

Benign enough so far, and not far afield from some of his intellectual contemporaries.

From the sort of non-Romantic novelists White claimed to prefer (“art . . . *of his own time*”): “I got this idea of doing a really serious big work – it would be precisely like a novel, with a single difference: every word of it would be true from beginning to end”

⁵⁵⁰ My term.

⁵⁵¹ White, *Tropics of Discourse*, p. 13.

⁵⁵² *Ibid.*, p. 23.

(Truman Capote, referring to his *In Cold Blood* as “a nonfiction novel”); “Good fiction is made of that which is real” (Ralph Ellison).⁵⁵³ And from Alain Besançon, French

intellectual and cultural historian, who compared history to the dramatic arts:

If it is true that men use history as a frame within which to enact again and again their monotonous conflicts, this means that it is also theatre and representation. For one generation after another it must arrange the production of the same dramas, just as literature has produced more than one *Don Juan* and *Iphigenia*.⁵⁵⁴

But White’s version of how literature and art “knowledge” intersected history writing was something more upsetting. One of the essays in *Tropics of Discourse* he entitled “The Fictions of Factual Representation,” offering in it words rankling those traditionalist historians who elected to infer something more than White actually stated:

Although historians and writers of fiction may be interested in different kinds of events,⁵⁵⁵ both the forms of their respective discourses and their aims in writing are often the same Readers of histories and novels can hardly fail to be struck by the similarities. There are many histories that could pass for novels, and many novels that could pass for histories, considered in purely formal (or I should say formalist) terms. Viewed simply as verbal artefacts, histories and novels are indistinguishable from one another.⁵⁵⁶

As elsewhere, here White carefully danced around the question of factuality, never quite denying it (indeed – “I wish to grant at the outset that historical events differ from

⁵⁵³ Capote and Ellison quotations from Mardy Grothe, *Oxymoronica* (New York, 2004), pp. 190 and 188, respectively. Capote’s *In Cold Blood* appeared the same year (1966) as White’s *The Burden of History*.

⁵⁵⁴ Alain Besançon, “Psychoanalysis: Auxiliary Science or Historical Method?” *Journal of Contemporary History* (April 1968), p. 160.

⁵⁵⁵ “Historians are concerned with events which can be assigned to specific time-space locations, events which are (or were) in principle observable or perceivable, whereas imaginative writers – poets, novelists, playwrights – are concerned with both these kinds of events and imagined, hypothetical, or invented ones.” White, *Tropics of Discourse*, p. 121.

⁵⁵⁶ *Ibid.*, pp. 121-122. White was aware he might have also alienated some in the literary world: “This characterization of historiography as a form of fiction-making is not likely to be received sympathetically by either historians or literary critics, who, if they agree on little else, conventionally that history and fiction deal with distinct order of experience and therefore represent distinct, if not opposed, forms of discourse.” *Ibid.*, p. 122.

fictional events in the ways that is has been conventional to characterize their differences since Aristotle⁵⁵⁷) but rather shifting the chief focus to the techniques of conveyance (“What is at issue here is not, What are the facts? But rather, How are the facts to be described in order to sanction one mode of explaining them rather than another?”⁵⁵⁸).

In his later essay collection *The Content of the Form: Narrative Discourse and Historical Representation*, White raised the stakes a bit more by implying that historians do not just discover narratives – they essentially invent them, shoehorning them into the aforementioned modes: instead of “revealing the true essence of past reality, historical narrative imposes a mythic structure on the events it purports to describe.”⁵⁵⁹ Altogether, as Sol Cohen succinctly presented the essence, “White argued that *literary form* is the *primary carrier of content in historical writing*, and that historical narratives are essentially ‘constructions’ rather than ‘discoveries’ or ‘findings,’ which contain irreducible fictionalizing or invented elements.”⁵⁶⁰

It has been oft stated that the postmodern condition is one where satire reigns supreme, with *irony* its master trope. In White’s tropic formulation, “irony is the

⁵⁵⁷ Ibid., p. 121.

⁵⁵⁸ Ibid., p. 134 (majuscules in original).

⁵⁵⁹ Adam Timmis, “Hayden White: The Historical Imagination,” *Reviews in History*, URL=<http://www.history.ac.uk/reviews/review/1149>, citing and quoting Herman Paul, *Hayden White: The Historiographical Imagination* (Cambridge, 2011), p. 113, in turn referring to Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore, 1987). At least nine years earlier, i.e., in *Tropics of Discourse*, White had already referred to the historian’s “mythic consciousness,” surly vexing to some: “[T]here are at least two levels of interpretation in every historical work: one in which the historian constitutes a story out of the chronicle of events and another in which, by a more fundamental narrative technique, he progressively identifies the *kind of story* he is telling – comedy, tragedy, romance, epic, or satire, as the case might be. It would be on the second level of interpretation that the mythic consciousness would operate most clearly.” White, *Tropics*, p. 59 (italics original).

⁵⁶⁰ Sol Cohen, “An Essay in the Aid of Writing Histories: Fictions of Historiography,” *Studies in Philosophy and Education* 23 (2004), p. 318 (italics added for emphasis).

linguistic strategy underlying and sanctioning skepticism as an explanatory tactic, satire as a mode of emplotment, and either agnosticism or cynicism as a moral posture.”⁵⁶¹

White’s own writing ultimately revealed an ironic ambiguity as to the full bounds of structure and typology. In *The Content of the Form*, for example, White identified with both structuralist and a post-structuralist approaches.⁵⁶² Indeed, on the one hand, historians could protest how White’s modal-tropal construct was as artificial and deterministic as anything he attacked (to use two of his own terms within the grid, for such an “organicist” sense of analysis, it is strikingly “mechanistic”). But cutting the other way, White’s strongly implied denial of any hierarchical arrangement of one mode over the other further dismayed those already shaken by the waves of relativistic thought then reverberating throughout the academy. The notion that historians’ fact claims (content) and their mode of exposition (form) were not only inseparable, but to large extent also interchangeable, quite naturally grated traditionalist sensibilities.

White’s work thus elicited considerable and heated protest,⁵⁶³ some of which I briefly revisit in Section 8 to follow, *infra*. To the extent the backlash disappointed White, it is hard to characterize as surprising. Noted one commentator: “In a sense he had no one to blame but himself – statements such as ‘*I am a relativist*’ and ‘*there can be no such thing as a non-relativistic representation of historical reality*,’ although uttered for provocative effect, tended to overshadow the nuance and depth of his arguments.”⁵⁶⁴

⁵⁶¹ White, *Tropics of Discourse*, pp. 73-74.

⁵⁶² See Hayden White, “The Content of the Text: Method and Ideology in Intellectual History,” Chapter 8 in *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore, 1987).

⁵⁶³ See, e.g., Roger Chartier, “Four Questions for Hayden White” *On the Edge of the Cliff: History, Language, and Practices* (Baltimore, 1997).

But despite such impressive nuance and depth of historo-literary analysis (which included a consideration of how historians' very language "implies or entails a specific posture before the world which is ethical, ideological or more generally political"⁵⁶⁵), White somehow elided the question of what might be the historian's ultimate situatedness, i.e., the *autobiographical* element. That element in literature "proper" has long prompted discussion, as in the case of nineteenth century essayist Charles Lamb and what some scholars see as his thinly veiled alter ego, Elia.⁵⁶⁶ Writers themselves have reflected on the fusion, from novelists (William Makepeace Thackeray: "The world is a looking glass and gives back to every man the reflection of his own face") to columnists (Franklin P. Adams: "The best part of the fiction in many novels is the notice that the characters are purely imaginary") to literary theorists (Roland Barthes: "it [his 'autobiography'] must all be considered as if spoken by a character in a novel").⁵⁶⁷

Three greats in modernist literature well illustrate the crossover and hint at some of the historiographical implications.⁵⁶⁸ James Joyce's *A Portrait of the Artist as a Young Man*, ostensibly covers the education of a certain Stephan Dedalus, a young Irishman whose path strongly resembles that of the budding Joyce, but allotted just enough

⁵⁶⁴ Adam Timmis, "Hayden White: The Historical Imagination," *Reviews in History* (emphasis added).

⁵⁶⁵ White, *Tropics of Discourse*, p. 129.

⁵⁶⁶ See, e.g., Gerald Monsmon, "Charles Lamb's Art of the Autobiography" in *ELH*, vol. 50, No. 3 (Autumn 1983), pp. 541-557. The first novel as largely autobiographical, if not fully axiomatic, has at least adage status. Such traces are also recognizable in doctoral dissertations, like this one.

⁵⁶⁷ William Makepeace Thackeray, *Vanity Fair* (London, 1848); Franklin P. Adams, columnist and writer of light verse, quoted in Grothe, *Oxymoronica*, p. 187; Roland Barthes, *Roland Barthes by Roland Barthes* [title redundancy intended], Richard Howard, trans. (London, 1995), p. 1.

⁵⁶⁸ And considerably before the modernists, capturing something of this sense was the transcendentalist Ralph Waldo Emerson, who mused in his *Essays: History* (1841): "We are always coming up with the emphatic facts of history in our private experience and verifying them here. All history becomes subjective; in other words there is properly no history, only biography."

distance for critical reflection. In the wisdom of Dedalus/Joyce, the developed artist must “try slowly and humbly and constantly to express, to press out again, from the gross earth or what it brings forth, from sound and shape and colour . . . an image of the beauty we have come to understand.”⁵⁶⁹ But as Joyce contemporary Marcel Proust in his most famous work cautioned: “Remembrance of things past is not necessarily the remembrance of things as they were.”⁵⁷⁰ What we have personally “come to understand” is not at all a perfect account, but rather a blurred and nostalgic perspective further distorted through the prism of what we in the interim learned of what once was the “future.” What follows is an interpretive aesthetic that shifts according to intervening experiences. Thus Virginia Woolf noted: “To write down one’s impression of Hamlet as one reads it year after year, would be virtually to record one’s own autobiography”⁵⁷¹

All leading to this quasi-syllogism: if, as White argued, history writing is essentially like (other) literature, and if literature frequently involves autobiography, one might wonder about an autobiographical element in history writing. Some traces are probably inescapable, in that historians likely select their topics partly as a function of personal interests, which in turn often have some tie to one’s life path to date. But is it possible that historians sometimes cross over into the realm of the personalized arts?

Historian Simon Schama explored that question in his arresting 1991 work, *Dead Certainties (Unwarranted Speculations)*, unveiling at least one case answering in a

⁵⁶⁹ James Joyce, *A Portrait of the Artist as a Young Man* (New York, 1964 [1916]), p. 242.

⁵⁷⁰ *Se souvenir des choses passées n’est pas nécessairement se souvenir des choses telles qu’elles étaient.* Marcel Proust, *À la recherche du temps perdu* (Paris, 1954 [1913-1927]).

⁵⁷¹ See Theodore Leinwald, “Virginia Woolf Reads the Great William,” *The Yale Review*, Vol. 93, Issue 2 (April, 2005), p. 114. An autobiography typically focuses on the chronology of the writer’s entire life while a memoir ordinarily covers one specific aspect of the writer’s life.

convincing positive.⁵⁷² Schama examined the personal correspondence and documents associated with Francis Parkman, an eminent nineteenth century American historian. Held up against these papers, the imaginative descriptions and almost odic phraseology of Parkman's *France and England in North America*, a laboriously wrought (1865-1892) seven-volume history of the great struggle between Continental powers for New World dominance, suggested for Schama the identification of the author with a key subject to a degree that surely exceeded mere coincidence. Parkman seems to have projected onto a historical figure from over a century prior, British general James Wolfe, his own social habits and (class inflected) viewpoints, but especially his own almost maniacal drive to complete the laborious task at hand despite daunting physical and psychological health struggles, i.e., despite his myopic, arthritic, rheumatic, wearied, ailing and dwindling personal forces. The heroic Wolfe, consumptive and dysenteric, in an ongoing struggle with doubt, pain, extreme fatigue and the serious erosion of his military forces, had nonetheless, in Parkman's romantic account, tenaciously willed himself ever forward until the pivotal victory over the French at the 1759 battle for Quebec.

That Wolfe was mortally wounded in the battle, as so gloriously and poetically depicted in painter Benjamin West's 1790 masterpiece, *The Death of General Wolfe*, helped to reinforce the image of Wolfe as a tragic hero, worthy of the British military pantheon (like the slightly later Nelson and Wellington) and thus consonant with British imperial aspirations. Parkman, a major player in Boston intellectual circles, would have been readily familiar with West's rendering, which despite its hyper-romanticism (or even because of it) had emerged over a handful of other more prosaic tableaux of the

⁵⁷² Simon Schama, *Dead Certainties (Unwarranted Speculations)* (New York, 1991).

event to become the “standard” version of sorts.⁵⁷³ For Parkman, though, Wolfe’s death was but the climax to his longer and truer heroism, forged through and evidenced by long years of personal agony. Here Schama pointed to Parkman’s painterly and fanciful description of how Wolfe, at the supreme crisis of his life, with his army withering away:

. . . lay in an upper chamber, helpless in bed, his singular and unmilitary features haggard with disease and drawn with pain; no man could have less looked the hero. But as the needle, though quivering, points always to the pole, so through torment and languor and the heats of fever the mind of Wolfe dwelt on the capture of Quebec.⁵⁷⁴

Schama argued that Parkman’s correspondence revealed a parallel romantic quest, with sufferings akin to those in a hard and bitter military campaign, such that as Parkman at long last neared completion of his great work, no little degree of psychic merger resulted:

Past and present dissolved at this moment. *He became Wolfe and Wolfe lived again through him*; the man’s perseverance and fortitude; the punishments of his body; the irritability of his mind; the crazy, agitated propulsion of his energies all *flowed between subject and historian*; overtook and consumed him, robbed him of his sleep and colonized his days so that the writing of it all, the remembering, the recitation drove him on, relentlessly, *became akin to and part of the hard, forced climb* upwards to the heights; the drum-measured advance across the field, unstoppable till the very finish.⁵⁷⁵

As Wolfe sacrificed the last of his earthly energies on the Plains of Abraham, now part of British military lore (paintings also), so did Parkman perish within a year of completing his *opus magnum*. But how fair was Schama’s read of the parallels? Is there any reason

⁵⁷³ Schama joined other commentators in musing how romantic painters and historians similarly grappled with the tension between faithfulness to narrative detail and some ennobling effect on viewers via the poetic exercise of the imagination. Linking West’s flavored depiction of Wolfe to Parkman’s, and by extension to Parkman’s self-depiction, Schama noted: “From its first conception, West rejected literalism and embraced rhetoric. ‘Wolfe must not die like a common soldier under a Bush,’ he wrote. ‘To move the mind there should be a spectacle presented to raise and warm the mind and should be proportioned to highest idea conceivd [sic] of the Hero . . . A mere matter of fact will never produce the effect.’” Ibid., p.28

⁵⁷⁴ Ibid., p. 64.

⁵⁷⁵ Ibid., pp. 64-65 (italics mine, added for emphasis).

to conclude that Parkman's case was either fully idiosyncratic or otherwise bound to a specific era? Might one be able to imagine autobiographic traces in any written history and, if so, how problematic would that prove? As for the accuracy of Schama's speculations, Parkman himself had elsewhere reflected on such a theme:

The narrator must seek to imbue himself with the life and spirit of the time. He must study events in their bearings near and remote; in the character, habits, and manners of those who took part in them. He must himself be, as it were, a sharer or a spectator of the action he describes.⁵⁷⁶

As for imagination and projection in history writing outside of Parkman's romantic era, we find, from 1955, Dutch historian Pieter Geyl ("[i]magination plays too important a role in the writing of history, and what is imagination but the projection of the author's personality") and, from 1982, as we have already seen (see Section 6, *supra*), medievalist Natalie Zemon Davis ("the 'perhapses,' the 'may-have-beens,' to which the historian has recourse when the evidence is inadequate or perplexing").⁵⁷⁷ Then even Schama, who with an irony befitting the postmodern condition (and the exquisite *double entendre* of his book title), might be seen as projecting certain traits upon Parkman in much the way he supposed Parkman had projected other traits upon Wolfe. Consider Schama's metaphoric assessment of Parkman's *modus operandi*:

He had become a stitcher of tapestry, albeit with slowness, like those at Bayeux who had chronicled another encounter between France and England: Norman power and Saxon bloody-mindedness. As in such a tapestry, there were brilliantly fabricated moments, flights of pure fanciful embroidery, stitched into the epic.⁵⁷⁸

⁵⁷⁶ Francis Parkman, *Pioneers of France in The New World* (Boston, 1865), Introduction.

⁵⁷⁷ Pieter Geyl, *Use and Abuse of History* (New Haven, 1955); Natalie Zemon Davis, *The Return of Martin Guerre* (Cambridge, 1983).

⁵⁷⁸ Schama, *Dead Certainties*, p. 63.

In fact, Schama acknowledged the experimental nature of *Dead Certainties* itself, calling the Parkman-Wolfe account a “historical novella” in which “some passages (the soldier with Wolfe’s army, for example) are pure inventions, based, however, on what documents suggest.”⁵⁷⁹ He thus consciously confronted, at least partially, a highly problematic aspect of the merger in history writing of the supposed, the imaginative and the projected, all three of which are more manifestations of the historian’s mind than of the available evidence. Prior notable works – for example, Brodie’s psycho-history of Jefferson (Section 6 *supra*) – had probed the internal dimensions of historical subjects. Schama and others turned the examining lens inward, to the *historian’s* mind.⁵⁸⁰

Threads of such a perspective had existed for over a century. Philosopher Frederick Wilhelm Schelling (1775-1854) attempted (in typical high abstraction) to reconcile the self – and self-consciousness – as a matter of both subject and object. Heinrich von Sybel (1817-95), disavowing the objectivism (overly) associated with his mentor Ranke, argued instead that historical work is always mediated by factors specific to the historian: “The historian reports to us, not events themselves, but the impressions they have made on him.” Yale history professor Allen Johnson in 1926 reasoned: “A mind devoid of prepossessions is likely to be devoid of all mental furniture . . . the historian who thinks that he can clean his mind as he would a slate with a wet sponge, is ignorant of the simplest facts of human life.” In the inter-war period, Martin Heidegger’s existentialist phenomenology introduced the rather abstruse concept of *Dasein* (“there-

⁵⁷⁹ Ibid., p. 322.

⁵⁸⁰ As Sol Cohen reflected on a key theme in Novick, *That Noble Dream*, “for all their interest in delving into the motives of past historical figures, historians are hard put to understand that their own activities are driven by any motive other than logic or rationality.” Cohen, “Revisiting the History of Urban Education: Historiographical Reflections” in *Challenging Orthodoxies*, p. 48.

being,” also “being-with” and “being-in-the-world”) to suggest that because humans are not detached observers of the world, able to isolate spectacle without affecting it or themselves, Cartesian subject-object distinctions must be rejected in thinking about the past. R.G. Collingwood, an Oxford scholar in the philosophy and aesthetics of history, in 1946 (posthumously published) described how the interpretation of and the projection of historical mentalities are in effect commingled: “The history of thought, and therefore all history, is the re-enactment of the past thought in the historian’s own mind.”⁵⁸¹

Hayden White and others had suggested a link between the signature *monologue intérieur* of the literary modernists and the “middle voice” of classical Greek. And while Schama’s extension of the equivalent (autobiography) to history writing may have rankled some of his colleagues, more provocative yet were some of the literary theorists (beyond White) of the new era. Roland Barthes believed he also had detected a middle or third way to consider the relationship between authors and readers. Rejecting the binaries of his own earlier structuralism, Barthes in “To Write: An Intransitive Verb?” recast the understanding of text production, from one privileging the authorial function to one having both *lisible* (“readerly” – reader passive) and *scriptible* (“writerly” – reader as shaper) dimensions that compete: “To write is traditionally an active verb . . . *to write* is now becoming a middle verb” [and] “the *I* of the one who writes *I* is not the same as the *I* of the one which is read by *thou*.”⁵⁸² Indeed, “the goal of literary work . . . is to make the

⁵⁸¹ Schelling notes from Phillip Stokes, *Philosophy* (New York, 2003) p. 101; von Sybel quote from quotegarden.com, but see also Heinrich von Sybel, *On the State of Modern German Historiography* (originally 1856); Johnson quote from Allen Johnson, *The Historian and Historical Evidence* (New York, 1926); Martin Heidigger, *Being and Time*, trans. J. Macquarrie and E. Robinson (New York, 1962); Collingwood quote from R.G. Collingwood, *The Idea of History*, (Oxford, 1946), p. 215.

⁵⁸² Roland Barthes, “To Write: An Intransitive Verb?” in *The Structuralist Controversies: The Languages of Criticism and the Sciences of Man*, eds. Richard Macksey and Eugenio Donato (Baltimore, 1972), p. 141.

reader no longer a consumer, but a producer of the text.”⁵⁸³ In a slightly later work, instigative in its very title – “The Death of the Author” – Barthes transfers further supremacy to the reader, for writing occurs mostly to fulfill its own “illogical” dictates: “the hand, cut off from any voice, borne by a pure gesture of inscription (and not of expression), traces a field without origin – or which, at least, has no other origin than language itself, language which calls into question all origins.”⁵⁸⁴

This sort of circular skepticism about an authoritatively knowable text⁵⁸⁵ (with stable and cognizable meaning) typified thinkers at the crumbling edge of structuralism as it largely yielded to what became known as “deconstruction.” The structuralists had undercut the myth of the individual literary “creator” but had left in place “logocentrism,” the metaphysics of presence of some ultimate reference outside the text. Deconstruction, associated most directly with ever contentious Jacques Derrida (a major influence on Barthes, et al.), defined the logocentric remainder as an internal contradiction in structuralism, insisting instead on the openness of text to a plurality of interpretations, with the reader better positioned than the author to create meaning via textual analysis.⁵⁸⁶

⁵⁸³ Roland Barthes, *S/Z*, Richard Miller, trans. (New York, 1974), p. 4. Reading thereby becomes a “form of work” instead of merely “a parasitical act, the reactive complement of a writing.” Ibid., p. 10.

⁵⁸⁴ Barthes, “The Death of the Author” in *Image-Music-Text*, trans. S. Heath (New York, 1977), p. 146.

⁵⁸⁵ A ponderous topic alone, the concept of “knowable text” appears to include Noam Chomsky’s idea of “linguistic competence,” concerning the distinction between the ideal capacity of language (competence) and one’s actual utterances (performance). Memory limitations and distractions are among the factors that cause the type of speaker errors (false starts and other deviations) that in effect obscure the underlying language. See Noam Chomsky, *Aspects of the Theory of Syntax* (Cambridge, MA, 1965).

⁵⁸⁶ The writer is no longer an “Author” but rather only a “scriptor” whose powers lie in presenting combinations of pre-existing texts, conventions and norms, all to which the reader refers as part of the interpretation; accordingly, “the birth of the reader must be at the cost of the death of the Author.” Barthes, “The Death of the Author,” in *Image-Music-Text*, p. 148. This view seemed to question the ability of authors to encrypt their own subtle messages and meanings. For example, regarding the statement “[t]he declared meaning of a spoken sentence is only its overcoat, and the real meaning lies underneath its scarves

The topic already befuddling enough, Derrida's notoriously impenetrable writing style, while perhaps lending to his mystique, also fueled the intensity of the predictable reaction (see Section 8, *infra*). If one could find an essence to Derridean deconstruction, it was in its anti-foundational cast, its nihilistic extrapolation (or descent) from the logic of knowing to the illogic of unknowing. It was one thing to question, like Nietzsche, the assumptions which underlay the Western philosophic tradition (and, by extension, Western culture), quite another to seek to place oneself "at a point so that I do not know any longer where I am going" [such that] "Now I don't know what perception is and I don't believe that anything like perception exists."⁵⁸⁷ As for certain possible "traces" of reality and the temporary and unstable "assemblage" of lines of sense or force, Derrida offered a highly cryptic discussion of an analytical device he styled *la différance*:

Holding back and not exposing itself, it goes beyond the order of truth . . . yet it is not itself concealed, as if it were something, a mysterious being, in the occult zone of a nonknowing. Any exposition would expose it to disappearing as a disappearance. It would risk appearing, thus disappearing.⁵⁸⁸

Epistemological anarchy may have lent energy to linguistic and literary debates, but elsewhere it rang too much of obscurantism, and thus just would not do, particularly

and buttons" (Peter Carey, *Oscar and Lucinda*, 1988), Barthean deconstructionists appear to locate primarily – or solely – in the reader the skills of deeper comprehension (and even there only certain qualified readers, the same analysts of course), whereas the very statement by Carey, a novelist, reveals his separate active role in meaning creation.

⁵⁸⁷ Hayden White voiced this objection in *Tropics of Discourse*, pp. 277 and 280, respectively, citing to Jacques Derrida, "Structure, Sign and Play in the Discourse of Human Sciences" in Richard Macksey and Eugenio Donato, eds., *The Languages of Criticism and the Sciences of Man: The Structuralist Controversy* (Baltimore, 1970), pp. 267 and 282, respectively.

⁵⁸⁸ The irregular spelling (in both French and English ["différance"] the second "e" replaced by an "a" – a silent distinction in French, i.e., only recognizable in writing) was to create a neologism (although Derrida claimed it was "neither a word nor a concept") apparently meant to express in the "middle voice" much of what is untraceable and irreducible in language, and which is susceptible to ongoing interpretation, "the unity of chance and necessity in an endless calculus." Jacques Derrida, "Différance" in Lawrence Cahoon, ed., *From Modernism to Postmodernism: An Anthology* (Oxford, 2003), pp. 225-240.

in history writing. As Terry Eagleton summarized, “the work of Derrida and others cast grave doubt upon the classical notions of truth, reality, meaning and knowledge, all of which could be exposed as resting on a naively representational theory of language.”⁵⁸⁹ The implications here were inescapably severe for language-centered social sciences, history perhaps most of all, in that history deals directly in truth claims and the meaningful interpretation thereof.

But how deeply did the linguistic-literary turn in fact affect historians’ view of their craft? Could historians somehow stay afloat in the tidal bore? Lyotard, Foucault, Barthes and Derrida were French, and the Anglo-American history profession had largely ignored prior waves of esoteric Continental thought. But while many historians continued to devote their prime focus and scarce resources elsewhere (“we have little time or inclination to participate in general debates about the meaning of our work” – see again, Chapter 1, *supra*⁵⁹⁰), the inroads this time proved considerably deeper.

Explanations why, even those quite reasonable, are necessarily speculative. One possible factor, somewhat ironic (in that irony had emerged as the dominant trope of postmodernism), may have been the effect of sustained reengagement with Europe (World War II and the ensuing Cold War), with Americans involved internationally in ways and degrees unimaginable during previous isolationist eras, and thus encountering continental (and global⁵⁹¹) thought more regularly. It might have been also that post-

⁵⁸⁹ Terry Eagleton, *Literary Theory: An Introduction* (Oxford, 1983), p. 143.

⁵⁹⁰ As previously noted, Appleby, Hunt and Jacob, *Telling the Truth about History*.

⁵⁹¹ Urging broader historical perspectives in the wake of interrelated observations about colonialism and globalization, Eric Foner noted in his 2000 *AHA Presidential Address*: “Far less attention has been devoted to how our history has been affected from abroad. ‘Europe,’ Frantz Fanon wrote in *The Wretched of the Earth*, ‘is literally the creation of the Third World.’ Fanon was referring not only to the wealth Europe

foundational critiques, in targeting all grand narratives, assailed much of positivistic, teleological Marxism as well, somewhat lowering resistance. It was also the era in which thinkers like Jürgen Habermas and Daniel Bell articulated the assessment of knowledge as an increasingly dominant factor in productivity and social arrangements,⁵⁹² such that grappling with questions about the nature of knowledge might have seemed a natural outgrowth with now greater immediacy. And of course, in contemplating how power relations affect expression, and therefore in challenging establishment narratives, the linguistic-literary turn ran parallel to and shared analytical and descriptive power with the social-personal standpoint reformulations in history writing noted in Section 6, *supra*.⁵⁹³

In any case, despite an acknowledged propensity otherwise, historiographers and other historians eventually did engage post-foundationalism, albeit with some lag. Some arguable key milestones: in 1978 William J. Bouwsma included the term “postmodern” in his AHA presidential address; John E. Toews in a 1987 AHR article announced the arrival of the “linguistic turn” in history; by 1989 David Harlan wrote (in another AHR article) about a resulting epistemological crisis for historians; the year 1997 saw both a book by Alun Munslow, *Deconstructing History*, and another set of AHA presidential remarks on the topic, in this case Joyce Appleby’s urging of a synthesis of sorts to

gleaned from its colonial dependencies but to the fact that the encounters of different peoples – real encounters and those of the imagination – crystallize political ideologies and concepts of identity.”

⁵⁹² Regarding a “knowledge theory of value” in which scientific-technical progress rates as an independent (from labor) source of “surplus” value, see Jürgen Habermas, *Toward a Rational Society* (Boston, 1970); regarding the centrality of knowledge as economies shift from “extractive” to “fabricating” and then “processing” in prime emphasis, see Daniel Bell, *The Coming of Post-Industrial Society* (New York, 1976).

⁵⁹³ The cross-adaptation, of course, was not universal. For example, some scholars hesitated to analyze African-American narratives through Western literary theory. As literary academic Henry Louis Gates, Jr. explained: “My desire has been to allow the black tradition to speak for itself about its nature and various functions, rather than to read it, or analyze it, in terms of literary theories borrowed whole from other traditions, appropriated from without.” Henry Louis Gates Jr. “The Blackness of Blackness,” *Literary Theory: An Anthology* (Oxford, 1998, 2004), p. 992.

balance “language’s insinuating codes” with the “irreducible positivistic element” of history.⁵⁹⁴ As the millennium neared its close, the extent to which these discussions had grown (by history profession standards) more incendiary than peripheral is indicated in a 2014 AHA annual meeting session entitled (to suggest the retrospective) *The “History Wars” of the 1990s: What Was That All About?*

What the wars were – and remain – all about is the question of the historian’s identity and goals indelibly stamping the work. The essentially problematic assessment is that some historians wish to exclude themselves from equation but ultimately cannot (fully), while others are willing agents to a narrative in line with personal or group ends. Because no new paradigm arose to dislodge the reign of (or traditionalists’ grudging *cohabitation* with) personal-social standpoint histories as interbred with linguistic-literary theory,⁵⁹⁵ deep discomfort persisted as to, in sum:

what the historian’s language represents: whether there is assumed to be a correspondence with a past reality, or whether what is presented is just an internally consistent system constructed from and for a specific point of view. Acceptance of the latter position additionally highlights the interrelationship of any historical “discourse” with ideology and power. For, it is argued, there will inevitably be some stated or unstated motive behind the point of view adopted, the data consequently selected, the interpretation proposed, and what by implication is ignored or denied.⁵⁹⁶

⁵⁹⁴ John E. Toews, “Intellectual History After The Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience” in *American Historical Review* 92: 4 (October 1987), pp. 879-907; Alun Munslow, *Deconstructing History* (London, 1997); as indicated in Chapter 1, note 77, *supra*, the Bouwsma, Harlan and Appleby observations figured in Gabrielle Spiegel’s 2009 AHA presidential address.

⁵⁹⁵ Again, in Kuhnian terms, a paradigm shift solves only some problems: “. . . since no paradigm ever solves all the problems it defines and since no two paradigms leave all the same problems unsolved, paradigm debates always involve the question: Which problems is it more significant to have solved?” *Structure of Scientific Revolutions*, p. 110.

⁵⁹⁶ Southgate, *History: What and Why?*, pp. 8-9.

The linguistic-literary turn thus reanimated the accumulated doubt and cynicism, the accusations of opportunism and manipulation, that critics had long pointed at the history profession, even before post-foundationalism. “History without politics descends to mere Literature,” John Robert Seely intoned in 1883 (defending his instrumentalist version of British colonialism), foreshadowing the later lengthy debate as to whether history *with* politics is even more essentially fictive. *The past does not influence me; I influence it* brashly exclaimed Willem De Kooning (1904-1997), the Dutch abstract expressionist, or “action painter” (who created just the type of era-appropriate art Hayden White argued historians should prefer to romanticism or impressionism). Historian William L. Burton in 1982 noted a similar instinct in his own field: *If you do not like the past, change it.*⁵⁹⁷

In the course of two generations, i.e., since at least Kuhn, historiography had shifted its primary focus from “history” to the ferment of cross-effects embodied in “historians” – (re)discovering in the process Nietzsche’s haunting vision:

*The problem with staring into the abyss is that the abyss stares back.*⁵⁹⁸

Novick concluded his titanic study on objectivity in history with the grim observation that the epistemological “vital center” had utterly collapsed:

But as of the 1980s, hardly anybody was listening [to centrist appeals]. Sensibilities were too diverse to be gathered under any ecumenical tent. As a broad community of discourse, as a community of scholars united by common aims, common standards, and common purposes, the discipline of history had ceased to exist.⁵⁹⁹

⁵⁹⁷ Sir John Robert Seely, *The Expansion of England* (London, 1883, 1922); Willem De Kooning quote from *History News Network*, George Mason University; William L. Burton, “The Use and Abuse of History,” *AHA Newsletter* 20:2 (1982), p. 14 (emphasis added).

⁵⁹⁸ One of several translations of Nietzsche’s aphorism from *The Birth of Tragedy* (1872).

⁵⁹⁹ Novick, *That Noble Dream*, p. 628.

And thus no little despair. As Southgate remarked: “Postmodern theorists have challenged the fundamental assumptions of conventional history study, and have gone so far as to *question the very point of persisting with the subject at all.*”⁶⁰⁰

But many historians, as we shall see in the section below, resisted the notion that that a Kuhnian paradigm shift in their field had occurred (or was even underway), holding instead that their ability to do meaningful work remained more than just a dream. For them, the discovery, collection, classification, understanding, interpretation and recounting of the “facts” of human behavior, a model stretching back to Aristotle, could not and should not be waived away as the mere construction of narratives, subject now to the nebulous tools of deconstruction. Whether one views their assorted arguments as reactionary or in some sense re-constructive makes for ongoing historiographical debate.

In either case, it is notable that a logical inconsistency exists in many if not most variations of standpoint relativism, for in their “strategy” (to borrow a term again from Foucault) even those historians who give little weight to “objectivity” still must hope for *persuasion* on some level, else the given agenda withers away in isolation. And so the door remained slightly ajar for those hoping to achieve *rapprochement* of some sort.

(8) The neo-judicialist synthesis: Attempted reconciliation

In historiography, Novick averred, temporary ceasefires can arise after a particular strident period. To illustrate the point, he recounted how in the late nineteenth and twentieth centuries, respectively, bitterly competing views of blameworthiness regarding the origins of (a) the American Civil War and (b) the Cold War, in each case

⁶⁰⁰ Southgate, *History: What and Why?*, p. 2 (emphasis added).

eventually lost steam. His cautionary point was that any seeming thaw in academic and cultural wars at the time of his book (1988) was insufficient to support hopes for some permanent accord:

The extent of convergence should not be exaggerated: the moderation of controversy . . . was as much the result of temporary exhaustion as anything else. The greatest limitation of the analogy . . . was that in the earlier case[s] there was a powerful will to achieve reconciliation, which, while not completely absent, was much less powerful in the grumpy and sullen mood of the 1970s and 1980s.⁶⁰¹

As noted briefly in Section 7 just above, the perception among a number of historians is that the “history wars” in fact continued through at least the 1990s. Lending credence to that assessment was the wide and vigorous reaction to a 1997 study, *The Defense of History*, in which British historian Richard J. Evans discussed what he believed were a number of shortcomings in post-traditionalist historiography, prominently including interest group and postmodernist approaches and some of their resulting problematic interpretations.⁶⁰² In light of this kind of pronounced and protracted debate as to thought, values and modes of knowledge, social historian of ideas Daniel T. Rogers labeled the final quarter of the last century *The Age of Fracture*.⁶⁰³ Arguing that the lengthy battles had “permanently altered the play of argument and ideas,” Rogers predicted: “*The pieces would have to be reassembled on different frames . . .*”⁶⁰⁴

⁶⁰¹ Novick, p. 455.

⁶⁰² Richard J. Evans, *In Defense of History* (Cambridge, 1999), originally published in 1997 in the U.K. as *In Defence of History*. For a sample of the tenor and range of reviews the book generated, see the author’s extensive responses at URL = <http://www.history.ac.uk/ihr/Focus/Whatishistory/evans.html>. Also deeply critical of postmodernist incursions in history was Arthur Marwick, “Two Approaches to Historical Study: the Metaphysical (including ‘Postmodernism’) and the Historical,” *Journal of Contemporary History* 30 (1995), pp. 1-35, the title alone betraying no little disdain.

⁶⁰³ Daniel T. Rogers, *The Age of Fracture* (Cambridge, 2011).

⁶⁰⁴ *Ibid.*, p. 271 (italics added for emphasis). Although Rogers was referring to the world of ideas at large, his comments (and training) well fit the perceived crisis in history.

Other historians were not so sure that, after thousands of years of probing and brilliant commentary, any new conceptual bones were available, or even necessary. For them, it was more a question of imagining and articulating, in a manner recognizable since at least Hegel, some plausible and useful *synthesis*. In this regard one is reminded of John Dewey's observation that "problems are often not solved . . . they merely give way to others."⁶⁰⁵ Indeed, the attempts at synthesis over the past three decades have been less an effort to snuff out the unruly spirit of post-traditionalist history – for that genie was forever out of the bottle – than one to accommodate the best lessons from the series of challenges as part of a revival of practicality.

And in retrospect, several of the prominent voices in post-traditionalism, despite their general accusatory barrage against Western rationalist traditions, provided (unwittingly no doubt) some intriguing openings to a blended course. A few concessionary passages, while not exactly recantations, suggested more commonality than immediately evident.

Derrida, for example, having repudiated most of historians' authority with his perturbing formula, "language is a social practice within which the conscious thought of speakers have no privileged position in the testimony of meaning," seemed to intend to eradicate all traces by his oft-quoted proclamation that "there is nothing outside the text" (*il n'y a pas de hors-texte*).⁶⁰⁶ But he later clarified that he actually meant "*context*"⁶⁰⁷ – considerably altering the essence of the statement, now much in line with what historians

⁶⁰⁵ "John Dewey's Theory of History," a manuscript by Merle E. Curti, as cited in Novick, p. 404.

⁶⁰⁶ Jacques Derrida, *Of Grammatology*, trans. G. Spivak (Baltimore, 1976), p. 158.

⁶⁰⁷ Jacques Derrida, "Signature Event Context," in *Margins of Philosophy*, trans. Alan Bass (Chicago, 1982), p. 320 (partial word italics added).

have always tried to do, i.e., use language to give meaningful context to events and their interpretation. Moreover, Derrida acknowledged that despite the play of ambiguities and lack of narrative closures, not all interpretations would be equally meritorious:

“Otherwise, one could indeed say just about anything at all and I have never accepted saying, or encouraging others to say, just anything at all.”⁶⁰⁸ In some of his later writings, Derrida discussed how a given discourse “community” could act as a kind of “interpretive police” to discourage poor interpretation.⁶⁰⁹ While it is unclear whether by community Derrida meant, for example, an academic discipline, it would not be inconsistent to so extend that thinking.⁶¹⁰

In an ironic age, the most iconoclastic works invite the return irony of idea appropriation.⁶¹¹ In this vein, one notes how Derrida in late career introduced the notion of “hauntology” – concerning that which is neither present nor absent (“*ce non-objet, ce présent non-présent*”⁶¹²) – thereby reiterating his long opposition to binaries. The context of *Spectres de Marx* (1993, English version 1994⁶¹³) was a spate of then-recent triumphal pronouncements as to the end of ideological struggles and, thus, “the end of history.”⁶¹⁴

⁶⁰⁸ Jacques Derrida, Afterword to *Limited Inc* (Chicago, 1988), pp. 144-145.

⁶⁰⁹ Ibid. pp. 131, 146, respectively.

⁶¹⁰ “*Hantologie*” in French – in that language the neologism (the study of that which haunts or spiritually echoes) is a clever near-homonym to “ontology” (*ontologie*), the study of the nature and relations of being.

⁶¹¹ Where everything is contested, eventually will come a challenge even to the modes of contestation, as we see in this Section 8. Is such reaction necessarily “reactionary”? Those answering “yes” need contemplate just how (in)complete has been their rejection of positivism and teleology in history.

⁶¹² Jacques Derrida, *Spectres de Marx* (Paris, 1993), pp. 25-26.

⁶¹³ Jacques Derrida, *Specters of Marx, the State of the Debt, the Work of Mourning, & the New International*, trans. Peggy Kamuf (London, 1994).

Derrida argued that because important socio-moral sensibilities never fully perish, some variant of the spirit Marx unveiled in the opening line of *The Communist Manifesto* (“A spectre is haunting Europe – the specter of Communism”) would, like the ghost in *Hamlet*, periodically reappear, for capitalist liberal democracy would likely continue to fall egregiously short of its ideals. But Derrida and his adherents probably did not imagine that – for the purposes of historiography – the use of spectro-poetics to speak of non-closure and even possible returns (hauntings) permitted (and perhaps begged) the reverse application, i.e., a revisitation of and by aspects of traditionalism.⁶¹⁵

And the same period brought just that, albeit in chastened form, as we shall see. One way to contemplate the effort to forge some rough new consensus is through the dialectic (not inappropriate, given the centrality of Marxist references by Derrida, et al.): if teleological, positivistic, scientific objectivity had been the historiographical *thesis*, and archeological, personalized, deconstructionist relativism the *antithesis*, what were the key characteristics of the attempted *synthesis*?

What might the result look like? A sub-group of commentators aimed chiefly to defend or otherwise rehabilitate the traditionalist realm. Although they largely cast themselves as liberal thinkers, because liberalism itself had been a primary target of the above-denoted antithesis, others could portray them as reactionaries. Thus historian A.M. Schlesinger, Jr., ruing the logical extremes of interest group instrumentalism (“The

⁶¹⁴ That phrase is now often associated with the title of a book that drew numerous heated rebuttals -- Francis Fukuyama, *The End of History and the Last Man* (New York, 1992).

⁶¹⁵ Here, any accusations that traditionalists were casting an unfair equivalence – the sort of binary to be avoided in Derridean thought – would itself betray the principle, for one could always respond that Derrida had set up the specter of Marxist hauntology, in classic binary form, i.e., in direct and countervailing reference to capitalist liberal democracy.

use of history as therapy means the corruption of history as history”⁶¹⁶) could appear as simple denial of the powerful critiques of the time, and thus regressive.⁶¹⁷ But while persistent, the supposed spokespersons for retroversion eventually go the way of all flesh, as Kuhn noted in recounting an earlier paradigm shift: “Max Planck, surveying his own career in his *Scientific Autobiography*, sadly remarked that ‘a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.’”⁶¹⁸ Planck’s comments are pertinent here in two ways. First, the generation that drove much of the postmodernist revolution, having outlived most of the hard positivists, has in turn aged or died (Kuhn, Foucault, Lyotard, Derrida, Barthes, for example, have all passed) and constitutes now, again somewhat ironically, a different flavor of “old guard.” Second, the generation reaching intellectual maturity within the postmodern condition may have acquired greater capacity (or tolerance) for cohabitation (however awkward) with preceding paradigms and thus perhaps have found binary equations less compelling.

A tempered sense of alarm, then, lowered resistance to integrating the lessons of more than one prior historiographical paradigm. And while “[t]he world is full of people whose notion of a satisfactory future is, in fact, a return to the idealized past”⁶¹⁹ a partial return to earlier themes and lessons, as Kuhn conceded, is not inherently retrograde and

⁶¹⁶ Arthur M. Schlesinger, Jr., *The Disuniting of America: Reflections on a Multicultural Society* (New York, 1993), p. 93.

⁶¹⁷ Literary academic and aphorist Mason Cooley offered a sassier critique of standpoint excesses: “Radical historians now tell the story of Thanksgiving from the point of view of the turkey.”

⁶¹⁸ Kuhn, p. 151, quoting Max Planck, *Scientific Autobiography and Other Papers*, trans. F. Gaynor (New York, 1949), pp. 33-34.

⁶¹⁹ Canadian literature professor and novelist Robertson Davies, as quoted in Grothe, *Oxymoronica*, p. 42.

may even bear substantial fruit, for provocative departures (like social-personal history and the linguistic-literary turn) by their very agitation may re-expose fertile but recently untilled ground: “In the twentieth century, Einstein succeeded in explaining gravitational attractions, and that explanation has returned science to a set of canons and problems that are . . . more like those of Newton’s predecessors than of his successors.”⁶²⁰

But just which problems to visit again, presumably now with additional insight? Turning a final time to Kuhn, we see how the direction of inquiry is often a function of the inquirers’ perceived needs and goals, such that a shift in those values and ends, perhaps in response to external forces and opportunities, influences problem choice:

[S]ince no paradigm ever solves all the problems it defines and since no two paradigms leave all the same problems unsolved, paradigm debates always involve the question: Which problems is it more significant to have solved? Like the issue of competing standards, that question of values can be answered in terms of criteria that lie outside of normal science altogether, and it is recourse to external criteria that most obviously makes paradigm debates revolutionary.⁶²¹

One way to interpret the efforts over the last three decades to forge a workable fusion (or at least, again, cohabitation) of liberalism and postmodernism is to view them through hauntological lenses. Perhaps what has been in play here is a yearning – rooted in need – to augment the hyper-relativism of “outsider” theoretical critiques with older concepts of essential fairness and justice as practical means to achieve the desired social-personal outcomes.

And those aspirations find voice and utility at the enduring intersection of discourse, history, persuasion and law. One view is that interest group and other standpoint writers, as well as thinkers speaking to subjugated knowledges and the like,

⁶²⁰ Kuhn, p. 108.

⁶²¹ Ibid., p. 110.

where their arguments are stripped down to essences, all rely on assumptions that in the liberal societies they engage, some shared sense exists as to the right, or at least ideal, of fair intellectual exchange. As Columbia sociologist Todd Gitlin in 1995 reflected:

Those postmodernists who propose to discard the Enlightenment as an excrescence of male, imperialist, racist, Western ideology are blind to their own situation. For all their insistence that ideas belong to particular historical moments, they take for granted the historical ground they walk on. They fail, or refuse to recognize that their preoccupation with multiculturalism, identities, perspectives, incommensurable world views, and so forth would be unimaginable were it not for the widespread acceptance of Enlightenment principles: the worth of individuals, their right to dignity, and to social order that satisfies it.⁶²²

Indeed, an issue at the intersection of Critical Race Theory and Critical Legal Studies was the hyper-cynicism in much of CLS as to the fruitfulness of attempting to gain eventual fair treatment by persuasively alluding to standards of justice and truth (including generally accepted historical facts) shared with the larger society. Patricia J. Williams reflected on her own concerns about that tendency in a law review article pointedly entitled “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights”:

In CLS, I have sometimes been left with the sense that lawyers and clients engaged in the pursuit of “rights” are viewed as foolish, “falsely conscious,” benighted, or misled. . . . That position seems to discount entirely the voice and the experiences of blacks in this country, for whom politically effective action has occurred mainly in connection with asserting or extending rights.⁶²³

Whatever the influence of CLS/CRT on the social discourse generally, race and ethnic

⁶²² Todd Gitlin, *The Twilight of Common Dreams: Why America is Wracked by Culture Wars* (New York, 1995), as cited in Carlos Alberto Torres, *Democracy, Education, and Multiculturalism* (Lanham, MD, 1998), p. 103. Gitlin, a Columbia sociologist, was a founding member, and later president of Students for a Democratic Society, has been far from reactionary in his ensuing life work.

⁶²³ Patricia J. Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” reprinted in Richard Delgado and Jean Stefanic, eds., *Critical Race Theory: The Cutting Edge* (Philadelphia, 2000), pp. 82 and 85, respectively. Williams noted the tension between the harm resulting from the abuse of rights and the promise still inherent in holding rights language to its own standard and logic: “I by no means want to idealize the importance of rights in a legal system in which rights are so often selectively invoked to draw boundaries, to isolate, and to limit. At the same time, it is very hard to watch the idealistic or symbolic importance of rights being diminished with reference to the disenfranchised, who experience and express their disempowerment as nothing more or less than the denial of rights.” *Ibid.*, p. 82.

histories (see Section 6, *supra*), either in line with the authors' own beliefs, or for strategic – i.e., persuasive – purposes (or both), tend to incorporate liberalist language and symbolism: “Their [Negro] history demonstrates that no matter what the despoilers of history may do – enslave, segregate, torture, lynch – they cannot destroy the people’s will to freedom, their urge towards equality, justice, and dignity, for without these things there is no decent life, there is no joy, there is no peace.”⁶²⁴ In this respect, “the voice and the experiences” of racial and ethnic minorities are similar to those of women and gays and “activists” of all stripes, in their implicit, at times explicit, reliance on some external standard of fairness of judgment in a democracy. Legal scholar and liberal activist Owen Fiss, who once clerked for Thurgood Marshall, and a regular disputant of the Burger court, lamented how CLS “nihilism” undercut “confidence in the existence of the values that underlie the litigation of the 1960s.”⁶²⁵ Indeed, members of each of the aforementioned groups continue to rely extensively on the courts, where they in turn make extensive reference to historical struggle.

And an unavoidable centerpiece of law in practice, of course, is contestation of the historical facts. As Appleby, Hunt and Jacob expounded in their widely read 1994 book, *The Truth About History*, “[b]ecause history and historical evidence are so crucial to a people’s sense of identity, the evidence itself often becomes the focus of struggle.” With that as a central thread, and asserting that “relativists and traditionalists have both gone wrong” the authors offered a new pluralistic historiography that “embraces a

⁶²⁴ Herbert Aptheker, ed., *A Documentary History of the Negro People in the United States* (Secaucus, NJ, 1973 [1951]), Introduction.

⁶²⁵ Owen Fiss, “The Supreme Court, 1978 Term – Forward: The Forms of Justice,” *Harvard Law Review* 93 (1979), p. 17, as quoted in Novick, *That Noble Dream*, p. 567.

healthy skepticism, but . . . rejects the cynicism and nihilism that has accompanied contemporary relativism.”⁶²⁶ One can perhaps sense here the ghost of the Enlightenment and its sponsorship of the “marketplace of ideas” so essential to a liberal democracy.⁶²⁷

Just as totalitarian governments continue to crumble everywhere on the globe in favor of democratic polities, so too are absolute claims to knowledge giving way to the recognition of the multiplicity of points of view and their importance in generating knowledge. In a profound sense, burying the belief that definitions of knowledge about humankind can be fixed unconditionally is as important to democracy as the removal of autocratic rulers.⁶²⁸

The authors thus attempted to define a middle zone with parameters, though the borders vague, large enough to accommodate not only the confrontational thrust of standpoint history and Foucault’s ubiquitous power struggles, but also E.H. Carr’s gentler sense of history as “unending dialogue between the present and the past” and the Victorian idealism of Benjamin Disraeli’s maxim that “Justice is truth in action.”⁶²⁹

History, then, as a vehicle for the often messy exchange of contested narratives and perspectives, is akin not just to democracy, but also to an institutional mainstay of democracy, the law court: “History doesn’t just reflect; it provides *a forum for readjudicating* power and interests.” And the given debate involves serious scrutiny of truth claims: “*without proof there is no historical writing of any worth.*”⁶³⁰

⁶²⁶ Appleby, Hunt and Jacob, *Telling the Truth about History* (New York, 1994), pp. 5, 276 and 2, respectively.

⁶²⁷ If our democracy is to flourish, it must have criticism,” advised pillar of liberalist history Henry Steele Commager in *Freedom, Loyalty, and Dissent* (Oxford, 1954).

⁶²⁸ Appleby, Hunt and Jacob, *Telling the Truth about History*, p. 276.

⁶²⁹ Edward Hallett Carr, *What is History?* (New York, 1961), p. 35; Disraeli quote from John Morley, *The Life of William Ewart Gladstone* (London, 1903).

⁶³⁰ Appleby, Hunt and Jacob, pp. 289 and 262, respectively (italics added in both passages).

The centrality of proof in comparing and interpreting truth claims within an appropriate forum lends the authors' historiography a decided neo-judicialist cast, so rich with law metaphors. "The truth about history" (to employ the book title), then, is the *adjudicated contestation of asserted facts, fact patterns, and interpretations thereof*. Here, Appleby, Hunt and Jacob were in accord with scholars over many centuries. Carlo Ginzburg (as part of a much longer discussion as to proof, to which I return shortly below) showed how in the first century Quintilian employed the phrase *declamatio* as a label for a rhetorical exercise based on the alternating demonstration of opposite arguments.⁶³¹ Erasmus in 1511, with typical subversive wit, illustrated much the same point by having his allegorical figure Folly contrast the imperfect state of present affairs to that of the simple people of a mythical Golden Age: "What use of Logick, where there was no bickering about the double-meaning words? What need of Rhetorick, where there were no Law-suits?"⁶³² In our own time, Kuhn's social history of scientific revolutions was of course, as already discussed at length, all about contestation between differing paradigms (and between their adherents).⁶³³ And finally even Schama, who underscored how "alternative accounts of the event compete for credibility."⁶³⁴

As such, these hints of neo-judicialism raise questions about *judgment* in history. Interwoven within any more fully developed historiographical model are the following vital matters:

⁶³¹ Carlo Ginzburg, *History, Rhetoric, and Proof* (Hanover, NH, 1999), pp. 60-61.

⁶³² Desiderius Erasmus, *The Praise of Folly* (New York, 1942), p. 146.

⁶³³ For yet another of many such passages, see Kuhn, p. 4: "[M]ost sciences have been characterized by continual competition between a number of distinct views of nature . . .".

⁶³⁴ Schama, *Dead Certainties*, p. 322.

What is the object and nature of judgment engaging in history?

Just who (which actor or group) appropriately pronounces the given verdict?

What is the applicable standard of proof in any such judgment?

As elsewhere, my approach here is to review what historians themselves (and a few other thinkers) have stated on the topic. That their viewpoints do not cleave neatly along a traditionalist-relativist line may in fact work to enhance the possibility of a neo-judicialist fusion in historiography.

As for the first matter, the target and mode of treatment, what jumps out is an absence of uniformity or, to cast it in the positive, a rich variation. Not only does subject matter (and standpoint, acknowledged or not) range widely in history writing, so does the level of analysis, with assessments touching on such factors as individuals, families, groups, societies, cultures, laws, nations, alliances, structures, geographical, geophysical and meteorological factors, religion, philosophy, education, art, technologies, disease, accidents, natural disasters, coincidences, etc., and causal relationships between any and all of these factors. When moving past factors to *behaviors* (and some phenomena fit in either category, or both simultaneously), historians divide on the question of whether to limit the recounting to description and explanatory analysis or to argue also in the realm of moral assessment. The former, a “values-free” approach (if even possible), rates the prudence, wisdom, effectiveness, rashness, haphazardness and like qualities of human strategies, decisions, acts, reactions and omissions. The latter, moral judgment, concerns the ethical dimensions of that same behavior and is openly value-laden.

The tension between those elements has long been apparent in thinking about the field. “History is the story of events, with praise or blame” intoned famed New England

Puritan minister Cotton Mather (1663-1728), also a self-styled historian of American colonialism who, in notably influencing aspects of the Salem witch trials (and recording them), was no stranger to the judgment of persons and behavior.⁶³⁵ That was the dominant view for only the middle term, for closely parallel to the ensuing long struggle in history between the humanistic and scientific camps was the question of morality as something that historians should or should not assess. As previously seen, nineteenth-century histories of the French Revolution tended to include floridly judgmental prose. But Ranke and his scientific followers (more so than even he) insisted that professional historians break from the quick resort to moralism in favor of analytical approaches in line with the supposedly more inductive Darwin, et al. Even so, Marx's dialectic extrapolation of his *homo economicus* assumptions, despite its scientific pretensions, was as morally accusatory as anything before or since.

The unsettled pattern extended throughout the twentieth century. Whereas Creighton attempted to avoid the "Pharisaism" of moral judgments as to the main figures in his *A History of the Papacy* (1897), and whereas J.B. Bury speechified that "history is a science, no less and no more" (1902), Acton denounced how ostensibly neutral stances in fact masked partiality toward "great men" (it was Acton, after all, who had coined the timeless phrase "Power tends to corrupt, and absolute power corrupts absolutely").

In fleshing out his counterassault, Acton drew color from law court imagery. Regarding Creighton, for example, was this 1907 rebuke:

⁶³⁵ Mather embodied the complex mix of religious judgment and sponsorship of scientific progress (in his case, horticulture and smallpox inoculations were special interests) at work in the Puritan New World settlers. So affirm Appleby, Hunt and Jacob: "In striking contrast to the continental Catholic clergy, the seventeenth century English Protestants and Puritans who went to the American colonies thought they could have their bible along with their science . . . The Puritans bequeathed to modern thought, and particularly to the nineteenth-century university, a union between God's word and his work, between the study of the Bible and the study of natural science." *Telling the Truth About History*, pp. 44-45.

[He] is not striving to prove a case, or burrowing towards a conclusion, but wishes to pass through scenes of raging controversy and passion with a serene curiosity, a suspended judgment, a divided jury, and a pair of white gloves. Avoiding both alternatives of the prophet's mission, he will neither bless nor curse, and seldom invites his readers to execrate or to admire.⁶³⁶

Acton extended the critique even to the great Ranke, who for all his investigatory prowess “disliked the black cap and the solemnity of moral verdicts.”⁶³⁷ Historiography, in this view, is either Machiavellian (empirical and apologetic) or moral (conscientious), with Acton clearly favoring the latter. In all, he cautioned, historians should “be careful of too much explaining, lest we end by too much excusing.”⁶³⁸

“True, it is not for the historian to exonerate; but neither is it for him to condemn” replied Butterfield in his 1931 classic *The Whig Interpretation of History*.⁶³⁹ He instead suggested humility as the better course, given the shared fallen nature of all humankind. Accordingly, again rejecting Acton's view, all the more pointedly by using similar judicialist language, Butterfield decried the pretense of judge-like status and function:

By a curious example of the transference of ideas [the historian] . . . has come to confuse the importance that courts of legal justice must hold, and the finality they must have for practical reasons in society, with the most useless and unproductive of all forms of reflection – the dispensing of moral judgments upon people or upon actions in retrospect.⁶⁴⁰

Better, then, to strive for explanatory analysis: “So the last word of the historian is not

⁶³⁶ Acton, *Historical Essays and Studies* (London, 1907), p. 427. Acton's rough contemporary, Arthur Conan Doyle (1859-1930) had similarly averred: “It is with nations as it is with individuals. A book of history is a book of sermons.” *Micah Clarke* (New York, 1894), p. 39 (here Doyle had broken from his detective novels to write a historical adventure novel set during the 1685 Monmouth Rebellion in England).

⁶³⁷ Lionel Kochan, *Acton on History* (London), 1954, p. 130, in turn referring to Acton's manuscripts housed at the Cambridge University Library.

⁶³⁸ Acton, *Lectures on Modern History* (London, 1930), p. 24, endorsing the words of the Duke de Broglie.

⁶³⁹ Herbert Butterfield, *The Whig Interpretation of History* (London, 1951 [1931]), p. 117.

⁶⁴⁰ *Ibid.*, pp. 107-108.

some fine firm general statement . . . It is a study of the complexity that underlies any generalization that we can make.”⁶⁴¹

Butterfield’s exhortation to study historical complexity resonated in the interwar years, for analysts of the period were still perplexed and frustrated by how, despite extraordinary advances elsewhere in humanity, World War I in all its horrendous destruction had erupted. One explanation genre pointed to something approximating collective folly, with all the major nations and leaders overly beholden to a faulty system of alliance-based checks and balances in operation since the defeat of Napoleon a century earlier. Thus, the ability to identify some combination of structural forces, institutions, hubris, irrationalities and other shortsightedness left room to craft empirical interpretations without resorting to moral judgments. Moral assessments were certainly possible, but not centrally necessary.

But then came the naked aggressions sparking World War II and the nearly imponderable hatred driving the Holocaust. Moral handwringing has never since ceased. “Purely historical thought is nihilistic; it wholeheartedly accepts the evil of history” bemoaned Albert Camus in *The Rebel* (1951).⁶⁴² Likewise, in *Historical Inevitability* (1954) Isaiah Berlin, an Oxford philosopher and historian of ideas, contested the idea of historical determinism, i.e., the supposed supremacy in history of universal forces beyond human control. In that construct, “we reduce history to a kind of physics; as well blame the galaxy or gamma-rays as Genghis Khan or Hitler.” Instead, Berlin argued, all humans carry certain internalized moral categories (which also deeply embed the

⁶⁴¹ Ibid., p. 73.

⁶⁴² As quoted in White, *Tropics of Discourse*, p. 38.

structure of our language, a point of much debate in the next decades, as we have already seen). Writing history with little or no weight attached to these categories – and here Berlin was overtly contradicting Butterfield – would in effect garble the recounting, “just as our ordinary speech would become fantastically distorted by a conscious effort to eliminate from it some basic ingredient.” Such a course could only “further confuse an already sufficiently bewildered public about the relations of value to fact, and, even more, the nature and methods of the natural sciences and historical studies.”⁶⁴³

It was, of course, only eight years later that Kuhn ignited the reconsideration of scientific method, with a deep and bewildering challenge to all epistemology soon to follow. The serial uncertainties unleashed in the postmodern condition of course made it much harder to assign blame. The favorite remaining targets were Western traditionalists, whose arguments that Enlightenment and humanist principles had led to a more equitable, saner and safer world now seemed increasingly strained. Two global conflicts and the Holocaust showed the unprecedented scale and scientific efficiency of organized depravity. If that was modernity at its pinnacle, it was time to rethink the entire paradigm. Historian Gabrielle Spiegel was one of several later thinkers to trace the roots of the seismic shifts in Western intellectualism to the unspeakable outrages the prior generation had suffered, witnessed – and caused:

[T]he Holocaust put to rest, finally and forever, at least in the minds of many, a Western, modernist, progressive, and ultimately optimistic view of history. In that sense, the Holocaust has been critically important, I and others have argued, for the emergence of what we now conventionally call postmodernism.⁶⁴⁴

⁶⁴³ Isaiah Berlin, *Historical Inevitability* (London, 1954), pp. 43, 52 and 78, respectively.

⁶⁴⁴ Gabrielle M. Spiegel, “Memory and History: Liturgical Time and Historical Time,” *History and Theory* 41:2 (May 2002), p. 150.

With the moral and linguistic bases of meaningful discourse severely compromised, and with history reduced, in some eyes, to little more than narrative, could a place remain for traditionalist judgment in history writing? While it is not fair to place Hayden White, for example, among the extreme literary theorists of “the Absurdist Moment”⁶⁴⁵ (his term), or even among postmodernists (he declined that label), White’s tropic schema of modes of emplotment, by putting structuralist constraints on otherwise potentially liberating histories, similarly negated much possibility of moralist commentary.⁶⁴⁶ That limitation was one aspect of accusations by Carlo Ginzburg (1992), Roger Chartier (1997) and Richard J. Evans (1999) that such an approach is amenable to Fascist apologetics,⁶⁴⁷ and A. Dirk Moses’s caution (2005) that emplotted narratives, for all their analytical helpfulness, were susceptible to appropriation in the form of “public history” for propagandized use in nationalist and ethnic conflicts.⁶⁴⁸ Moses thus argued the continued

⁶⁴⁵ White the historian/literature theorist objected not only to the irrational elements that Barthes, Derrida and Foucault emphasized, but also to the disciplinary insatiability: “[C]ontemporary literary criticism does not constitute a coherent field of theory and practice. The contours of criticism are unclear, its geography unspecified, and its topography therefore uncertain. As a form of intellectual practice, no field is more imperialistic. Modern literary critics recognize no disciplinary barriers, either as to subject matter or as to methods. In literary criticism, anything goes. This science of rules has no rules. It cannot even be said that it has a preferred object of study.” White, *Tropics of Discourse*, p. 261.

⁶⁴⁶ In this vein, White hinted how deep ideological divides remained intractable precisely because of a shared gravitation toward moral-ethical claims: “It is fruitless . . . to try to arbitrate among contending conceptions of the nature of the historical process on cognitive grounds which purport to be value-neutral in essence, as both Marxist and non-Marxist social theorists attempt to do. The best reasons for being a Marxist are moral ones, just as the best reasons for being a Liberal, Conservative, or Anarchist are moral ones.” White, *Metahistory* (Baltimore, 1973), p. 432

⁶⁴⁷ Carlo Ginzburg, “Just One Witness” in Saul Friedlander, ed., *Probing the Limits of Representation: Nazism and the “Final Solution”* (Cambridge, 1992); Roger Chartier, “Four Questions for Hayden White” *On the Edge of the Cliff: History, Language, and Practices* (Baltimore, 1997), pp. 28-38; Richard J. Evans, *In Defense of History* (New York, 1999). The literature on historiographical issues raised by the Holocaust is quite large. One aspect treats the matter of Holocaust denial in its various guises, with Evans suggesting that Holocaust denial gained appeal and momentum in the wake of the post-modernist theories that focused on the constructive nature of history and the oppressive results of the Western rationalist tradition.

⁶⁴⁸ A. Dirk Moses, “Hayden White, Traumatic Nationalism, and the Public Role of History,” *History and Theory* 44:3 (2005), pp. 311-332. White eventually acknowledged the issue, deflecting it by characterizing

salience of the moral assessment strain of judicialist historiography:

Frye's distinction between historical and ethical criticism needs to be reformulated. The historical *is* the ethical. In an age when genocides, ethnic cleansings, and imperial wars of domination are as prevalent as ever, using history to forestall their occurrence (where possible) is a profound expression of hopefulness. In this sense, historians assume the role of "moral commentators," as Richard T. Vann has enjoined recently.⁶⁴⁹

Eclectic scholar Paul Virilio joins that notion of history as a vehicle for (some) hope, insisting against Lyotard, et al. and the final death of metanarratives by noting instead that "the narrative of justice is beyond deconstruction."⁶⁵⁰ The postmodern condition, then, has not ended, and perhaps has even increased in roundabout fashion, the yearning to make sense of history in ethical and humanistic terms.

Threading through these two concepts (judgment in historically evaluating the effectiveness of human choices under varying conditions, and judgment of those acts on a moral-ethical scale) is a third type of assessment or judgment. It concerns the correctness of the given historical interpretation, and evaluates the persuasive power of the account and the sufficiency of the supporting evidence (both direct and indirect). In this sense one might think of it as historiographical judgment as opposed to, or in addition to, historical judgment, to the extent that historiography touches on the quality, credibility, accuracy and methodological sufficiency, in short the *persuasiveness* of the offering.

the Holocaust as a modernist "aberration" from his model, which covered history since the early nineteenth century as most historians practice(d) it most of the time. He continued to chafe, however, in the belief his critics remained unsatisfied, quipping that Ginzburg "hates Metahistory. He thinks I am a fascist." Quote from Eva Domanska, *Encounters: Philosophy of History After Postmodernism* (London, 1998), p. 16.

⁶⁴⁹ Ibid., p. 300, with Moses citing to Richard T. Vann, "Historians and Moral Evaluations," *History and Theory*, Theme Issue 43 (2004), pp. 3-30.

⁶⁵⁰ John Armitage, "From Modernism to Hypermodernism and Beyond: An Interview with Paul Virilio" in John Armitage, ed., *Paul Virilio: From Modernism to Hypermodernism and Beyond* (London, 2000), p. 39.

This third notion of judgment in history is at once the subtlest and yet, for the chief purposes of this essay, the most important in historiography, and in some key ways subsumes the other two. And all three types of judgment ultimately point to a cluster of questions central to any judicialist approach: Who is properly the judge? If for some compelling reason it is not the historian, then who else might it be? What then is a better understanding of the role for the historian in the judicialist analogy? Why does it matter?

Starting with the last question, because the literature widely continues to discuss historical analyses in terms of judgment (sometimes in the denial of its appropriateness), and because that language makes implied, sometimes express, reference to law courts and legal procedures, it makes sense to examine the particulars and nuances of the comparison. First, as briefly raised in Chapter 1, because law, which penetrates nearly every area of society, both encapsulates and creates history, historians inevitably contemplate on some level the making, violation and effects of law, at least as deep background or context to the given topic, but at times as a chief topic in itself. Second, while some terms of inquiry are of course common to all knowledge endeavors, it may be that no two other fields have such a striking overlap in imagery and vocabulary: inquiry, discovery, memory, witness, testimony, interrogation, documentation, facts, investigation, examination, interpretation, presumptions, refutations, experts, argument, truth, forensics, contestation, narrative, evidence, circumstances, causation, appeal, rhetoric, proof, and nearly always arbiter/jurist/judge and adjudication/verdict/judgment. Third, despite extensive use of such terminology, the overall impression (to this writer) is one of historiographers talking past each other, with no little confusion resulting. The explanation, I believe, lies in the tendency to *conflate* or otherwise confuse the roles and

activities of the principal actors in law – and even entire legal systems – and, thus, by analogy, the norms and mechanics of the history profession.

A small sampling of the great body of historians' language here helps to illustrate the high level of confoundedness, in turn demonstrating the degree of either disaccord or (more likely) confusion on the point. Acton, as we saw above, exhorted historians not to avoid donning the judge's "black cap." But he also criticized Creighton for "not striving to *prove a case*" and warned that the "historian who does not root them [class and social biases] out is exactly like a *juror who votes* according to his personal likes or dislikes" (Creighton had urged historians, somewhat cryptically, to "leave the course of *events to pronounce the verdict* upon system and men alike").⁶⁵¹ Berlin's exhortation to attribute responsibility to individuals came with a prescription for exacting inquiry: "Our best historians use empirical tests in sifting facts, [and] make microscopic examinations of the evidence"⁶⁵² Butterfield acknowledged that investigatory sense in the calling, but strongly protesting any dual role for the historian: "It is typical of him that he tends to regard himself as the judge when by his methods and his equipment he is only fitted to be the detective," a view largely echoed by Mark K. Krug (" . . . the historian and the detective have much in common"), John Clive (" . . . the historian is after all, the skilled detective who asks questions, locates and follows clues, and must not reveal the solution until the tale is told") and Robin W. Winks ("the techniques to be used differ neither in

⁶⁵¹ Acton, *Historical Essays and Studies* (London, 1907), p. 427 (italics added); second quote from Acton and quote from Creighton both from *Essays on Freedom and Power*, Gertrude Himmelfarb, ed. (London, 1956), pp. 339 (italics added) and 371 (italics added), respectively.

⁶⁵² Isaiah Berlin, *Historical Inevitability*, p. 76.

kind nor in degree from dogged legwork of . . . the detective routinely pursuing leads which, he hopes, will unfold like nesting boxes to reveal a kernel of evidence.”⁶⁵³

Ginzburg approvingly quoted Momigliano as to much the same notion of the historian as a professional investigator: “I am not disgusted by the comparison this suggests with the daily work of a policeman (or of a judge). Both have to make sense of certain events after having ascertained that the events happened.” However, historians have more complex knowledge in certain helpful areas: “Policemen are not supposed to understand, still less to publish, medieval charters. Even judges nowadays seldom have to deal with them: when they do, they are welcome to the historian’s table.”⁶⁵⁴

The idea of the historian as a resource for expert testimony springs from both fact and metaphor. In a law journal article entitled “Adjudication of Things Past: Reflections on History as Evidence,” Daniel A. Farber explored “the literal intersection between law and history that occurs when historians enter the legal arena to testify as expert witnesses,” concluding that in most cases “institutional conditions” adequately promote truthseeking.⁶⁵⁵ A slightly less sanguine read comes in Novick’s recounting of how the historians working with the NAACP on the landmark *Brown v. Board of Education* case found it prudent to sidestep the question the Supreme Court had posed about the intent (or lack of intent) of the Fourteenth Amendment drafters as to outlawing school segregation: “When committed scholars enter the legal arena, they uphold the highest

⁶⁵³ Butterfield, *The Whig Interpretation of History*, p. 107; Mark M. Krug, *History and the Social Sciences: A New Approach to the Teaching of Social Studies*, p. 12; John Clive, *Not by Fact Alone: Essays on the Writing and Reading of History* (New York, 1989), p. 21; Robin W. Winks, ed., *The Historian as Detective: Essays on Evidence*, p. 105.

⁶⁵⁴ Ginzburg, *History, Rhetoric, and Proof*, p. 49.

⁶⁵⁵ Daniel A. Farber, “Adjudication of Things Past: Reflections on History as Evidence,” *Hastings Law Journal* Vol. 49 (April 1998), pp 1009-1038.

academic standards when circumstances allow; when circumstances don't, they fudge . . . [t]he principal contribution of the historians involved was to devise ways of evading a direct answer to the question.”⁶⁵⁶ Less rosy still is the depiction by Butterfield, et al., of the historian's “testimony” as part of normal historical writing (i.e., practiced outside the formal courthouse) as not necessarily above board in every case.

What those critiques also show is the commentators' shared uncertainty as to the historian's exact role in the ongoing legal analogy. Butterfield, though dismissive and cynical, pointed to some of the possibilities still in currency: “[The historian] is neither judge nor jury; he is in the position of a man called upon to give evidence; and even so he may abuse his office and he requires the closest cross-examination, for he is one of those ‘expert witnesses’ who persist in offering opinions concealed within their evidence.”⁶⁵⁷ Later historians in the wake of the linguistic-literary turn were sometimes ready to acknowledge more overtly the tradeoffs between roles. Schama, for example, conceded he had offered his study, *Citizens: A Chronicle of the French Revolution*, “more as *witness* than judgment” and that it “does not pretend to dispassion.”⁶⁵⁸

Judicialist historiography, in fact, continued to bubble up even from unexpected ground. White, in one of his typical literary ruminations – here, on Ibsen's *Hedda Gabler* – equated the two historians in the play (Tesman an ascetic researcher, Lövberg a

⁶⁵⁶ Novick, pp. 507-508.

⁶⁵⁷ Butterfield, p. 131. Here Butterfield was bookending and responding to the equally sarcastic statement with which he opened *The Whig Interpretation of History*: “It has been said that the historian is the avenger, and standing as a judge between the parties and rivalries and causes of bygone generations he can lift up the fallen and beat down the proud, and by his exposures and verdicts, his satire and his moral indignation, can punish unrighteousness, avenge the injured or reward the innocent.” *Ibid.*, p. 1.

⁶⁵⁸ Simon Schama, *Citizens: A Chronicle of the French Revolution* (New York, 1989), pp. xvi (italics added) and 6, respectively.

Hegelian-type philosopher), though polar opposites, with Judge Brack, “another custodian of tradition.”⁶⁵⁹ Elsewhere, White considers one more actor and associated procedure common in law practice, questioning whether “the historian . . . *mediates* between past and present” (he maintained his reservations).⁶⁶⁰ Even Lyotard employed courthouse language to convey the “injustice” resulting where a historical linguistic regime holds sway unabated:

I would like to call a differend [*différend*] the case where the plaintiff is divested of the means to argue and becomes for that reason a victim. If the addressor, the addressee, and the sense of the testimony are neutralized, everything takes place as if there were no damages. A case of *differend* between two parties takes place when the regulation of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.⁶⁶¹

And thus here we see a possible bridge of sorts between historians from seemingly antithetical schools – they all claim to be concerned about justice, and therefore about the need to examine “truth stories” critically. As we have seen at length above, those concerns very frequently get translated into and with judicialist nomenclature, which in turn has always necessarily exhibited literary dimensions. There is a fundamental but not fatal tension between these elements. On the one hand, as Winks declared, “[t]he central methodological problem for the historian . . . is to know how to interrogate witnesses, how to test evidence, how to assess the reliability and the relevance of testimony” while on the other, as Schama reminds us, “even in the most austere scholarly report from the archives, the inventive faculty – selecting, pruning, editing, commenting, interpreting,

⁶⁵⁹ White, *Tropics of Discourse*, pp. 33-34.

⁶⁶⁰ Ibid., p. 27 (italics added).

⁶⁶¹ Jean-François Lyotard, *The Differend: Phrases in Dispute* (Minneapolis, 1988) p. 9.

delivering judgments – is in full play.”⁶⁶²

The combination of factors and activities has long invited a variety of analogies (see Chapter 1, *supra*). Preeminent among recent voices is Carlo Ginzburg, a major figure in attempts to forge, in the wake of postfoundationalism, a viable balance between fact and narrative in history writing. Ginzburg has regularly alluded to analogies in that effort: the historian as physician, the historian as master carpet weaver, but most often, in the widest and deepest analysis of the comparison during the entire long arc of judicialist historiography, the historian as judge. “*Evidence*, like *clue* or *proof*, is a crucial word for the historian and the judge” reads the opening line of Ginzburg’s 1991 article “Checking the Evidence: The Judge and the Historian.”⁶⁶³ And from *History, Rhetoric, and Proof*, his 1999 collection of essays/speeches: “Judges and historians share a concern for ascertaining facts . . . therefore, they share a concern for proof.”⁶⁶⁴ Agreed. The appeal here for historians, as noted previously (see Chapter 1, *supra*) is no surprise. For at heart, as stated intellectual and literary historian Cushing Strout, “[w]riting history is a perpetual exercise in judgment.”⁶⁶⁵ That emphasis on the centrality of judgment to and in history writing encourages a certain conflation of attributes and actors – the historian’s use of judgment with the historian *as* judge (the social-professional cachet of judges as recognized authorities rendering the allure of the comparison deeper yet, also discussed in Chapter 1, *supra*).

⁶⁶² Robin W. Winks, *The Historian as Detective*, p. 39; Simon Schama, *Dead Certainties*, p. 322.

⁶⁶³ Carlo Ginzburg, “Checking the Evidence: The Judge and the Historian,” p. 79.

⁶⁶⁴ Carlo Ginzburg, *History, Rhetoric, and Proof*, pp. 49-50

⁶⁶⁵ Cushing Strout, *ActiveHistory*, URL = http://www.activehistory.co.uk/historical_quotations.htm.

It would not be fair to Ginzburg, however, to portray his reflections as so narrow, for he has wrestled with the historian-judge likeness for some decades, never arguing perfect equivalence, and also striving to accommodate important observations about the literary aspects of history writing. That latter theme in much of Ginzburg's work, in fact, has personal roots – again the autobiographical element in history writing – in particular his deep grounding in literary studies.⁶⁶⁶

Viewing literature as a knowledge tool, Ginzburg liberally referenced Tolstoy, Proust and Flaubert, all of which made his long and heated rivalry with Hayden White all the more intriguing, in that each had used analyses of Flaubert and others in support of their respective historiographical points. In all, Ginzburg's approach is in fact much less old guard and much more integrative than a focus on only his judicialist and anti-relativist language might suggest:

To regard history and literature as two wholly disparate fields is both mistaken and unhistorical. They have always existed in dialogue, more or less overlapping. The fact that historical writing sometimes devolves into fiction and that, furthermore, it often relies on literary models, should not surprise us. A much more challenging approach – to history and literature alike – is to start out from the fact that both disciplines share an obligation to the *truth*, and to see how this has been lived up to at different times.⁶⁶⁷

As scholar Perry Anderson noted, Ginzburg's larger problem with the literary turn in history was “the modern skepticism that would erase the boundary between history and fiction altogether . . .” (and here the reference is White) “not so much because it looms large in the discipline, but because it threatens the integrity of one conjugation of

⁶⁶⁶ His mother was a prominent Italian novelist and essayist (his father, a journalist, editor and teacher, was arrested and beaten for his anti-Fascist activism, dying in prison in 1944, when Ginzburg was quite young.

⁶⁶⁷ “On the Dark Side of History: Carlo Ginzburg talks to Trygve Riiser Gundersen“ *Eurozine* URL = <http://www.eurozine.com/articles/2003-07-11-ginzburg-en.html>.

literature and history with false proximity to another, deleterious one.”⁶⁶⁸

It is in this context that Ginzburg’s judicialist writings must be considered. Law and history are, in this view, truth-seeking pursuits. Seldom have two fields had such a degree of overlap in core vocabulary, technique and mode of – literary – exposition. Proof via rhetoric as to evidence, employing judgment throughout – this version of the judicialist formula seems to work reasonably well to grasp and explain the essence of truth-seeking history writing.

The analogy would be clearer yet with one conceptual adjustment. First an observation about Ginzburg’s own history writing, so widely and deservedly admired. His most known work, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (1980), is at once an enchanting and colorful story of the clash between popular culture and Inquisitorial authority, a philosophical-historiographical exploration of the nature of truth and knowing, and a demonstration of the robustness of the then still-emerging microhistory approach. As for the advances from such an approach:

More and more in the past few decades historians have been working with such judiciary sources as the Inquisition trials, court records, and so forth . . . what led many historians to work with judiciary sources also brought to the fore, first, the ambiguous contiguities between judges and historians and, second, the relevance of judicial rhetoric to any discussion on the methodology of history . . . proofs, far from being incompatible with rhetoric, are its fundamental core.⁶⁶⁹

Another book, *The Judge and the Historian: Marginal Notes and a Late-Twentieth-century Miscarriage of Justice* (1991),⁶⁷⁰ less known but far more personal, concerns the

⁶⁶⁸ Anderson, “The Force of the Anomaly,” (2012), a review of Ginzburg’s *Threads and Traces*, in *London Review of Books*, URL = <http://www.lrb.co.uk/v34/n08/perry-anderson/the-force-of-the-anomaly>, p. 4.

⁶⁶⁹ Ginzburg, *History, Rhetoric, and Proof*, p. 50.

⁶⁷⁰ Carlo Ginzburg, *Il giudice e la storico* (1991), English version *The Judge and the Historian: Marginal Notes and a Late-Twentieth-century Miscarriage of Justice*, trans. Antony Shugar (London, 1999).

trial of Ginzburg's friend Adriano Sofri, a one-time revolutionary anti-Fascist convicted of ordering a political assassination. In each study – histories of legal cases – Ginzburg strenuously protested the (mis)handling of evidence and the resulting guilty verdicts. He throughout marshaled and emphasized helpful alternative evidence, both documentary and circumstantial, interrogated opposing fact claims and interpretations, questioned inconsistencies and procedures, and sponsored a sense of human empathy for the defendants, all with deep recourse to evocative, i.e., literary, rhetoric, including much credibility-inducing paratext (partly in the form of his own impressive erudition).

In short, it is *the historian as lawyer* in operation, using good judgment in building a convincing case.

The judge/jury for history writing is the community of readers, assessing the adequacy and persuasive power of the given offering.

The standard of proof is not “beyond a reasonable doubt” as in criminal law, but “more likely than not” as in civil law.

Chapter 3 is an exploration of each of these points and supporting realities.

CHAPTER 3. *The Historian-Lawyer Analogy* (Exposition of working theory)

History is not a catalogue but . . . a convincing version of events.

A.J.P. Taylor

We are arguing here that truths about the past are possible, even if they are not absolute, and hence are worth struggling for.

Joyce Appleby, Lynn Hunt and Margaret Jacob

These four historians join legion more in understanding history writing as an enterprise that transcends the arid amassing of data from the past, one that instead celebrates the call to make astute, vigorous, meaningful and ultimately persuasive truth claims. All this is “worth struggling for” – and at their core all such endeavors to convince require advocacy. “We are arguing here” could be – should be – part of the introduction to virtually any historical work.

If, as Ginzburg insisted, the search for truth centrally involves rhetoric to help establish proofs (as to “the relevance of judicial rhetoric to any discussion on the methodology of history . . . proofs, far from being incompatible with rhetoric, are its fundamental core”⁶⁷¹) then some version of the neo-judicialist analogy indeed makes sense. Here Ginzburg seems much in line with Winston Churchill’s observation: “Apt analogies . . . are among the most formidable weapons of the rhetorician.”⁶⁷² But which of the possible variants of that legal analogy best captures the argumentative/persuasive dynamic of history writing?

⁶⁷¹ Ginzburg, *History, Rhetoric, and Proof*, p. 50. Again, Ginzburg’s neo-judicialism is consonant with, and lends much leadership to, current attempts to reconstruct some foundations for History after decades of foundation-shaking tumult.

⁶⁷² From an unpublished essay, Winston S. Churchill, “The Scaffolding of Rhetoric” (November 1897). See www.winstonchurchill.org. And while analogies are not themselves proof, analogies leading to questions about truth-seeking are useful and pertinent in history.

The historian's effort to build and then convincingly demonstrate a historical argument closely parallels in mode and style how *lawyers* in the Anglo-American legal tradition develop and present their cases. Here it is important to distinguish the "prosecutorial" or "inquisitorial" legal systems found in much of the Continent, with its long Civil Law tradition, from the "adversarial" approach in the U.K. and U.S., steeped in Common Law.⁶⁷³ Each aims to distill something approximating the truth as part of delivering something approximating justice, but through different procedures.⁶⁷⁴ As a general matter (a full exposition would be treatise-length⁶⁷⁵), in inquisitorial legal systems the judge plays a central role in directing the investigation, marshalling evidence and posing relevant questions, whereas in the Anglo-American context those activities are squarely the lawyer's domain (partly a function of distrust of centralized state power⁶⁷⁶). American procedural law, especially at the state court level, authorizes liberal

⁶⁷³ The choice/evolution of systems is a function of lengthy social, political, philosophical and even military developments. For example, Roman civil law set an initial course in Europe of extraordinary duration; the medieval church and ecclesiastical courts instituted much of the inquisitorial format; excesses by the Star Chamber in England, particularly under Henry VIII, influenced the fuller move there to an adversarial system; on the continent, Bonaparte, in territories his armies conquered, typically implemented a version of the revamped French Civil (Napoleonic) Code.

⁶⁷⁴ One suggestion is that differences in procedures are natural outgrowths of lawmaking in the Civil as opposed to Common legal system. In the former, law creation proceeds via codification, while in the development of the latter, much law was "judge made" (emanating from case rulings). Hence, "[w]ith case-by-case legal development, there was, perhaps, more of a need for a debate format in the adjudicative process." Ellen E. Sward, "Values, Ideology, and the Evolution of the Adversary System," *Indiana Law Journal* 64:2 (1989), p. 323.

⁶⁷⁵ For just a hint of the copious materials here, see: H. Patrick Glenn, *Legal Traditions of the World* (New York, 2000); John Henry Merryman, *The Civil Law Tradition: An Introduction To The Legal Systems Of Europe And Latin America* (Stanford, 1969); Peter de Cruz, *Comparative Law In A Changing World* (London, 1999); Stephan Landsman, *The Adversary System: A Description and Defense* (Washington, DC, 1984); Luke M. Froeb and Bruce H. Kobayashi, "Evidence Production in Adversarial vs. Inquisitorial Regimes," *Economics Letters* 70(2): 267-272 (Feb. 2001); JA Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure," *International and Comparative Law Journal* 52(2): 281-295 (April 2003); Michael K. Block, Jeffrey S. Parker, Olga Vyborna and Libor Dusek, "An Experimental Comparison of Adversarial versus Inquisitorial Regimes," *2 American Law and Economics Review*, pp. 170-194 (2000).

⁶⁷⁶ The issue is whether one trusts the state agents to be perfectly (or even adequately) neutral when they

discovery regimes, in effect allowing parties (mostly through their lawyers) very broad rights to gathering evidence.⁶⁷⁷

The judge is more a referee, holding the disputants to the procedural rules, making occasional pronouncements of the law and certain “judicial facts” (which I cover below in Section 4), but for the most part not actively seeking or presenting evidence or arguments based thereupon. In the Anglo-American system it is the lawyer who seeks, amasses, ponders, evaluates and sifts the evidence preliminary to arranging the ultimate mix, how it is argued, for whom, and why, employing judgment throughout, and *all in the context of competing arguments*. It is the lawyer, then, rather than the judge, who employs rhetoric in the manner Ginzburg urged in countering hyper-relativism:

“Aristotle’s approach, focusing on proof as the rational core of rhetoric, utterly contradicts the current [late twentieth century] self-referential image of rhetoric, based on

(and the state itself) have their own interests – joining traditionalists who questioned the value neutrality of any system charged with preserving the order were commentators from Critical Legal Studies and Critical Race Theory who noted how often the judiciary comprised the children of the elite, now themselves part of the elite, thus arguably with more self-interest in maintaining law and order than challenging entrenched power structures. This historical and still vibrant degree of distrust is reflected in commentary from any number of disparate fields: in legal studies, see Monroe H. Freedman, “Our Constitutional Adversary System,” 1 *Chapman Law Review* 59: 57-90 (1998); in public administration studies, see Robert A. Kagan, “Adversarial Legalism in American Government,” *Journal of Policy Analysis and Management* 10(3): 396-406 (Summer 1991); in critical analysis, see (of course) Michel Foucault, “The Subject and Power,” *Critical Inquiry*, Vol. 8, No. 4 (Summer, 1982), pp. 777-795, although there the discussion extends beyond the U.S. to any state power.

⁶⁷⁷ The right to discovery is considerably broader than the ability to introduce evidence at trial. See, for example, California Code of Civil Procedure § 2017.010: “Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, electronically stored information, tangible thing, or land or other property.” (Italics added for emphasis.)

the assumption that rhetoric and proof are basically incompatible.”⁶⁷⁸ It is the lawyer who employs rhetoric compatible with proof. Thus the historian-lawyer analogy is the most helpful in neo-judicialist historiography.

One must speculate here why prior variations of the neo-judicialist analogy focus more on the judge. Chapter 1 included a discussion of the higher social standing traditionally accorded judges over lawyers, who by definition and obligation are also far more instrumentalist than historians see themselves.⁶⁷⁹ Moreover, Ginzburg and several of the influences he mentioned (e.g., Momigliano, Nagy, Valla, Croce, Burckhardt), and numerous other recent voices in historiographical debates were continentalists either by birth and training, and/or by subject matter focus (e.g., White, Davis, Foucault, Derrida) and thus may have tended to have prosecutorial (i.e., investigatory) judges in mind when making judicialist observations about history.⁶⁸⁰ And historians tilling the fields of “microhistory” – here most tellingly Ginzburg with *The Cheese and the Worms* and Davis with *The Return of Martin Guerre* – acknowledge how the scant direct documentation covering the lives of common folk, especially in the medieval era, comes largely if not mostly from records of encounters with (prosecutorial) legal systems. In each of those books the authors ruminated upon questions of evidence, proof and the

⁶⁷⁸ Ginzburg, *History, Rhetoric, and Proof*, p. 62.

⁶⁷⁹ Another aspect of the bias here is the image (however accurate) of the judge as an embodiment of the collective, i.e., the people as a whole. However, as discussed in Chapter 2, *supra*, in recent decades no little cynicism has engaged as to the extent judges act more as agents for State and class interests.

⁶⁸⁰ Although he enjoyed a long stint (1988-2006) at UCLA, Ginzburg was born in and trained in Italy, serving as a professor at the University of Bologna and *la Scuola Normale Superiore di Pisa*. While Italy presently is beginning a shift to some aspects of the adversarial legal system, the move post-dates most if not all of Ginzburg’s work on historiography. See Elisabetta Grande, Italian Criminal Justice: Borrowing and Resistance,” *American Journal of Comparative Law* 48:2, p. 227-260 (Spring, 2000).

search for truth in a criminal/ecclesiastical trial in Continental Europe.⁶⁸¹

In contrast, we might discern in historians/historiographers with Anglo-American backgrounds and/or focus an instinct, by no means fully articulated, toward the model this essay proposes, i.e., of historians striving to prove a case, often in the context of competing versions.

Butterfield, for example, encapsulated his critique of whig history in casting the historian as “neither judge nor jury; he is in the position of a man called upon to give evidence . . . and he requires the closest cross examination”⁶⁸²

Robin Collingwood noted how historians might assess the sufficiency of a colleague’s offered treatment: “[I]t is possible to take a particular problem, to study the solution of that problem advanced by a particular historian on a particular review of the evidence, and . . . to raise the question whether he has or has not *proved his case*.”⁶⁸³

Hofstadter also employed overtly legalistic imagery, populating Chapter 1 of his historical study of American (anti)intellectualism with a series of vignettes labeled “Exhibit A” through “Exhibit L” meant to illustrate aspects of the argument he proceeded to make throughout the work.⁶⁸⁴

Kuhn, of course, saw paradigm shifts as a matter of competing interpretations of even widely accepted evidence: “All historically significant theories have agreed with the

⁶⁸¹ Compounding the confusion arising from a focus on judges rather than lawyers in the neo-judicialist model is the tendency to provide legal examples in criminal law rather than civil litigation terms – an important distinction, as I discuss in Section 8 below, when addressing the sufficiency of proof in history.

⁶⁸² Butterfield, *The Whig Interpretation of History*, p. 131.

⁶⁸³ Robin Collingwood, “The Limits of Historical Knowledge,” *Essays in the Philosophy of History*, William Debbins, ed., (New York, 1966), p. 102 (italics added).

⁶⁸⁴ Hofstadter, *Anti-Intellectualism in American Life*, pp. 9-19.

facts, but only more or less. . . . It makes a great deal of sense to ask which of two actual and competing theories fits the facts *better*.”⁶⁸⁵

Schama pointed out how two historical mysteries he explored were susceptible to multiple, contestable interpretations: “In both cases, *alternative accounts of the event compete for credibility*, both for contemporaries and for posterity.”⁶⁸⁶

Appleby, Hunt and Jacob underscored that “knowledge-seeking involves a lively, contentious struggle among diverse groups of truth-seekers.”⁶⁸⁷

And from the American Historical Association we see a Statement on Standards of Professional Conduct: “*Multiple, conflicting perspectives are among the truths of history* . . . Because the questions we ask profoundly shape everything we do – the topics we investigate, the evidence we gather, the arguments we construct, the stories we tell – it is inevitable that different historians will produce different histories.” The practice norm is therefore “contesting each other’s interpretations.”⁶⁸⁸

These several observations by and for historians point toward a *litigatory* analogy within neo-judicialism, one capable of accommodating, as the pages to follow demonstrate, the sustainable middle course Ginzburg urged⁶⁸⁹ – both the reaffirmation of traditionalist attention to proof *and* the integration of the less nihilistic insights from the

⁶⁸⁵ Kuhn, *Structures*, p. 147 (italics original).

⁶⁸⁶ Schama, *Dead Certainties*, pp. 322-323 (italics added).

⁶⁸⁷ Appleby, Hunt and Jacob, *Telling the Truth About History*, p. 254.

⁶⁸⁸ “Shared Values of Historians,” AHA *Statement on Standards of Professional Conduct*, Section 2 (emphasis in original).

⁶⁸⁹ Ginzburg’s efforts to restore reliability and dignity to history writing were probably a factor in his 2012 selection as Honorary Foreign Member of the American Historical Association (Ranke was the first, 1886).

linguistic-literary turn. The art and delight of narrativity, in this approach, is adjunct to proof and persuasion.

The remainder of this Chapter 3 covers eight subpoints in the instant proposal that historians share with lawyers a strikingly similar set of challenges, opportunities, tools, methods and constraints:

- (1) In history there is always an argument and an effort to persuade;*
- (2) While some important evidentiary gaps can exist, overall historians grapple with a considerable surplus of potential evidence;*
- (3) Limited resources force historians to be data selective;*
- (4) Historians nonetheless can objectively discern the merits of certain individual facts (or certain fact clusters) and relationships;*
- (5) Historians and lawyers direct their narratives largely to matters of causation;*
- (6) From a selective basket of (arguably) objective facts, and with skillful phraseology and paratext, the historian defines, shapes and directs the terms of rhetoric within a recognizable, orderly, plausible and compelling narrative.*
- (7) Notwithstanding all the above, external pressures – including the devices of formal and informal counteradvocacy and external judgment – help reinforce the historian’s presumed objectivity, fairness and trustworthiness; and*
- (8) The historian’s realistic standard of proof is cast in probabilities similar to those in jurisprudence – not “beyond a reasonable doubt” (criminal law) but rather “more likely than not” (civil law).*

I support each of these points by plenteous citation to historians and historiographers discussing their enterprise and craft.⁶⁹⁰ The task here is to synthesize those earlier sage observations in suggesting an additional lens potentially helpful for historiographic study.

⁶⁹⁰ That stated, I have researched far more material than is possible to discuss in an essay even of this length. Section 3 further below is a discussion of the historian’s selectivity under such circumstances.

(1) In History there is always an argument and an attempt to persuade

How can we know the dancer from the dance?

Yeats

Naturally attaching to history and history writing is the question of *purpose*. Is history necessarily instrumentalist, i.e., a means *for something*? A first glance suggests traditional lack of consensus on the point, with some commentators, for example, lauding history study as its own reward, others pointing to the instructional value of the enterprise, others yet to the futility of either set of those efforts. A subtler read, however, is that historians invariably offer *some proposition*, even if not overtly enunciated, then attempt to evince its validity. I return to this point shortly, but first provide a sampling of aphorisms capturing the chief currents as to the existence (or lack) of purpose in history study and writing.

(a) A likely minority view is the cynical/contrarian school – we might like to learn from history, but do not:

Life is a tale told by an idiot, full of sound and fury, signifying nothing.

Shakespeare

*History teaches us that history teaches us nothing.*⁶⁹¹

G.W.F. Hegel

That men do not learn very much from the lessons of history is the most important of all the lessons that history has to teach.

Aldous Huxley

If History teaches any lesson at all, it is that there are no historical lessons.

Lucien Febvre

⁶⁹¹ Otherwise translated, “We learn from history that we never learn anything from history.”

(b) Another likely minority view – history is for knowledge of universals, satisfying intellectual curiosity, honoring via resurrection, self-reflection, but not necessarily for seeking political or other practical guidance:

History is Philosophy teaching by examples.
Thucydides

Mankind are so much the same, in all times and places, that history informs us of nothing new or strange in this particular. Its chief use is only to discover the constant and universal principles of human nature.
David Hume

I think our studies ought to be all but purposeless. They want to be pursued with chastity, like mathematics.
Lord Acton

In the last resort, sheer insight is the greatest asset of all.
Herbert Butterfield

The aim of the historian, like that of the artist, is to enlarge our picture of the world, to give us a new way of looking at things.
James Joll

History is a people's memory, and without memory man is demoted to the lower animals.
Malcolm X

Historical awareness is a kind of resurrection.
William Least Heat Moon

History re-presents the dead.
Gabrielle Spiegel.

Our core business is resurrection: helping the dead past live again.
William Cronon

History is for human self-knowledge The value of history, then, is that it teaches us what man has done and thus what man is.
R. G. Collingwood

History is a means of access to ourselves.
Lynn White, Jr.

(c) The apparent plurality view – history is “for something” practical and useful – moral guidance, pragmatic instruction for present and future actions, a test of theory, witness, freedom, justice and the betterment of humankind:

History is the best medicine for a sick mind; for in history you have a record of the infinite variety of human experience . . . examples and warnings; fine things to take as models, rotten things to avoid.

Livy

This I regard as history’s highest function, to let no worthy action be uncommemorated, and to hold out the reprobation of posterity as a terror to evil words and deeds.

Tacitus

For if history relates good things of good men, the attentive hearer is excited to imitate that which is good; or if it mentions evil things of wicked persons, nevertheless the religious and pious hearer or reader shunning that which is hurtful or perverse, is the more earnestly excited to perform those things which he knows to be good and worthy of God.

Bede (The Venerable)

Whoever wishes to foresee the future must consult the past; for human events ever resemble those of preceding times. This arises from the fact that they are produced by men who ever have been, and shall ever be, animated by the same passions, and thus they necessarily have the same results.

Niccolo Machiavelli

In a word, we may gather out of History a policy no less wise than I eternal; by the comparison and application of other men’s fore-passed miseries with our own like errors and ill-deservings.

Sir Walter Raleigh

In history, a great volume is unrolled for our instruction, drawing the materials of future wisdom from the past errors and infirmities of mankind.

Edmund Burke

History, by appraising . . . [the students] of the past, will enable them to judge of the future.

Thomas Jefferson

When the past no longer illuminates the future, the spirit walks in darkness.

Alexis de Tocqueville

History teaches everything, even the future.
Alphonse de Lamartine

Progress in the direction of organized and assured freedom, is the characteristic fact of Modern History, and its tribute to the theory of providence.
Acton

History is philosophy teaching by example and also by warning.
Bolingbroke

Those who cannot remember the past are condemned to repeat it.
George Santayana

A nation which does not know what it was yesterday, does not know what it is today, nor what it is trying to do.
Woodrow Wilson

The contemporary historian has to establish the value of the study of the past, not as an end in itself, but as a way of providing perspectives on the present that contribute to the solution of problems peculiar to his own time.
Hayden White

[W]hat historians do best is to make connections with the past in order to illuminate the problems of the present and potential of the future.
Appleby, Hunt and Jacob

History, in brief, is an analysis of the past in order that we may understand the present and guide our conduct into the future.
Sidney E. Mead

For wisdom is the great end of History. It is designed to supply the want of experience.
Hugh Blair

History is the only laboratory we have in which to test the consequences of thought.
Etienne Gilson

. . . the foundation of an ongoing social order, history's conspicuous purpose.
Henry Glassie

We study history in order to intervene in the course of history.
Adolf von Harnack

Again, a preliminary review of the adages above and the various schools of thought from which they emanate might lead to the conclusion that an argued thesis appears in some but not all works of history. My view is to the contrary: *in history there is always an argument and an attempt to persuade*. The second clause to that postulate gives evidence for the first – any exercise meant to convince acknowledges some underlying proposition(s). However, we should *not* presuppose that the given argument is always consciously or even subconsciously *ideologic* (although as discussed in Chapter 2, *supra*, sometimes it is undeniably so). Rather, very often the case is that:

(1) the historian disagrees with something essential in existing accounts; or

(2) agrees with the essential facts but not with their interpretation; or

(3) believes one could and should better exposit existing accounts (else why bother readdressing the topic?);⁶⁹² or

(4) concludes that a previously unaddressed matter merits historical treatment, in which case the historian's argument is against such mistaken oversight to date.⁶⁹³

Each case (1), (2), (3) or (4), then, (as well as each ideologic work) is an axis of *contention*, calling on the historian's collection, selection, organization and presentation of evidence to give some convincing world of dimension thereto. A historian undertakes rigorous inquiries and espouses a particular historical read. Thus, from the outset, a historian differs in this important way from a judge, who – in the Anglo-American

⁶⁹² “The motive of the new re-write, and the nerve of its accompanying explanation, is always the desire to see things straight, to get – on the basis of the known facts – a narrative that can be properly followed; its initial spur is always the feeling or hunch that things have hitherto been presented the wrong way on” W.B. Gallie, *Philosophy and the Historical Understanding* (New York, 1968), p. 117.

⁶⁹³ “Surely we have the right to claim for history the indulgence due to all new ventures. The incomplete . . . is quite as enticing as the most perfect success. To paraphrase Péguy, the husbandman takes as much pleasure in plowing and sowing as in the harvest.” Marc Bloch, *The Historian's Craft*, p. 15.

adversarial approach to law – does not normally seek out and initiate matters to dispute or clarify. Rather, disputes in the form of lawsuits or other contested questions come not *by* the judge, but *to* the judge (and jury), most often with legal counsel – professional advocates – representing the disputed viewpoints. Circling back to history practice, a historian’s selection of any historical topic, time frame and/or perspective is in essence a statement that prior treatments are either absent or insufficient by some measure. First by offering a new treatment, and then through it, the historian advocates just why that new treatment is necessary or otherwise desirable, corrective, instructive, hortatory, etc.

Charles Beard as early as 1933 recognized the inescapable question as to the meritworthiness of the given topic. Even the seeming haven of the monograph ultimately proves illusory – the only escape from “the hazards of taking thought”

is silence or refuge in some minute particularity of history . . . some very remote and microscopic area of time and place, such as the price of cotton in Alabama between 1850 and 1860, or the length of wigs in the reign of Charles II, on the pleasing but false assumption that he is really describing an isolated particularity as it actually was, an isolated area having no wide-reaching ramifications of relations. But even then the historian would be a strange creature if he never asked himself *why he regarded these matters as worthy of his labor and love*, or why society provides a living for him during his excursions and explorations.⁶⁹⁴

The historian thus acknowledges at least an interior argument as to why the endeavor is worthwhile. It is hard to imagine how the resultant works are not also arguments, now directed to the external world. And those assertions inevitably reflect the writer’s interests and passions, else they would not issue at all. As philosopher of history Morris R. Cohen noted: “Inertia is the first law of history, as it is of physics.”⁶⁹⁵ Or, as Becker explained, they would issue without much skill: “Mr. Everyman . . . is a good historian

⁶⁹⁴ Charles Beard, 1933 *AHA Presidential Address* (emphasis added).

⁶⁹⁵ Morris R. Cohen, *The Meaning of Human History* (La Salle, IL, 1947), p. 107.

precisely because he is not disinterested: he will solve his problems, if he does solve them, by virtue of his intelligence and not by virtue of his indifference.”⁶⁹⁶ Interests and passions, in turn, have some touchstone in values and philosophy, which as natural loci of contestation always imply error on the part of someone. The historian nonetheless pushes forward: “Without passion there might be no errors, but without passion there would certainly be no history.”⁶⁹⁷ Nor without values: “History free of all values cannot be written. Indeed, it is a concept almost impossible to understand, for men will scarcely take the trouble to inquire laboriously into something which they set no value upon.”⁶⁹⁸ Concluded Southgate: “It is impossible to write history without *some* standpoint – and that means some philosophical or ideological standpoint.”⁶⁹⁹

Values and standpoint (which may or may not be ideological) intertwine with interests and passion, together bespeaking *purpose*. Because historians are not disinterested, and because they operate within an enormous range of specialty topics, idiosyncratic lenses and enthusiasms, one historian’s purpose set quite naturally differs from another’s: “If a modern historian were to show his works to the Venerable Bede, the man might well say, well and good, but I want to know how it was that God ordained the conversion of the British Isles.”⁷⁰⁰

⁶⁹⁶ Carl L. Becker, 1931 *AHA Presidential Address* (emphasis added).

⁶⁹⁷ C. V. (Cicely Veronica) Wedgwood (1910-1997), a specialist in seventeenth century English history and Continental history. *History and Hope: The Collected Essays of C.V. Wedgwood* (London, 1989), p. 258.

⁶⁹⁸ W. H. B. Court, as quoted by Arthur Marwick, *The Nature of History* (New York, 1971), p. 327.

⁶⁹⁹ Southgate, *History: What and Why?*, p. 10.

⁷⁰⁰ Charles W. Cole, “The Relativity of History,” *Political Science Quarterly* 48 (June, 1933), p. 165.

Presentism and instrumentalism are first cousins. According to John Hope Franklin, “[t]he writing of history reflects the interests, predilections, and even prejudices of a given generation.”⁷⁰¹ But of course individuals within a given generation differ considerably in opinion. Hence politics. One need not ratify Mark Twain’s (1897) waggish swipe that “[t]he very ink with which all history is written is merely fluid prejudice”⁷⁰² – far too strong – to countenance Seely’s formulation from roughly the same era: “History without politics descends to mere Literature.”⁷⁰³

If we accept even partially the essence of intellectual movements discussed at some length in Chapter 2, including a more realistic assessment of law judges (and thus judicialist historians), we acknowledge that a kernel of the political resides in practically every mode of intellectual expression. No work is utterly sterile politically and philosophically, and it is no longer fruitful to consider any so. Historians hoping to emulate artist Paul Klee’s attempt at willing naïveté (or complete dispassion) as to his situation – “I want to be as though new-born, knowing nothing, absolutely nothing about Europe”⁷⁰⁴ – ultimately encounter Roland Barthes’ inescapable axiom attaching to all communicative expression: “*language is never innocent*” (see again, Chapter 2, Section 7 and note 501).⁷⁰⁵ Barthes noted that chosen words are themselves laden with nuances of

⁷⁰¹ John Hope Franklin, *Current Biography* 24 (October 1963), p. 14.

⁷⁰² Samuel Langhorne Clemens (Mark Twain), *Following the Equator* (Hartford, 1897), p. 699.

⁷⁰³ Sir John Robert Seely (1834-1895), named Regius Professor of Modern History at Cambridge in 1869, was a leading apologist for British imperialism.

⁷⁰⁴ Paul Klee, 1902 journal entry, as recorded in *Artists on Art from the XIV to XX Centuries*, eds. Robert Goldwater and Marco Treves (London, 1972), p. 442.

⁷⁰⁵ Roland Barthes, *Writing Degree Zero (Le degré zéro de l’écriture)*, trans. Annette Lavers and Colin Smith (London, 1967 [1953]) (italics added).

historical definition(s) and underlying philosophies.⁷⁰⁶ Therefore, not only does the selection of specific terms from among others implicate the writer's fundamental inclinations, the very act of recasting those words in new combinations as part of a new piece of writing renegotiates the tension between past and present meanings.

These dynamics hold also in even those seemingly straightforward cases mentioned four pages above (there enumerated [1] through [4]), where the historian offers "simply" a treatment of a new topic, or further (and/or better) exposition of a topic previously treated, while striving to avoid ideologic considerations. To reiterate an earlier stated point, in each case the historian nonetheless *argues* the salience of the latest execution. And the nature and framing of the historical issue itself are (now) hard to imagine emerging from a *tabula rasa* mentality, i.e., utterly uninfluenced consciously and even subliminally by the author's specialized training, demographics, and a host of other personal attributes, experiences and beliefs.

Some commentators seem to believe history is the servant of power relations, overtly ideologic or not, or at least a tool to employ in the course of pursuing some laudable outcome. Foucault spoke to the former, describing how dominant elements in society are in a position to dictate, and do dictate, which knowledge counts, therefore which learning construct provides access to power, thus setting the terms of discourse in that society. For Foucault, it was critical to ponder *who* gets to tell history, through what

⁷⁰⁶ As Russell Hoban puts it, "Language is an archaeological vehicle . . . the language we speak is a whole palimpsest of human effort and history." As quoted in John Haffenden, *Novelists in Interview* (London, 1985), p. 138.

means, and to what ends.⁷⁰⁷ Likewise, the late military historian John Keegan, while not claiming universal application, acknowledged instances of presentist-instrumentalist linkage: “History is the projection of ideology into the past.”⁷⁰⁸ Similarly, Eric Foner (2000 AHA president) notes how even presumably benevolent aspirations color the given historical recounting: “A new future requires a new past.”⁷⁰⁹ And reflecting the linguistic attunement of a less suspecting school is Schlesinger’s much repeated admonition: “Honest history is the weapon of freedom.”⁷¹⁰

Perhaps so, if we could agree how exactly to define the key qualifier “honest” in historiographical terms. This essay aims elsewhere – not to indicate whether certain purposes or means of history writing are principled or perfidious, not even whether the underlying philosophies are edifying or corrosive (although surely I have my own ideas), but rather to underscore that historians necessarily and inescapably operate in the world of argument. And because historians, acting on any variety of beliefs or other motivations, quite regularly find prior treatments (or vacuums) wanting in some measure, the number of possible new interpretations – or treatments of new questions the prior accounts inspired – endlessly multiplies:

⁷⁰⁷ A theme discussed throughout Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Colin Gordon, ed. and trans. (New York, 1980).

⁷⁰⁸ British military historian and historiographer of modern conflict John Keegan (1934-2012).

⁷⁰⁹ Eric Foner, *Who Owns History?: Rethinking the Past in a Changing World* (New York, 2002), p. 77.

⁷¹⁰ Arthur M. Schlesinger, Jr. *History News Network*. Freedom as a historical concept has attracted extensive commentary. See, e.g., Eric Foner, *The Story of American Freedom* (New York, 1998).

*History is always written wrong, and so always needs to be rewritten.*⁷¹¹

*Problems cannot all be solved, for, as they are solved, new aspects are continually revealed; the historian opens the way, he does not close it.*⁷¹²

*[I]n the form of a record prepared by a human being [history] is about as malleable as potter's clay. The older histories may be authentic but leave all sorts of new histories to be written, which will be quite as scrupulous in the examination of their data and more intelligent in their interpretations.*⁷¹³

*The idea of history in any age, like the idea of property, or of progress, is an unstable compound; it is put together as needed, by historians or by philosophers, out of the irreconcilable opinions of men.*⁷¹⁴

*History thus is a constant argument among historians, and accounts of the past constantly change – the result of new questions and of differing purposes of historical knowledge as much as of new evidence.*⁷¹⁵

Henry Adams emphasized that argumentative reexamination is the historian's duty to the discipline itself: "History will die if not irritated. The only service I can do to my profession is to serve as a flea."⁷¹⁶ As previously noted, regions to scratch are countless, for the limitations of time, space, interest, learning, viewpoint, patience and other resources result always in "partial" recountings, in both senses of the term. Roosevelt issued *The Naval War of 1812* partly to refute an earlier British work trumpeting the superior prowess of the English navy and largely dismissing American successes. Yet, as

⁷¹¹ George Santayana, *The Life of Reason: or the Phases of Human Progress*, Volume 5, *Reason in Science* (New York, 1906), p. 45.

⁷¹² Maurice Powicke, *Modern Historians and the Study of History: Essays and Papers* (Westport, CN, 1976 [1955]), p. 104.

⁷¹³ James Harvey Robinson, 1929 *AHA Presidential Address*.

⁷¹⁴ F. Smith Fussner, *The Historical Revolution: English Historical Writing and Thought, 1580-1640* (London, 1962), Introduction, p. xiv.

⁷¹⁵ John Barker, *The Superhistorians: Makers of our Past* (New York, 1982), Preface, p. xiv.

⁷¹⁶ Henry Adams, Letter to Margaret Chanler, 9 September 1909, published in *the Selected Letters of Henry Adams*, Newton Arvin, ed. (New York, 1951), p. 263.

he conceded in the preface to his supposedly corrective version, there are no histories that give “the whole story” or “do justice to both sides.”⁷¹⁷ Likewise, 2007 AHA president Barbara Weinstein saw contestation of fact and interpretation even where purposes seemingly are aligned: “[O]ne of the truisms of the historical profession is that people in positions of power would produce better public policies if they had a deeper knowledge of the past. But that begs the question of which version of the past they would adopt.”⁷¹⁸

None of this means historians invariably talk right over or past each other. As covered in more detail in the sections below, historians – like lawyers – learn much from competing versions and manage to agree on a good many of the essential facts, at times also on certain aspects of the overall interpretation. Natalie Zemon Davis offered a picture strikingly akin to the central analogy in this dissertation: “My image of History would have at least two bodies in it, at least two persons talking, arguing, always listening to the other as they gestured at their books”⁷¹⁹

Argumentative exchange, with persuasion both means and ends. These are key elements in the lawyer’s stock-in-trade, and the historian’s. The whole point of the argument is to persuade someone about something. To do so effectively requires deft handling of the data, starting with the discovery of such facts, a task involving some counterintuitive dimensions.

⁷¹⁷ Theodore Roosevelt, *The Naval War of 1812* (Annapolis, 1987 [1882]), preface, p. xxiii. William James in 1817 had penned that earlier British account, *Naval Occurrences of the War of 1812: A Full and Correct Account of the Naval War Between Great Britain and the United States of America, 1812-1815* (London, 2004 [1817]), in reaction to American triumphalist accounts of the conflict.

⁷¹⁸ Barbara Weinstein, 2007 *AHA Presidential Address*.

⁷¹⁹ Natalie Zemon Davis, “History’s Two Bodies,” 1987 *AHA Presidential Address*.

(2) While some important evidentiary gaps can exist, overall historians grapple with a considerable surplus of potential evidence

Very deep, very deep is the well of the past. Should we not call it bottomless?
Thomas Mann

One view of historical discovery is that the data are rare and difficult to exhume, largely because so much of human activity goes unregistered in any durable fashion: “The unrecorded past is none other than our old friend, the tree in the primeval forest which fell without being heard.”⁷²⁰ Some of that is purposeful, given certain utilities attendant to muteness: “More history’s made by secret handshakes than by battles, bills and proclamations.”⁷²¹ Of that actually recorded, interested parties have burned, shredded or otherwise destroyed some large portion in various attempts to eliminate whole cultures and/or erase their own nefarious acts. Negligence, rust, mildew, desiccation, insects, natural disaster and accident have also laid waste to immense lots. The sum effect, in this first view, is that with the spoliation (purposeful or not) of much of an already fragmentary body of evidence “[a]ll our knowledge – past, present, and future – is nothing compared to what we will never know.”⁷²²

Perhaps so. But if seas of historical data have evaporated, oceans of potential material yet remain and indeed continue to tide forth, especially where, as discussed below, notions as to legitimate sources liberalize, as they have rather remarkably over the last 150 years. In this second, more common, view of evidence discovery in history, the

⁷²⁰ Barbara W. Tuchman, *Practicing History: Selected Essays* (New York, 1981), p. 26.

⁷²¹ John Barth, *The Sot-Weed Factor* (Garden City, NY, 1960), p. 120.

⁷²² Konstantine Tsiolkovsky (1857-1935), Russian scientist, oft considered the father of modern rocketry. The quoted language is eminently adaptable to history. Similarly, among the more insightful “snowflakes” with which former Secretary of Defense Donald Rumsfeld notoriously blanketed his staff was this note appropriate here: “The absence of evidence is not evidence of absence.”

complexity of human interaction within equally complex and shifting environments yields a practical infinity of usable material.

Historians have long recognized the proliferous nature of their quarry. In the eighteenth century Carlyle lamented, “what mountains of dead ashes, wreck and burnt bones, does assiduous pedantry dig up from the past time and name it History.”⁷²³ In the ensuing era of professionalization, Ranke’s *Zur Kritik neuerer Geschichtsschreiber* and Ernst Berheim’s *Lehrbuch der Historischen Method*⁷²⁴ directed scholars ever after to the archives (“We had made a very essential discovery, the distinction between primary and secondary sources of historical knowledge”⁷²⁵), immensely amplifying the expanse of documents on which to perform philology and critical textual exposition.

As discussed in more depth in Chapter 2, as the focus of history writing broadened from primarily political leaders and institutions, war and religion to include as deep context other social realities, the categories of potentially relevant evidence, and thus data quantity, greatly multiplied, as did the number of possible interpretative lenses. Economic analyses in the wake of Marx, et al. opened for discussion vast troves of potential new data and a provocative new manner of interpreting them. From another angle, Burckhardt’s masterful depiction of the Italian Renaissance transcended politics and economics by treating the period in its entirety, i.e., by explaining how sculpture, painting and architecture both sprung from and helped provide the social context of everyday life. By the 1920s historians could place the astounding scientific and

⁷²³ Thomas Carlyle, as quoted in Beverly Southgate, “Why Dryasdust? Historians in Fiction,” *Historically Speaking* 10:2 (April 2009), p. 12.

⁷²⁴ Roughly translated, *Critique of Modern Historians* and *Manual of Historical Method*, respectively.

⁷²⁵ James Harvey Robinson, 1929 *AHA Presidential Address*.

technological transformations all around them into a context reaching back through the onset of the Industrial Revolution: “It would never have occurred to most nineteenth century historians to include an account of the progress of scientific research and invention in what they called history, but now it ranks with that of Church and State – should mayhap be accorded a larger place than they in reviewing the changes of the last two or three centuries.”⁷²⁶ In the following decades the Annales School exhorted something akin to “whole history,” with particular focus on the rhythms of life and challenges for common people. The approach later labeled “microhistory,” while distancing itself from attempting total histories, adopted much of the Annalist focus on the tracings, real and (sometimes) speculative, of peasant society,⁷²⁷ with legal documents, including those recording encounters with the judicial system, both providing key evidence and suggesting the direction of argument. The 1960s accelerated a still ongoing sweep in which historians both re-evaluate already treated materials and introduce fresh data in support of feminist, ethnic, colonial, psychological, ecological, post-colonial and other perspectival tool sets, with some tendency to contemplate the borders and intersections of more than one at a time.

The deep chords of economic relations (among them the fallout of slavery and other forms of class, race and gender based subservience), the visual and literary arts, the development (and excesses) of science, industry and technology, the rhythms of everyday life, punctuated by interactions with legal systems, the unequal effects of home

⁷²⁶ Robinson, 1929 *AHA Presidential Address*, anticipating to some extent Popper and Kuhn, et al.

⁷²⁷ One claim here is that the norms of peasant societies can be etched in deeper relief by examining outliers and outcasts such as heretics, witches and the like, one specialty of the ever fruitful Carlo Ginzburg. See, e.g., along with the already noted *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (Baltimore, 1980), Ginzburg’s *The Night Battles: Witchcraft and Agrarian Cults in the 16th and 17th Centuries* (London, 1983) and *Ecstasies: Deciphering the Witches’ Sabbath* (Chicago, 1991).

environments in cross-civilization encounters,⁷²⁸ the myriad intersections of all these factors and more, including the “traditional” categories of political and institutional workings, wars, kings and religion – ever more boundless are the pastures of inquiry.

And ever more fertile, if measured by evidence strains rising from them.

Coincident with the diffusion of new topics and fresh argumentative lenses has been an expansion of the types of supporting evidence employed (however contestable). Written documents may remain central on the evidential throne,⁷²⁹ but the royal seat itself has stretched left and right to become considerably more commodious. First, from eras where written evidence does exist, it appears not only as “official” documentation (e.g., birth and death records, state and ecclesiastical court records, royal charters, fiats, writs and other authoritative issuances), but also as inscriptions on monuments and other buildings, on coins and tombs, as literature, as religious commentary, estate maps, personal correspondence, commercial record keeping, even graffiti (and no doubt more).

From the same literate eras historians inspect other material beyond writings. An AHA publication explains that “[b]y ‘documents,’ historians typically mean all forms of evidence – not just written texts, but artifacts, images, statistics, oral recollections, the built and natural environment, and many other things – that have survived as records of former times.”⁷³⁰ Such non-written evidence might be widely available, certainly in

⁷²⁸ See, e.g., Jared Diamond, *Guns, Germs and Steel: The Fates of Human Societies* (New York, 1999): “History followed different courses for different people because of differences among peoples’ environments, not because of biological differences among people themselves.” Ibid., p. 25.

⁷²⁹ “Because they are most often found in texts, the remnants of the past usually present themselves in words.” Appleby, Hunt and Jacob, *Telling the Truth about History*, p. 252. While that statement might seem overloose, it does suggest a sense of the directional and representational immediacy that writings augur (but of course do not always deliver).

buildings, waterworks and roadways of various states of ruin or preservation, but also in tools and weaponry, statuary, paintings, drawings, mosaics and other expressions.

Certain articles of clothing, ornaments and figurines, and even the aesthetic elements of armament and tools may carry religious or other symbolic importance. Period writings, in turn, may help explain the implications of these other materials in political, religious, caste, gender, age, marital status, and other terms.

But sometimes not so decidedly. And to the extent some historians, in the wake of the Annalists, insist that even monographs (somehow not oxymoronically) should provide ever deeper and wider contextual explanations, we return to a central tension in history writing – how to state anything with academic rigor without stating everything arguably relevant thereto. For every noteworthy historic set of events carries its own lineage and set of collateral influences, such that *comprehensive* understanding is a daunting quest. As Michelet intoned, “History is a reconstruction of life in its wholeness, not of the superficial aspects, but of the deeper, inner organic processes.”⁷³¹ All the harder if one accepts, with Warren Sylvester Smith, that “[i]n history there are no real beginnings.”⁷³² Robinson as well, for all his *brio*, seemed to comprehend the extra cost of the impulse to totalize: “Each people at every stage of its civilization owes most of its

⁷³⁰ American Historical Association, *Statement on Standards of Professional Conduct* (wholly revised in 2005; latest amendment January 2011).

⁷³¹ *L’histoire est une résurrection de la vie intégrale, non pas dans ses surfaces, mais dans ses organismes intérieures et profondes.* Jules Michelet, *Histoire de France* (Paris, 1880), pp. iii-iv (Préface de 1869).

⁷³² As quoted in *History News Network*. Smith, a historian of religion, elsewhere elaborated the concept in reference to all story writing, ruing the breakdown of chronological (and other) order in the contemporary era: “In all the narrative forms, the beginning, middle, and end – which were to Aristotle essential to good story-telling – have blended together to become one. Or rather they have become one great middle in a world where beginnings and endings extend into the unknown.” Warren Sylvester Smith, “Of Holy Ambiguity,” *The Journal of General Education* 27:4 (Winter, 1976), p. 258. His mention of Aristotle recalls Ginzburg.

knowledge, skill, art and *mores* to other peoples including those of a very remote past. So national history merges into general history. And without some vivid conception of the whole sweep of civilization national history is likely to be very badly interpreted.”⁷³³ Though Robinson was speaking to a traditional country focus, one can extend the logic to other demarcations of geography, chronology, political regime and the like.⁷³⁴

And the “whole sweep” of civilization extends, of course, to pre-writing epochs, one reason the field boundaries between history and archeology can seem nebulous. Extolled Robinson, typically risking excess: “What was not long ago called prehistory has become honest-to-God history, for few question now that implements, pottery, decoration, ornaments and curiously arranged stones are quite as authentic sources of knowledge as inscriptions. They are indeed more fundamental than writing.”⁷³⁵

One does not need agree on the relative merits or quality of historical materials to reach accord as to what seems their immeasurable quantity. In this respect historians face challenges similar to those burdening lawyers, especially in larger civil cases where significant money amounts or other high stakes⁷³⁶ are in question. There, lawyers typically engage the full range of formal and informal discovery devices. State and federal codes of civil procedure formally direct the disputants’ cooperation in gathering documents (including medical and other expert results) and other case related information

⁷³³ Robinson, 1929 *AHA Presidential Address* (italicized term in original).

⁷³⁴ Santayana described the resulting conundrum thusly: “Historical investigation has for its aim to fix the order and character of events throughout past time and in all places. The task is frankly superhuman.” George Santayana, *The Life of Reason: or the Phases of Human Progress*, Volume 5, *Reason in Science* (New York, 1921), p. 51.

⁷³⁵ Robinson, 1929 *AHA Presidential Address*.

⁷³⁶ A good many “public interest” cases concern important and far-reaching matters. And in some hard-fought private cases the remedies available are non-monetary but still of deep import to the parties.

from each other and from various third parties. In line with those rules, lawyers issue document demands, form and “special” interrogatories and requests for admissions. They conduct depositions of parties, witnesses and experts, some lasting days, and at times requiring deponents to deliver (under subpoena *duces tecum*) yet other documentary evidence, sometimes copious. Deposition testimony is under oath and often concerns the origin and content, at times even interpretation, of any number of writings and other evidence.

Parties may object as to the scale and scope of the evidence sought by claiming, inter alia, that the given request is not “reasonably calculated to lead to the discovery of admissible evidence” or is “unduly burdensome” to the answering litigant. The discovery referee, usually a judge, aims to limit abuse in either direction, i.e., on the one hand, where a party “stonewalls” against producing much of anything potentially useful to the other side or, on the other, where the aim might be to “paper over” the opponent either with numerous, overly broad production demands (and related court briefs), or by producing mountains of documents in reply to requests, where a narrower body would suffice (despite the toll exacted in review, it is somewhat harder to convince a discovery referee that overproduction rather than its opposite is much of a sin). The general trend over decades has been toward liberal discovery regimes, in line with the assumption that more rather than less shared information helps the parties narrow the areas of genuine dispute and better assess the strengths and weaknesses of their cases, all lending a higher likelihood of reaching some livable accord.⁷³⁷ Informal discovery (such as client input, non-deposition interviews, private investigation, background research, forensic

⁷³⁷ An adage in litigation practice is that 90% of disputes never result in a lawsuit and that 90% of lawsuits never reach trial. Much of the logic behind formal discovery is to sustain those figures.

accounting, physical testing, and other expert review) also helps the sponsoring party better explore and comprehend relative merits in case aspects.

All this work results in great piles of records, transcripts, photos, charts, reports, filings and other documents, in some cases requiring an entire room for receipt, storage, organization and retrieval purposes.⁷³⁸ Moreover, as in history, not all evidence is in written form. One illustration is a “construction defect” lawsuit concerning a 100-unit condominium complex, in which case a large portion of the potential evidence might be physical, depending on the issue: water intrusion, ground subsidence, mold invasion, roofing, plastering, glass, electrical or plumbing problems – the full list can be lengthy, with one problem causing parties to search for others, all the more where the various subcontractors attempt to shift blame elsewhere (water leakage might, for example, have several explanations). Railway and shipping incidents, disputes over land boundaries and water rights, industrial plant failures, and questions about artwork all relate to artifacts and other physical evidence outside of writings.

However, a great deal of the description and analysis of conditions, actions, events, plans, charts, photographs, measurements, schematic diagrams and tests, as well as oral testimony by eyewitnesses and experts, eventually reduces to written form in reports and transcripts. In law, as in history, writing is the principal medium, or at least *primus inter pares*. Might it be that the only profession as steeped in and dealing in as many evidentiary documents as law is, again . . . history?

⁷³⁸ Electronic data storage and transmission has not yet proved to reduce significantly the amassing of paper in law offices, and perhaps not for historians either. In fact, digitalization overall works to magnify the volume of potential historical data – powerful computerized search mechanisms and algorithms can probe distant and far flung data bases with deep and diverse contents, offering historians more material than ever.

Very few are the documents that speak for themselves.⁷³⁹ Exercises to establish document authenticity only add yet more material to the evidence pile. Setting aside for now the thorny issue of fact verification (addressed in Sections 4 and 7, *infra*), the *interpretation* of surviving fact constellations is the key task for lawyers and historians. As Robinson noted, even the general acceptance of the authenticity of documents is only a partial step to good historical understanding of their importance. For that, one must distinguish “the face and appearance” of human actions from “what at all times has been carrying on.” Robinson explained how the difference is not always easy to discern: “What we formerly deemed especially authentic were ‘documents’ – the Rule of St. Benedict, Charlemagne’s Capitularies, Magna Carta, the French Declaration of the Rights of Man, the amendments to the Constitution of the United States. Are these examples of the ‘face and appearance’ of things or of what was ‘carried on’ under them?”⁷⁴⁰

Thus, the plain text of a document, even where decipherable as to intended meaning, tells little about the actual influence of the document in human affairs. And often, maybe more often than not with older writings, the text is not facially unambiguous, begging reference to commentary and circumstances beyond the documents to uncover its essence and importance. A recent AHA publication speaks to interpretative approaches in either case: “We honor the historical record, but understand that its interpretation constantly evolves as historians analyze primary documents in light of the ever-expanding body of secondary literature that places those documents in a

⁷³⁹ Even in law, the rule of evidence known as *res ipsa loquitur* (“the thing speaks for itself”) is a *rebuttable* presumption or inference of negligence. See *Black’s Law Dictionary*, Fifth Edition (St. Paul, MN, 1979).

⁷⁴⁰ Robinson, 1929 *AHA Presidential Address*.

larger context.” In this sense, some secondary literature⁷⁴¹ is also evidentiary material.⁷⁴² One way to think about the “larger context” it provides is to consider its rough equivalent in the law: “circumstantial evidence.” That legal term seems to confuse the lay public, which tends to assign it a lower status than primary or “direct” evidence. But as law professors David Binder and Paul Bergman affirm, “[a]lthough there is a logical distinction between direct and circumstantial evidence, the law does not value one more highly than the other.”⁷⁴³ Why? Because “in reality all evidence is subject to the frailties of circumstantial evidence . . . acceptance even of direct evidence requires inferences.”⁷⁴⁴

In history as well, one looks, for example, not only to writings issued around the time of a key document or event, but also to other clues (about overall circumstances), some of them amassed through good scholarship in the interim. Donning his double hat of historian-historiographer, Ginzburg confirmed the double directional nature of context: “Historical knowledge, obviously, involves the construction of documentary series But the *hapax legomenon* [that which is documentarily unique], strictly speaking, does not exist. Any document, even the most anomalous, can be inserted into a series. In addition, it can, if properly analyzed, shed light on still-broader documentary series.”⁷⁴⁵ Again, the full historical importance of an item or event in isolation is rarely, if ever, self-

⁷⁴¹ The AHA defines secondary literature as “all subsequent interpretations of those former times based on the evidence contained in primary documents.” *AHA Statement on Standards of Professional Conduct*.

⁷⁴² I am suggesting that *all* secondary literature in history is akin to circumstantial evidence. It seems reasonable to posit as a general rule that the more recent the commentary, and greater distance in time from the core material discussed, the less likely the later writing can be considered evidence rather than something more like opinion or argument, however well founded.

⁷⁴³ Binder and Bergman, *Fact Investigation: From Hypothesis to Truth* (St. Paul, MN, 1984), p. 80.

⁷⁴⁴ *Ibid.*, pp. 79-80.

⁷⁴⁵ Carlo Ginzburg, “Microhistory: Two or Three Things I Know About It,” *Critical Inquiry* Vol. 20, No. 1 (Autumn 1993), p. 21.

evident. Efforts to give fuller dimension bring further material into evidence, with that material in turn subject to contextual scrutiny, such that the yield of potentially employable data quickly and exponentially mounts.

Among those data are materials that straddle standard classifications. A later portion of the aforementioned AHA passage acknowledges that “determining whether a document is primary or secondary largely depends on the questions one asks of it.”⁷⁴⁶ For example, the collection of 85 articles and essays now cited as the *Federalist Papers*⁷⁴⁷ arguably comprises both secondary and primary and material. The Papers give considerable context to the issues surrounding the eventual ratification of the U.S. Constitution, including concerns about its likely effects. But to comprehend the Papers as primary documents in their own right one might contemplate the biographies (and aspirations) of the principal authors, as well as a host of factors alluding to the inadequacies of the preceding Articles of Confederation, and how the terms of the Articles reflected American suspicions of centralized power reaching back through the Revolutionary War to the long colonial experience, before that the circumstances behind emigration to the New World, before and collateral to all that . . . yet more explanatory conditions and occurrences.

Boundary straddling in classifying primary or secondary sources (and thus further expansion of potential evidence) occurs in forward time also. Fourteen years after ratification a critical aspect of the Constitution came to the forefront in the landmark

⁷⁴⁶ AHA *Statement on Standards of Professional Conduct*.

⁷⁴⁷ First published all together as *The Federalist: A Collection of Essays, Written in Favour of the New Constitution as Agreed Upon by the Federal Convention, September 17, 1787* (New York, 1788). The moniker *The Federalist Papers* apparently arose much later, perhaps even in the twentieth century.

1803 Supreme Court case, *Marbury v. Madison*,⁷⁴⁸ the Supreme Court therein asserting the power of judicial review as to the constitutionality of acts of the other federal branches. In terms of primary or secondary sources, was Chief Justice Marshall's written decision more in the realm of secondary commentary exploring and helping to explain the "primary" document (the Constitution) or is it equally well considered primary material in its own right, with an important body of contextual material attaching to it (the written decision) both backward and forward in time? Marshall, after all, retrospectively was heir to the legacy of circumstances suggested in the prior paragraph, but he also post-*Marbury* issued case language⁷⁴⁹ and newspaper articles⁷⁵⁰ more expansively elucidating the themes earlier raised in *Marbury*.

The Constitution and John Marshall tale (in the interest of space, very abbreviated here) is a microcosmic example of how law joins a great many other disciplines both in its reliance on history and in how the playing out of such reliance works to generate new waves of historical facts and context (it also illustrates an earlier point herein, that so much of history concerns law). But the overarching purport of this larger subsection 2 is that the evidential corpus regarding any historical topic quickly mushrooms with each new reach of depth or compass investigated.

Further, connate and running parallel with the issue of constantly expanding and confounded primary and secondary data in history, is an embrace of gradually wider sets of data qualifying as historical evidence. As noted in Chapter 2, *supra*, the notion of

⁷⁴⁸ 5 U.S. (1 Cranch) 137, 2 L.Ed. 20 (1803).

⁷⁴⁹ *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 4 L.Ed. 579 (1819).

⁷⁵⁰ Through articles entitled "A Friend of the Constitution" Marshall explained and defended the reasoning in *McCulloch* and, by extension, in *Marbury v. Madison*. See Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland* (Stanford, 1969).

what kinds of tracings historians deem worthy is a moving target. Few would see contraction here; some of what were once peripheral considerations now receive treatment as core materials. A short and incomplete list of such later arrivals could include “the family, the human body, relations between the sexes, cohorts, factions, charisma”⁷⁵¹ as well as paintings and photographs, trial transcripts, folklore, ethnicity, forgeries, statistics and other quantitative views on practically everything (much aided by computer technology), maps, witchcraft, business practices, local histories, writings by common people (e.g., to flesh out or perhaps contravene generals’ accounts of armed engagements, extemporaneous battle notes by lower-level officers, even personal letters from foot soldiers), dendrochronology, attitudes and *mentalités*, etc. – in short, historical evidence in the prosaic guise as much as the exceptional, with no few edifying instances of the hybrid, i.e., the “exceptional normal.”⁷⁵² The historian’s seemingly “current” appreciation of the quotidian has to some extent validated Carlyle’s nineteenth century assertion that “History is the essence of innumerable biographies,”⁷⁵³ itself echoing Shakespeare’s byword and *modus operandi* for playwriting offered centuries earlier yet: “There is a history in all men’s lives.” Virtually endless material, then, for historical research and writing.

Some final comments about evidentiary abundance in history also spring from the other great narrative arts. Robinson, in line with Burckhardt, et al., urged the exploitation of “a class of sources which historians have eagerly used when they had them but which

⁷⁵¹ Ginzburg, “Microhistory,” p. 19.

⁷⁵² Ibid., p. 33, with Ginzburg crediting Edoardo Grendi, “Micro-analisi e storia sociale,” *Quaderni storici* 35 (August 1977), p. 512.

⁷⁵³ But not of course Carlyle’s best known formulation: “The History of the world is but the Biography of great men.” Thomas Carlyle, *On Heroes, Hero-Worship, and the Heroic in History* (London, 1841), p. 47.

seemed to lack the authenticity of documents. I refer of course to those writings of the past classified as [literary] literature.” Literary works can be locations for historical tracings in meager supply elsewhere and, because of their inherently expressive nature, can breathe life and understanding into the face of other remains: “Our knowledge of the ancient Hebrews, Greeks, and Romans would be scanty indeed were it not amplified by such portions of their respective literatures as have escaped destruction.” Robinson prophesized that “[f]uture historical writers when they come to describe our own days will be forced to assign the modern novel a high place in the hierarchy of sources.”⁷⁵⁴ Indeed, among the novelists, playwrights and poets at the forefront in Robinson’s era were luminaries of modernism Proust, Joyce, Woolf and Eliot, who collectively challenged (among other matters) the pretense of the third person omniscient voice so dominant in traditional narratives – history included – by centering more the narrator’s internal thought processes, the *monologue intérieur*. History commentators in our own era picked up that trail in, for example, White’s comparison of the *monologue intérieur* with the “middle voice” of classical Greek (see Barthes’ “I write myself”) to interrogate the traditional subject-object distinction. And experimenting with the modernist literary form as adapted directly to history writing, Schama suggested (see again Chapter 2, Section 7, *supra*) that historians at times consciously – or less so – insinuate elements of autobiography into their work.⁷⁵⁵ Literature, then, has provided inspiration and means for historians to contemplate further layers of evidence about evidence.

⁷⁵⁴ All three passages from Robinson come from his 1929 *AHA Presidential Address*.

⁷⁵⁵ Schama, *Dead Certainties*, and a later work largely about mental and psychological maps and history: *Landscape and Memory* (New York, 1995).

It is not just those historiographers beset with what Ginzburg called “skeptical euphoria”⁷⁵⁶ who can countenance the thrust of the paragraph above. Ginzburg himself, later musing on his motives in penning *The Cheese and the Worms*, conceded: “Gradually I came to realize that many events and connections of which I was totally unaware contributed to influencing the decision that I thought I had made independently.”⁷⁵⁷ Among other ends, the book reflected a personal effort to grasp “the relationship between research hypotheses and narrative strategies.”⁷⁵⁸ And out of that critical nexus⁷⁵⁹ or so this writer accepts, arises a fresh category of evidence – the history of the given history project itself, and especially its evidential challenges. For Ginzburg, “[t]he *obstacles* interfering with the research were *constituent elements of the documentation* and thus had to become part of the account; the *same for the hesitations and silences* of the protagonist in the face of his persecutors’ questions – or mine.”⁷⁶⁰

Such language acknowledges how the investigator’s very efforts catalyze in some fashion an alteration both of the account itself (as in modernist literature) and of the body and nature of the evidence therein. I state “body and nature” as part of a full-circle return to the opening paragraph of this subsection, i.e., to reintroduce, in line with Ginzburg, the notion of *silences* as promising historical data. If we allow that “reality is fundamentally discontinuous and heterogeneous,”⁷⁶¹ we can likewise recognize how lacunae aid

⁷⁵⁶ Ginzburg, “Microhistory,” p. 31.

⁷⁵⁷ Ibid., p. 23.

⁷⁵⁸ Ibid.

⁷⁵⁹ An intersection I explore at some length in Sections 5 and 6 later in this chapter.

⁷⁶⁰ Ginzburg, “Microhistory,” pp. 23-24 (italics added for emphasis).

perception of the wider assemblage, in much the same way that rests in music help inform the notes, and *oscuro* in painting and photography the *chiaro*.

Thus, the late Haitian anthropologist-historian Michel-Rolph Trouillot's charge that "[a]ny historical narrative is a bundle of silences"⁷⁶² is also an invitation to examine evidence surrounding the *fact of the gaps* to explore why and how the silences exist. It seems to me that while sometimes, of course, it is just rust,⁷⁶³ quite often it is a function of power disequilibria (who gets to record – or keep from recording⁷⁶⁴ – and who gets to interpret – or subdue – what, and why). Other times yet it is rust *because* of some disequilibrium (who gets to *preserve* what, and why).⁷⁶⁵

Finally, we might think of forgery and falsity – and mistake – as other hybrid cases of silence in history. Purposefully false documents of any variety (including, e.g. art forgeries) are shrouded in lies either express or silent (or both) – anti-facts, maybe, but still evidence – as to motivations and means. “Above all,” Bloch emphasized, “a fraud is, in its way, a piece of evidence.”⁷⁶⁶ Other documents contain less willful mistakes

⁷⁶¹ Ibid., p. 27.

⁷⁶² Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Boston, 1995), p. 26.

⁷⁶³ As Freud (at least apocryphally) quipped – “Sometimes a cigar is just a cigar.”

⁷⁶⁴ In this vein, some point to strategic data prevention and suppression as integral to the Shoah: “the Nazis took every precaution and care to leave no trace, no documents, photographs or ruins . . . to erase the Jews not only from the face of the earth, but also from history, memory, past and future.” Peter Klepic, “Lyotard and the ‘Second Copernican Turn,’” *Filozofski vestnik*, Volume XXV, No. 2 (2004), p. 166, paraphrasing Gérard Wjacman, “L’art, la psychanalyse, le siècle,” in Aubert, Cheng, Milner, Regnault, Wajcman, *Lacan, l’écrit, l’image* (Paris: Flammarion, 2000) and Gérard Wjacman, *L’objet du siècle*, (Paris: Verdier, 1998).

⁷⁶⁵ Paul Valéry seemed to agree with all those points: “Books have the same enemies as people: fire, humidity, animals, weather, and their own content.”

⁷⁶⁶ Marc Bloch, *The Historian’s Craft*, p. 77. Moreover, “[w]ith ink, anyone can write anything.” So Bloch quoted an eleventh century lawsuit defendant as an introduction to several notable frauds: errors and omissions in Caesar’s *Commentaries*, a fake charter of Charlemagne to the church at Aix-la-Chappelle, *The Protocol of the Elders of Zion*, the false privileges of the See of Canterbury and of the Duchy of Austria,

resulting from an incomplete view of the events, hazy memory, or imprecise language or other ineptitude. Or an earlier researcher-commentator, wrestling with the evasiveness of locution over time, space and caste, may have committed errors in translation or otherwise misread the material.⁷⁶⁷ In certain cases in law and history alike, to retrace and restamp the explanatory trail, it is crucial and sometimes decisive to detect false, misleading or mistaken documents and to interrogate the silences within. As with every other evidence category, the exercise of unmasking subterfuge or mistake must resort to fuller context – again, circumstantial evidence – thus triggering an(other) expanding spiral of potential expository material.

In sum, the usable data-scape is as rich as the historian elects. Every intriguing find among archives and artifacts begs further evidence as to context and circumstance. Gaps, discontinuities, falsities and mistakes may hold clues (and effects) as important as those found in tangible and (ostensibly) linear material. In that respect, we might think of silences as comprising the historical dark matter that underlies and helps bind ever-swelling galaxies of more easily discernable bodies of evidence.

All of which underscores a gnawing predicament – must one try to recount the history of everything in order to make an authoritative statement about something historical in particular? Bury’s formula, “[a] complete assemblage of the smallest facts of human history will tell in the end,”⁷⁶⁸ betrayed the presumptuousness (and naïveté) of

the Dreyfuss affair forgeries, and the “extraordinary literary concoction known as Donation of Constantine.” Ibid., pp. 66-81. Ginzburg devoted an entire lecture (later published) on that last example – “Lorenzo Valla on the ‘Donation of Constantine’” in Ginzburg, *History, Rhetoric, and Proof*, pp. 54-70.

⁷⁶⁷ Vagaries of language and/or mistakes in translation have always been a recognized concern in history, in some ways akin to challenges in translating trade verbiage (“terms of the trade”) across fields in a lawsuit.

⁷⁶⁸ J.B. Bury, *An Inaugural Lecture: The Science of History* (Cambridge, 1903), p. 31.

the scientific movement. Robinson later articulated (without necessarily endorsing its pursuit) the logical extreme of whole history: “In its amplest meaning History includes every trace and vestige of everything that man had done or thought since he first appeared on earth.”⁷⁶⁹ Acting more the censor, Bernard Bailyn in 1981 offered a trenchant and telling anecdote as to the dilemma and stakes:

A poignant moment in modern historiography was reached recently when an encomiast of the *Annales* school, contemplating in rapt admiration Fernand Braudel’s adaptation of Lévi-Strauss’s three-level general communications theory, concluded that in the end, when the whole business was brought up to date and put into historiographical operation, there would be “16,777,216 subsystems” – no big job for a decent computer to handle, the author assures us. But one small problem remains: “who,” he asked, “would read the enormous number of printouts?”⁷⁷⁰

(3) Limited resources force historians to be data selective

History never embraces more than a small part of reality.
François de La Rochefoucauld⁷⁷¹

What historian – what constellation of historians – aspires “a complete assemblage of the smallest facts of human history . . . every trace and vestige of everything that man had done or thought” (much less an analysis of 16,777,216 subsystems)? Even the kernel of such a fantasy withers from resource starvation far short of germination – no historian, nor any intended audience, possesses the means for that sort of olympian-quixotic campaign. As in the parable Bede (in 731) recounted about a sparrow briefly passing through a banquet hall,⁷⁷² the situation of humans in a time-space continuum prevents

⁷⁶⁹ James Harvey Robinson, *The New History: Essays Illustrating the Modern Historical Outlook* (New York, 1912), p. 1.

⁷⁷⁰ Bernard Bailyn, “The Challenge of Modern Historiography,” 1981 *AHA Presidential Address*.

⁷⁷¹ Carl Bridenbaugh, “The Great Mutation,” 1962 *AHA Presidential Address*.

their consciousness of the historical universal. Bede understood this is the realm of religion and other metaphysics. Historians thus acknowledge La Rochefoucauld and rightly aim a bit lower.

For a common-sense understanding of life realities shows that constraints of money, endurance, focus, capabilities, enthusiasm and other resources also limit the scope and scale of historical explorations. As do professional duties and outside interests and demands. Academic historians attend departmental and division meetings, serve on committees, teach specialty topics to undergraduates and graduates, in the latter case including at times historiography, deliver and attend lectures outside the classroom, grade papers, serve as graduate student advisors and dissertation committee members, attend conferences and symposia, draft letters of recommendation, pen book reviews, edit journals, read copiously just to keep anything close to current,⁷⁷³ and so on. We must assume that most historians (some large percentage outside the university), also tend to some mix of various personal obligations, chosen activities, and normal needs: significant others, children and extended family, friends, volunteer work, worship or

⁷⁷² “The present life of man, O king, seems to me, in comparison of that time which is unknown to us, like to the swift flight of a sparrow through the room wherein you sit at supper in winter, with your commanders and ministers, and a good fire in the midst, whilst the storms of rain and snow prevail abroad; the sparrow, I say, flying in at one door, and immediately out at another, whilst he is within, is safe from the wintry storm; but after a short space of fair weather, he immediately vanishes out of your sight, into the dark winter from which he had emerged. So this life of man appears for a short space, but of what went before, or what is to follow, we are utterly ignorant. If, therefore, this new doctrine contains something more certain, it seems justly to deserve to be followed.” *Ecclesiastical History of the English People*, Book II, Chapter 13. Bede was recounting the words of Coifi, a counselor to Edwin, king of Northumbria, reinforcing the persuasiveness of an overture the missionary Paulinus had made in the (successful) hope of converting Edwin to Christianity.

⁷⁷³ Novick noted how the proliferation of historical works in every subfield has made keeping fully up to date in even a single one of them increasingly hard to manage: “[S]tarting in the sixties, came the flood: by the seventies there were approximately as many American academic works on [for example] modern European history published each year as there were on the total ‘backlist’ in 1960. The old assumption that a hardworking student should have a comprehensive grasp of the literature of a major field was hopelessly out-of-date.” Novick, *That Noble Dream*, p. 582.

other voluntary associations in the community or elsewhere, exercise/recreation, vacations and travel (even if somehow lending to history writing), medical, dental and vision care, health matters overall, including occasional illness of oneself or others, investments, tax planning, shopping, cooking and other household tasks, pleasure reading and other entertainment, political activism and, again, so on. Somehow the historian must find time and space and clarity of mind to ponder, hypothesize, research, debate, compare, write and, in pursuing publication, rewrite.

And what of the intended or likely consumers of historical works? They fall in several categories. The primary readers for a good deal of the work by professional historians are discipline colleagues (first among those are fellow subspecialists), who of course have the same mix of cross-pressures noted just above, as do academics from other disciplines who find the given works intriguing. Others – policymakers reading history for background relevant to current concerns, students encountering historical works in their course assignments or independent research, history *aficionados* (non-professional) of various stripes, casual general interest readers – each contend with numerous demands on their intellectual bandwidth, and with social, recreational and family allures and cross-pressures.⁷⁷⁴

In short, historians and history readers have in common real resource limits, particularly as to *time*, such that the denser and more exhaustive the historical work, the more reticence (or least for non-professionals) to select and read it, much less engage with it analytically and reflectively. Another way to think about that essential tradeoff is

⁷⁷⁴ Moreover, the lay public can chafe under and thus mock cases of too many perplexing obscurities in history. Nineteenth century American humorist Artemus Ward exploited such sentiments with this irreverent poke: “The researches of many eminent antiquarians have already thrown much darkness on the subject; and it is possible, if they continue their labors, that we shall soon know nothing at all.”

to look at the types of histories actually written – as a general rule they cover topics either widely cast but epidermoid, or narrower but more penetrative.

At either end of the continuum, or for any case between, the diligent historian's task is daunting. The research alone can be a feat of astonishing perspicacity. Consider Gibbon, recalling the arduous course of guided induction that eventually led to his 1776 masterpiece *The Decline and Fall of the Roman Empire*:

I insensibly plunged into the Ocean of the Augustan history, and in descending series I investigated, with my pen almost always in my hand, the original record, both Greek and Latin, from Dion Cassius to Ammianus Marcellinus, from the reign of Trajan to the last age of the western Caesars. The subsidiary rays of Medals and inscriptions, of Geography and Chronology were all thrown on their proper objects: and I applied the collections of Tillemont, whose inimitable accuracy almost assumes the character of Genius, to fix and arrange within my reach the loose and scattered atoms of historical information. Through the darkness of the middle ages I explored my way in the Annals and Antiquities of Italy of the learned Muratori . . . till I almost grasped the ruins of Rome in the fourteenth century, without suspecting that this final chapter must be by the labour of six quartos and twenty years.⁷⁷⁵

In what fashion therefore to organize, to reconvey, such a cumulus of knowledge and understanding? The historian's nearly insatiable inquisitorial bent, in the main an admirable trait, hazards what novelist John Barth styled *cosmopsis* – the condition of imagining too many possibilities (thus, too many possible narratives).⁷⁷⁶

Hayden White offered a similar illustration of the conundrum by drawing on Sartre's philosophic novel *Nausée* (1938). There, the protagonist Roquentin

is overwhelmed by the documents; there are just "too many" of them. Moreover, they lack all "firmness and consistency." It is not that they contradict each other, Roquentin says that it is that "they do not seem to be about the same persons."

⁷⁷⁵ Edward Gibbon, *Memoirs of My Life*, George A. Bonnard, ed. (London, 1966), pp. 146-147.

⁷⁷⁶ The term seems to have originated in Barth's 1958 novel *The End of the Road* (Garden City, NY, 1958), applied to character Jacob Horner, who lingered all night in a train station because he could not select from among the several possible destinations, even though he had enough resources (ticket money) for any one.

And yet, Roquentin notes in his diary; “Other historians work from the same sources of information. How do they do it?”⁷⁷⁷

White noted that for Sartre (and White seemed to have some sympathy for this position), “the past is what we decide to remember of it; it owes no existence apart from our consciousness of it.” Upon those shifting sands White assembled his 4-4-4-4 tropic construct, i.e., that any given historical work necessarily follows one of a limited number of narrative blueprints. The implication is that a historian’s adherence to any narrative blueprint requires the selection of some factual elements as more fitting than others for the given construct (recall that Jameson had equated historical facts with building bricks⁷⁷⁸). However, White’s quotation of Sartre stopped short of claiming that no fully discoverable historical facts exist. Even anti-relativist historians who find the overall Whitean approach anathema can find common ground here – one does not need to discuss tropics to agree that historical works necessarily segment lived reality.⁷⁷⁹ For the historian (and lawyer), data infinity is tantamount to anarchy, a state just as vexing to traditionalists as to supposed relativists. Quipped Schlesinger: “The passion for tidiness is the historian’s occupational disease.”⁷⁸⁰

Attendant to a taste for order are the triple realities of time, endurance and cognition. The Gibbon quote one page above hints how a historian could pass exhausting

⁷⁷⁷ White, *Tropics of Discourse*, p. 38.

⁷⁷⁸ See Chapter 1, footnote 51, *supra*.

⁷⁷⁹ As for chronological segmentation, for example, French philosopher Henri Louis Bergson (1859-1941) had earlier offered some influential thoughts on “duration.” Bergson believed the intellect tries to accommodate the continuous flow of experience by parceling time into artificially discrete “moments.” Any contemplated teleology from considering history is also false and overly deterministic. Bergson’s emphasis instead on the *élan vital* (intuition and instinct over matter and reason) places him within a lengthy anti-intellectual arc in French philosophy from Rousseau through Derrida. See, e.g., Bergson, *Time and Free Will: An Essay on the Immediate Date of Consciousness* (London, 1910).

⁷⁸⁰ Arthur M. Schlesinger, Jr., cited widely; see, e.g., *Active History* (activehistoryuk.co.uk).

decades in the archives, on field expeditions, in the supporting literature, etc. (and perhaps even die from the effort⁷⁸¹) and still absorb only a fraction of the arguably relevant data. And those discoverable with varying degrees of zeal reveal themselves in ponderously complex array:

Historians cannot comprehend all the variables bombarding a single event. Human beings participate in a dense circuitry of interacting systems, from those that regulate their bodily functions to the ones that undergird their intellectual curiosity and emotional responses. A full explanation of an event would have to take into consideration the full range of systematic reactions.⁷⁸²

No historian realistically aspires to total inclusiveness, *expansio ad absurdum*: “Not ever doing that, history-writing implicitly begins by concentrating on those aspects of an event deemed most relevant to the inquiry.”⁷⁸³ Even Bloch, one of the founders of the Annales “whole history” approach, conceded: “Like any scholar, like any mind which perceives at all, the historian selects and sorts.”⁷⁸⁴

Disentangling and then recounting the key threads are exercises in prudent discrimination, whereby the historian first chooses and then works within a *cadre* or framework. According to Beard:

[A]ny written history involves the selection of a topic and an arbitrary delimitation of its borders – cutting off connections with the universal. Within the borders arbitrarily established, there is a selection and organization of . . . things deemed necessary and of things deemed desirable. The frame may be a narrow class, sectional, national, or group conception of history, clear and frank or confused and half conscious, or it may be a large, generous conception . . . Whatever its nature the frame is inexorably there, in the mind.⁷⁸⁵

⁷⁸¹ A possibility Schama raised in the Francis Parkman case he examined in *Dead Certainties*. See again Chapter 2, Section 7, *supra*.

⁷⁸² Appleby, Hunt and Jacob, *Telling the Truth about History*, p. 253.

⁷⁸³ *Ibid.*, p 253.

⁷⁸⁴ Bloch, *The Historian's Craft*, p. 119.

As for common grids, until at least mid-century, the majority of writing focused on the “traditional geographical-chronological fields of history (ancient, medieval, modern, American, English, etc.)”⁷⁸⁶ with perhaps greater focus on some particular aspect (e.g., formal political activity) therein. The interim period has brought a multiplicity of new (or at least newly acknowledged) subfields. One measure of the magnitude of the trend is self-identification and group affiliation. According to Novick, “[b]y the early 1980s there were seventy-five specialist historical organizations affiliated with the AHA; many more, including some of the most important, with no formal affiliation.”⁷⁸⁷ Practitioners from each grapple with the question of appropriate borders. Variation, specialization, compartmentalization, fragmentation, whichever the label, each entails segmentation.

But even within some narrower segment, traditional or otherwise, historically interesting life is so rich and dense that abridgment is a constant reality. As Kuhn, for example, noted in the preface of his own masterpiece, “[f]ar more historical evidence is available than I have the space to exploit below.”⁷⁸⁸ E.L. Woodward some years earlier had good-humoredly complained, “an attempt to write the history of England in 65,000 words is like trying to pack the crown jewels into a hat-box!”⁷⁸⁹ Outside of narrowing monographic focus *reductio ad absurdum*, how then to proceed?

⁷⁸⁵ Charles Beard, 1933 *AHA Presidential Address*.

⁷⁸⁶ Gottschalk, 1953 *AHA Presidential Address*.

⁷⁸⁷ Novick, *That Noble Dream*, p. 580.

⁷⁸⁸ Kuhn, *The Structure of Scientific Revolutions*, p. xi of the preface to the 1970 version.

⁷⁸⁹ E. L. Woodward, *History of England*. In a review thereof by Richard Pares, *The Economic History Review*, New Series, Vol. 1, No. 1 (1948), pp. 79-81

*The historian amputates reality.*⁷⁹⁰ Salvemini's pronouncement was less a rebuke than an observation of necessary behavior. For such truncation is inextricably bound with and unavoidably flows from the historian's thought processes, outlook, purposes, goals – i.e., *argument* (as defined in Section 1, *supra*). For Beard:

[E]very written history – of a village, town, county, state, nation, race, group, class, idea, or the wide world – is a selection and arrangement of facts, of recorded fragments of past actuality. And the selection and arrangement of facts – a combined and complex intellectual operation – is an act of choice, conviction, and interpretation respecting values, is an act of thought. Facts, multitudinous and beyond calculation, are known, but they do not select themselves or force themselves automatically into any fixed scheme of arrangement in the mind of the historian. They are selected and ordered by him as he thinks.⁷⁹¹

As the historian thinks. The process of selection involves (at least) the elements of interests, theory, values and purpose/agency. In his work on philosophy of history W.B. Gallie (1912-1998) spoke to some of that overlap:

The historian . . . selects his data because of his interest in some individual person or institution or nation; so that his data may include any event, no matter how rare or bizarre, which helps him to understand that particular individual. Alternatively we can say: the historian's selection is guided by his idea of what was of value – of interest and importance – both *to* and *about* the individual he is studying; so that his principle of selection is the individual conceived as the centre of a network of values⁷⁹²

John Barker likewise ties selectivity to purpose and principles: "History is what the historian chooses from the facts to include and emphasize in his work, and his findings reflect questions of the era in which he lives as well as his personal convictions."⁷⁹³

⁷⁹⁰ Gaetano Salvemini, *Historian and Scientist: An Essay on the Nature of History and the Social Sciences* (Cambridge, MA, 1939), p. 60. Salvemini (1873-1957) was an Italian historian who wrote extensive anti-Fascist critiques employing economic and social analyses.

⁷⁹¹ Charles A. Beard, 1933 AHA Presidential Address.

⁷⁹² W.B. Gallie, *Philosophy and the Historical Understanding* (New York, 1968), p. 16 (italics original).

⁷⁹³ John Barker, *The Superhistorians: Makers of Our Past* (New York, 1982), Preface, p. xiv.

Again, then, the historian emerges as something of an agent, whose terms of agency are interrelated with the logic of strategic selectivity. And of course the strategic obverse is *de*-selection. If effective history writing entails, as Gottschalk held, “the careful analysis of testimony and the compact presentation of the results,”⁷⁹⁴ then a key skill is thoughtful omission. White’s accord does not surprise: “[T]here are always more facts in the record than the historian can possibly include in his narrative representation of a given segment of the historical process. And so the historian must ‘interpret’ his data by excluding certain facts from his account as irrelevant to his narrative purpose.”⁷⁹⁵ At roughly the same time, French-American cultural historian Jacques Barzun noted, “[t]here can be no history without the gift of knowing what to leave out . . .”⁷⁹⁶ thereby echoing the statement several decades earlier by British legal historian James Bryce: “The secret of historical composition is to know what to neglect.”⁷⁹⁷

The last three quotations acknowledge, even embrace, the historian’s practice of strategic deselection, i.e., *purposeful* omission. Historians with an instinct to protest such assertion risk self-categorization as agents unwittingly succumbing to a subliminal choice cascade. As philosopher Daniel Dennet explained regarding the frontiers of self-awareness and agency in investigations: “in many cases our ultimate decision as to which way to act is less important phenomenologically as a contributor to our sense of free will than the prior decisions affecting our deliberation process itself: the decision, for

⁷⁹⁴ Louis Gottschalk, 1953 *AHA Presidential Address*.

⁷⁹⁵ White, *Tropics of Discourse*, p. 51.

⁷⁹⁶ Jacques Barzun. “History: The Muse and Her Doctors.” *American History Review*. February 1972.

⁷⁹⁷ James Bryce, *Studies in Contemporary Biography* (New York, 1903), p. 393. Bryce was Regius Professor of Civil Law at Oxford from 1870-1893. Some of his lectures, largely centered on the history of Roman law, were published as *Studies in History and Jurisprudence* (New York, 1901).

instance, not to consider any further, to terminate deliberation; or the decision to ignore certain lines of inquiry.”⁷⁹⁸ Presumably, most historians would rather accept the mantle of an agent for a viewpoint via intentional and calibrated selection/deselection than to maintain they obliviously winnow and sort.

Historians themselves have supplied at least two analogies to illustrate the selectivity/deselectivity aspect of the law practice analogy central to the present essay. Both concern the making of images – paintings and maps – synopsisized to reflect the maker’s values and communicative priorities. As to the former, Lewis Namier submitted:

The function of the historian is akin to that of the painter and not of the photographic camera: to discover and set forth, to single out and stress that which is the nature of the thing, and not to reproduce indiscriminately all that meets the eye. To distinguish a tree you look at its shape, its bark and leaf; counting and measuring its branches get you nowhere. Similarly, what matters in history is the great outline and the significant detail; what must be avoided is the deadly morass of irrelevant narrative.⁷⁹⁹

Namier’s comparison has some defects. There is Namier’s seeming era-bound naïveté as to photographers’ painter-like tools and ends, i.e., the degree to which they can and do massage or otherwise select the subject matter, setting, cultural cues, pose, props, framing, lighting, focus, contrast, saturation, processing and titling, etc. of the image for the desired expressive effect, whether social, artistic, utilitarian, spiritual, ideologic, or some other manifestation of function, intention and authorship.⁸⁰⁰ Further, in stressing the historian’s need to avoid drowning in irrelevancies, Namier sidestepped the issue of

⁷⁹⁸ Daniel Dennet, *Brainstorms: Philosophic Essays on Mind and Psychology* (Cambridge, 1981), p. 297.

⁷⁹⁹ Lewis Namier, *Avenues of History* (London, 1952), p. 8. It does not inherently follow that “History is therefore necessarily subjective and individual.” Ibid.

⁸⁰⁰ The critical literature here concerning the move from the totalizing teleology of “straight” photography (or “photographic exceptionalism”) is plenteous and deep. A starting inquiry might include Douglas R. Nickel, “History of Photography: The State of Research,” in *The Art Bulletin*, Vol. 83, No. 3 (Sept., 2001), pp. 548-558. The phrase “function, intention and authorship” appears in Nickel at page 551.

whether deselection also might repress *relevant* material – relevant perhaps to some other interpretation – and whether the given author is the sole arbiter of either/both relevance and inclusion/exclusion (Sections 7 and 8, *infra*, revisit these issue cousins). These flaws notwithstanding, Namier’s historian as painter model does support the idea of admission and omission as a function of overall narrative strategy in support of an argument.

The second analogy (within my larger analogy) is Southgate’s comparison of selectivity in history writing to that in cartography:

Maps have long been considered to be ‘objective’ representations of the physical world But now they appear as something rather more complicated . . . presenting an inevitably partial representation of space from an inevitably partial ideological position For, as with any literary description and or pictorial representation of the external world, a map is drawn from a certain viewpoint, from a single chosen position; and the choice of that position is significant. It reveals in short what the map-makers think is important, for it enables them to include and exclude, and to express relationships between places and spaces according to their own (often unstated) criteria. In a sense, then, cartographers classify, categorise, and even define, their own material; and beneath the cloak of description lies (however invisible) a whole body of judgment.⁸⁰¹

Here again we sense how the deep currents of viewpoint, self-aware or not, drive the acts of inclusion and exclusion so vital to description. Also reappearing is language treating “judgment” less in the “neutral” (judicialist) sense of verdict than in the broader spirit of an advocate’s discerning sort-through and presentation of likely persuasive evidence in support of the argued interpretation.

Finally, silences and lacunae, as established in subsection 2, *supra*, may carry notable evidentiary weight and therefore are also subject to the historian’s selection or deselection logistics. It is, of course, rather easier to omit discussion of absences. Still, if

⁸⁰¹ Southgate, *History: What & Why?*, pp. 6-7. Southgate was referring more specifically to how the reassessment of geographic representations under post-colonial analyses ran parallel to post-colonial reassessments in history more generally.

we agree with Susan Sontage that “silence remains, inescapably, a form of speech,”⁸⁰² then *silence about the silences* is also in some manner a choice consonant with the historian’s ends.

As do lawyers, then, historians quickly encounter the dilemma of resource limits. Resolving it requires the distillation of facts and fact patterns tending to support the given interpretation. Even so, historians and lawyers should and mostly do understand the pivotal role of credibility – *trust* really – in fostering acceptance of the thesis, or at least acceptance of its plausibility. The first principle there is to get the facts straight. Fortunately, certain structural dynamics and other practices in both fields, while no absolute guarantee, do significantly aid the substantiation of fact claims.

(4) Historians nonetheless often can objectively discern the merits of certain individual facts (or certain fact clusters) and inferences

Facts are stubborn things . . .
John Adams

The future second American president, once a superb trial lawyer, uttered this challenge as part of successfully defending nine British soldiers and four loyalist citizens after the deaths of five protesting colonists in the May 1770 clash known as the Boston Massacre. Adams followed that first dramatic clause with another, with which few historians, then or now, would argue: “whatever may be our wishes or inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.”⁸⁰³

⁸⁰² Susan Sontag, “The Aesthetics of Silence” in *Styles of Radical Will* (London, 1967), p.11.

⁸⁰³ From L. Kinvin Wroth and Hiller B. Zobel, eds. *Legal Papers of John Adams*. Cambridge: Belknap Press of Harvard University Press, 1965, Vol. 3, No. 64, *Rex v. Wemms*, p. 269.

The encounter had come after a steep rise in tensions since October 1768, when Royal troops arrived in Massachusetts to help enforce the Townshend Acts and their heavy taxes. And although prosecution delayed the trials for several months in order to let tempers cool, other elements, including publication of Paul Revere's error-filled and inflammatory colored engraving, kept the community on edge. But extensive witness testimony had been delivered, and the court, for the first time recorded in America, instructed the jury (drawn entirely from outside Boston) to employ the notion of "reasonable doubt" as to the fit of the facts to the murder charges, such that first Captain Preston (tried separately), then eight regulars, later yet four citizens, all prevailed.⁸⁰⁴

Facts are critical in most settings, not just in criminal trials. They are foundational to law in general and of course to history writing. One might protest, as did the inimitable Samuel Johnson (1709-1784), that "[i]f a man could say nothing against a character but what he can prove, history could not be written."⁸⁰⁵ But surely the obverse holds – if historical narratives were absent of something nearing established facts, no one could speak of "proof." Here the historian's need for evidence resembles the lawyer's:

[L]itigation is largely a process of recreating historical events. Because the applicability of a substantive law is primarily dependent on a party's ability to prove historical facts that trigger the effect of that law, evidence in most cases concerns what happened in the past.⁸⁰⁶

⁸⁰⁴ The "reasonable doubt" instruction issued in the first trial, and thus it is likely jurors kept it in mind for the next two verdicts. While the jury exonerated all defendants of the murder charges, two British regulars were convicted of manslaughter, gaining their freedom under the ancient *Privilegium clericale* (benefit of clergy), under the condition of having their thumbs branded with the letter "M." For a thorough examination of all these events, see Hiller B. Zobel, *The Boston Massacre* (New York, 1995).

⁸⁰⁵ *Boswell's Life of Johnson*, ed. G. Birkbeck Hill (Oxford, 1887), Vol. III, p. 16.

⁸⁰⁶ David A. Binder and Paul Bergman, *Fact Investigation: From Hypothesis to Proof* (St. Paul, MN, 1984), p. 4. In Chapter 4, *infra*, I address the argument that lawyers, largely because of their assigned advocacy role, are sometimes unreliable historians.

Actors in each of these fields, despite the high stakes and equally elevated sentiments often involved, frequently reach accord on a non-trivial range of facts important to the question(s) at hand. Indeed, even where differing interpretations engage, it can be helpful to hold in common as many key facts as reasonably possible, in order better to isolate the points of essential distinction. How might this propitious state arrive?

Implicit in the exercise is some notion of what exactly constitutes a historical fact. That question straight away gets sticky, and could easily consume hundreds of pages of commentary (as it has elsewhere). A far briefer discussion is appropriate here, although even it must commence in the abstract. Aristotle claimed abstractions were necessary to think in any meaningful way about empirical results, a stance Bloch extended to all formal knowledge fields: “No science could dispense with ‘abstractions’ any more than it could dispense with imagination.”⁸⁰⁷ Philosopher of history Morris R. Cohen applied that notion more specifically yet to history: “Not only are abstractions [e.g., power, wealth or health] essential to the definition of the events with which the historian deals, but they are equally essential to the verification of events, which is perhaps the central problem of historical inquiry, for historical events are seldom if ever directly verified.”⁸⁰⁸

In considering how factual evidence can verify historical events we identify at least two interwoven elements – the facts themselves, and the human/social mediation of those facts. First is the question of how atomistically to think of facts. As seen in Section 2, *supra*, historians (and lawyers) rely on a vast range of evidence forms. Ever since Ranke, the document has reigned supreme, that status at times lending to facile

⁸⁰⁷ Bloch, *The Historian's Craft*, p. 122.

⁸⁰⁸ Morris R. Cohen, *The Meaning of Human History* (La Salle, IL, 1947), p. 47.

formulations, as with Acton: “History to be above evasion must stand on documents, not on opinion.”⁸⁰⁹ But let us then contemplate the potential facts encompassed in a single written document. The type of paper or parchment itself is a fact, as is its age and place of origin, all separate facts from the place(s), date(s) and author(s) of its inscription(s) or other printing and the type of ink(s) used. And of course several realities (discoverable or not) underlie the physical facts – the intent of the inscriber(s) or other active agents, the circumstances of drafting and editing, the chain of custody, the degree to which the writing was an “honest” attempt at recording some other reality, or instead an act (or acts) of fraud,⁸¹⁰ and even if well-intended, how fully and accurately the document captured the event(s) in question, for there is always ignorance, bias and plain mistake.⁸¹¹

The evidence sought, therefore, hardly ever locates in a single fact, but rather in something closer to a “fact cluster.” As M.R. Cohen explained, not only is a fact “simply the part of the picture on which we fix our attention” but also “it would be hard to find a fact that does not depend on other facts for its existence as well as for our knowledge of it.” Moreover, any such fact cluster is itself not in the ready order one might prefer:

According to a widespread but misleading view the facts of history are hard and bead-like, strung along various strings so that each fact is preceded and succeeded by other facts, and the historian has only to identify them, report them, and perhaps trace their order and interconnection. The truth, however, is that the so-called facts of history are cross sections or aspects of a world in process of change, and just where a cross section is to be drawn and how far it is to extend are questions that depend on all sorts of human predispositions and assumptions or on the artistry of the historian.⁸¹²

⁸⁰⁹ John Acton, *Lectures on Modern History* (London, 1906), p. 17.

⁸¹⁰ “[F]raud is, in its way, a piece of evidence.” Bloch, p. 77.

⁸¹¹ As to the last point, “No opinion can be trusted; even the facts may be nothing but a printer's error.” William Carlos Williams, *In the American Grain*, “The Virtue of History” (New York, 1956), p. 189.

⁸¹² M.R. Cohen, *The Meaning of Human History*, p. 44.

Thus, in the sense that “history does not consist of documents alone,”⁸¹³ we acknowledge the interwoven nature of fact and analysis, which mix for Cohen had a social dimension: “Generally speaking the facts of human history are social facts. This means they are facts which happen to human beings in their social relations.”⁸¹⁴ Bloch went a step further: “Historical facts are, in essence, psychological facts,” and thus “in the last analysis it is human consciousness which is the subject-matter of history. The interrelations, confusions, and infections of human consciousness are, for history, reality itself.”⁸¹⁵

According to Oxford medievalist F. Maurice Powicke, the given inquiry is so multi-dimensional and so dependent on prior work that the interceding human element in fact discovery and validation is unavoidable, necessary even: “Can anybody *know* an historical fact? If he tries to establish or even to verify a fact, he finds himself faced by a long elaborate process, so long and so elaborate that, at every turn, he has to cut it short by reliance on others . . . at second, third, fourth, up to nth hand.”⁸¹⁶ In mentioning the practical realities of the profession, Powicke was slightly modifying the sense of what William of Malmesbury had professed some 800 years earlier: “I, indeed, following the true law of history, have never set down any fact that I have not learned from trustworthy speakers or writers.”⁸¹⁷ Such a declaration naturally begs sharp skepticism, by historians

⁸¹³ John Lukacs, “Seventy Years Later,” *The American Scholar*, Essays (Winter 2010). Lukacs was consistent here with Cohen far earlier: “We must not fall into the common error of drawing a sharp line between facts and their meanings.” M.R. Cohen, p. 44.

⁸¹⁴ M.R. Cohen, p. 45.

⁸¹⁵ Bloch, pp. 160 and 125, respectively.

⁸¹⁶ F. Maurice Powicke, *Modern Historians and the Study of History: Essays and Papers* (Westport, CN, 1976), p. 231 (italics in original).

⁸¹⁷ See Dom Hugh Farmer, “William of Malmesbury’s Life and Works,” *The Journal of Ecclesiastical History*, Vol. 13:1 (April, 1962), pp. 39-54.

themselves even, as in Emil Reich's satirical passage from 1908:

The vulgar constantly ask me whether or not history repeats itself. What, for goodness' sake, does that matter to me? It is sufficient for all purposes that historians repeat each other, for it is in that way that historical truth is established.⁸¹⁸

Parody aside, some resort to lineage and consensus is unavoidable. While historians and lawyers regularly perform their separate and supplementary analyses, at seemingly every turn they encounter, are hampered by, but also *depend on*, prior acts of compilation and selection (in or out) of materials, including statements by eyewitnesses and the like no longer available and, to some extent, prior analyses of all such incomplete materials in various combinations. History reveals (and hides) itself in threads or veins running through layers, such that uncovering and distinguishing antecedent from event is a central challenge. Kuhn, for example, reflecting on the science history question "Was it Priestly or Lavoisier, if either, who first discovered oxygen?" observed that while "we so readily assume that discovering . . . should be unequivocally attributable to an individual and to a moment in time" in fact it "is necessarily a complex event, one which involves recognition both *that* something is and *what* it is" and thus "is a process and must take time."⁸¹⁹ Historically recapturing the complexity of patterns of human activity almost always requires some reliance on prior recordation and characterization. It makes little sense, in determining to resolve a given historical question, to ignore all prior historical work on the matter, even should one ultimately disparage or otherwise discount it.

⁸¹⁸ Emil Reich, *Nights with the Gods* (London, 1908), p. 8. More recently, and perhaps with less amusement, was historian Lee Benson: "That generations of historians have resorted to what might be called 'proof by haphazard quotation' does not make the procedure valid or reliable; it only makes it traditional." *Toward the Scientific Study of History: Selected Essays of Lee Benson* (Philadelphia, 1972).

⁸¹⁹ Kuhn, pp. 54-55.

None of these difficulties defeat the historian's necessary proposition that real facts about the past exist and are discoverable and verifiable. As M.R. Cohen argued (on the positive side): "[H]istory . . . would be impossible if we did not admit the existence of a sensible object that can be discovered".⁸²⁰ Bloch was equally adamant: "The past is, by definition, a datum which nothing in the future will change" – ambiguities about past events exist, of course, but "[t]he uncertainty . . . exists in us, in our memory, or in that of our witnesses, and *not in the things themselves*."⁸²¹ On that theme, woven throughout Kuhn's exploration of knowledge revolutions is the assumption that a piece of evidence has no "motivation" or ability to lie or otherwise mislead – any deceit, error or other ambiguity is in the translation, often a function of truncated context.⁸²² As for Kuhn's notorious (to some) relativism or whatever other standpoint or perspectival approach, any is still amenable to – still demands – attempts at objectivity as to specific facts:

Having chosen a given perspective, that which [one] can truthfully report is objectively determined. *The relativism of historiography is not identical with subjectivism.*⁸²³

In trying to trace how real people acted (and reacted) in real places, circumstances and times, historians and lawyers research incomplete and sometimes erroneous records and commentary as to such behavior and its antecedents and consequences. How, then, to gauge the reliability of data and of prior work? Here again, some historians have acknowledged the utility of the legal comparison, especially in testing evidence under conditions of doubt. Bloch, for example, alluded to striking similarities:

⁸²⁰ M.R. Cohen, pp. 48-49.

⁸²¹ Bloch, pp. 48 and 103, respectively (emphasis added).

⁸²² Here, apart from a deceitful act or message, the *reality* that some person lied is an unmotivated "fact."

⁸²³ M.R. Cohen, p. 46 (italics added).

There is nothing arbitrary in the coincidence. In both roles, the need for intellectual discipline is the same . . . [o]bligated always to be guided by the reports of others, legal action is no less interested than pure research in weighing their accuracy. *The tools at its disposal are not different than those of scholarship.*⁸²⁴

It is reasonable to believe Bloch in turn was a major influence on Ginzburg's brand of neo-judicialism.⁸²⁵ The approach requires the devotion of high skill to the taxing work of cross-referencing and critically analyzing multiple sources:

[T]here are no witnesses whose statements are equally reliable on all subjects and under all circumstances. There is no reliable witness in the absolute sense. There is only more or less reliable testimony.⁸²⁶

To extract the most reliable "testimony" (factual evidence) reasonably possible from the given "witness" (a document, in the broadly inclusive sense⁸²⁷) the historian and lawyer thus imaginatively search for flaws or obstacles of a sort to illuminate those data not obvious on the surface. Recall from Section 2, *supra*, Ginzburg's note of how "the obstacles interfering with the research were constituent elements of the documentation."

Bloch had hinted at much the same:

[F]rom the moment when we are no longer resigned to purely and simply recording the words of our witnesses, from the moment we decide to force them to speak, even against their will, *cross-examination* becomes more necessary than ever. Indeed it *is the prime necessity of well-conditioned historical research* . . . For even those texts or archaeological documents which seem the clearest and the most accommodating will speak only when they are properly questioned.⁸²⁸

⁸²⁴ Bloch, pp. 112-113 (emphasis added).

⁸²⁵ According to Peter Burke, "[t]he Russian Aaron Gurevich, the American Natalie Davis, and the Italian Carlo Ginzburg are among the foreign historians who owe most to Bloch's inspiration." Preface to Bloch, *The Historian's Craft*, pp. xiii-xiv, referencing also Davis, "A Modern Hero," *New York Review of Books*, 26 April 1990, pp. 27-30 and Ginzburg, "Marc Bloch," in *Clues* (London, 1989). As noted throughout this essay, Davis and Ginzburg employ legal trials as centering devices in their microhistories.

⁸²⁶ Bloch, p. 84.

⁸²⁷ Again (first shown in Section 2 above), the AHA definition: "[b]y 'documents,' historians typically mean all forms of evidence – not just written texts, but artifacts, images, statistics, oral recollections, the built and natural environment, and many other things – that have survived as records of former times."

The axial role for cross-examination, in Bloch's view, ran also to the sort of questions, more identified in our era with Barthes, et al., about the accumulated and sometimes inconsistent and inadvertent (where appropriation is not intended) layers of meaning in language.⁸²⁹ For example: "The great land-register instituted by William the Conqueror, the Domesday [sic] Book, was the work of clerks of Normandy or Maine. Not only did they describe in Latin institutions which were peculiarly English, but they had first thought them over in French." In this sense, "the vocabulary of documents is, in its way . . . another form of evidence."⁸³⁰ Quickening one's awareness of such factors improves the ability to refer to one fact cluster to help verify (or undercut) another. Probing under the surface to search for flaws or other inconsistencies, one hopes to isolate residual zones that inspire greater confidence, in line with Kuhn's endorsement of Francis Bacon's methodological dictum: "Truth emerges more readily from error than from confusion."⁸³¹ As discussed at greater length in Sections 7 and 8, *infra*, no historian can be an expert in all aspects relevant to a given matter, discovering error often requires the collectivity of skill sets dispersed over any number of separate researchers.

"To what extent, however, are we justified in mouthing that glorious word 'certainty'? So far as it finds certainty only by estimating the probable and the improbable, historical criticism is like most other sciences of reality, except that it

⁸²⁸ Bloch., p. 53 (italics added for emphasis). In the same year, but with no exposure to Bloch's statement (published later), the esteemed American jurist Justice Learned Hand opined: "There is no surer way to misread any document than to read it literally." *Giuseppi v. Walling* 144 F.2d 608, 624 (2d Cir. 1944).

⁸²⁹ Even an avowed detractor of postmodernism acknowledged, "words and language have their own histories." John Lukacs, "Putting Man Before Descartes," *The American Scholar* (Winter 2009).

⁸³⁰ *Ibid.*, pp. 136 and 138, respectively.

⁸³¹ Kuhn, p. 18, in turn citing Bacon, *Novum Organum*, Vol. VIII of *The Works of Francis Bacon*, James Spedding, Robert L. Ellis and Douglas D. Heath, eds. (New York, 1869), p. 210.

undoubtedly deals with a more *subtle gradation of degrees*.⁸³² Here Bloch introduced his understanding of how to contemplate the verifiability of facts and (by my extension) fact clusters. For him, “the path of historical research, like that of so many other disciplines of the mind, intersects the royal highway of the theory of *probabilities*.”⁸³³

M.R. Cohen was much in accord: “[W]hile the historian in his effort to reconstruct the life of the past must be engaged in some kind of construction, this construction is not as arbitrary as fiction but is subject to objective considerations such as prevail in the natural sciences.”⁸³⁴ An important goal within that approach is to distinguish between a merely coincidental correlation and a fact cluster with robust internal consistencies. Some of the best examples from Bloch again concern language: “In linguistics, there is the famous example of the word *bad*, which means the same thing in English and Persian [Farsi], although the term has not the faintest common origin in the two languages.” To contrast:

No association of prior ideas dictates that the sound of *tu*, as it is pronounced in either French or Latin, should serve to indicate the second person. If, then, we find that this sound has this role in French, in Italian, in Spanish, and in Rumanian – if we simultaneously observe a mass of other equally irrational similarities between these languages – the only sensible explanation would be that French, Italian, Spanish, and Rumanian have a common origin. Because the various possibilities were unaffected by human interests, a practically pure mathematical calculation of the chances has carried the decision.

Nonetheless, warns Bloch “this simplicity is far from the norm.”⁸³⁵ Many if not most matters call for reasonable inference of likelihood, taking into account such factors as

⁸³² Bloch, p. 110 (emphasis added).

⁸³³ Ibid., p. 103 (emphasis added).

⁸³⁴ M.R. Cohen, p. 48.

⁸³⁵ Bloch, pp. 109, 105 and 105, respectively (emphasis added to first excerpt).

observed phenomena over time, statistical analyses⁸³⁶ and even natural laws. Coming across an automobile wrapped around an otherwise intact roadside tree, one would without risk conclude that the car hit the tree and not the other way around, with the probability of that single fact, expressed in percentages, very near 100%. But what about some of the other facts surrounding this one? Another highly reasonable inference would be that the driver for some reason or combination of reasons lost control of the vehicle, but there a tiny doubt might exist as to (a) the possibility the driver intended to hit the tree, or (b) the possibility the car had no driver, having slipped out of gear or the like. Other data may well clarify the matter. But in thinking about fact clusters, we might with Bloch employ a mathematical equation (Bloch was careful to emphasize it was for the sake of illustration only, in that real life is not so easily amenable). Five key fact claims, each with a 99% probability of a correct read, yields for the claimant a fact cluster of overall strong certainty ($.99^5 = .951$ or 95.1%), whereas with five fact claims at 95% a considerably more modest figure emerges ($.95^5 = .774$ or 77.4%).

One of course could argue in the opposite, i.e., that strong evidence for a handful of facts helps to verify an additional fact claimed to be within the same cluster or immediately adjacent. Such an approach is analogous to the trigonometric operation known as “triangulation” (a method of finding a position or location by means of bearings from two fixed points a known distance apart).⁸³⁷ Either approach yields the

⁸³⁶ Historians join lawyers and other commentators in a position of healthy skepticism (at best) here. On the cynical side, we read: “Statistics are but mendacious truths” (Lionel Strachey); “There are three kinds of lies; lies, damned lies, and statistics” (Benjamin Disraeli, with variants by Mark Twain and others); “He uses statistics as a drunken man uses lamp-posts – for support rather than illumination” (Andrew Lang). Cutting the other direction was H.G. Wells: “Statistical thinking will one day be as necessary for efficient citizenship as the ability to read and write.” All that stated, probability itself is often expressed statistically.

⁸³⁷ *Webster's Ninth New Collegiate Dictionary* (Norwalk, CN, 1985).

best results when starting with some base of individual facts of near-universal accord or otherwise carrying high probabilities. For historians, Powicke averred, “[t]he establishment of a fact is an achievement in deduction.”⁸³⁸

For lawyers also, and here yet again are manifest similarities in how professionals in each field operate. “Circumstantial evidence is evidence which, if believed, permits one to infer the existence of another fact.”⁸³⁹ That statement from a law text touches on one of several modes, procedures, mechanisms and norms for lawyers that historians might find suggestive in their contemplation of data trustworthiness (we have already seen that each employ “cross-examination” of data and sources). In law, opposing sides and their counsel are able to reach accord on certain facts vital to the case even under conditions of strong contestation – sometimes *because of* such conditions. As noted in Section 2, *supra*, jurisdictions using the adversarial law approach often also create liberal discovery regimes, aimed largely at narrowing the issues of contention, and even at eliminating some of them, so as to allow greater focus on remaining critical divides. Although the rules differ slightly by jurisdiction, the following briefly describes some typical forms of discovery used in civil cases.⁸⁴⁰ Written questions called *interrogatories* require written responses signed under penalty of perjury. *Document demands* result in production of any number of articles with an accompanying statement, also subject to perjury, identifying the demand categories to which the transmitted documents respond. Interviews under oath called *depositions* record the oral responses of the parties,

⁸³⁸ Powicke, *Modern Historians and the Study of History*, p. 231.

⁸³⁹ Binder and Bergman, *Fact Investigation: From Hypothesis to Proof*, p. 77.

⁸⁴⁰ See, e.g., *California Code of Civil Procedure*. In Section 8, below, I discuss why civil litigation better than criminal illustrates the analogy central to this essay thesis.

eyewitnesses⁸⁴¹ and expert witnesses, often yielding confirmation of some facts, clearer delineations of where parties agree and disagree as to other facts, and at times even providing altogether new facts or fact claims (depositions sometimes also require the production of documents responsive to specific requests). Another device, *requests for admissions*, as the name suggests, goes to the heart of the matter, asks the responding party to confirm or deny certain factual propositions. Some actions within a case, such as a motion for summary judgment or motions for summary adjudication of issue(s), require the moving party to offer a *statement of undisputed facts*, to which the responding party asserts agreement or disagreement in part or whole, in each case supported by *affidavits* or *declarations* signed under penalty of perjury. At trial, parties may be required to coordinate to produce a *joint statement of stipulated fact*. Although lawyers vigorously oppose the subject matter and scope of certain inquiries and sometimes delay responses, they face sanctions for overstressing their duty of zealous advocacy. Thus, while it would be too strong to state that all such investigatory and procedural devices always work to establish salient facts, it is not too strong to conclude that they frequently do.⁸⁴²

In addition to codes of civil procedure, evidence codes speak to what constitutes relevant evidence;⁸⁴³ instruct how to treat evidence when direct witnesses (as most often

⁸⁴¹ In history also, “[o]ur sense perceptions lead us to all sorts of illusions” M.R. Cohen, p. 45.

⁸⁴² As somewhat of an outlier point, there may be rare instances where each/all sides are in accord on a fact, but each/all is mistaken. In such a case, the sides agree to a “fact” that is actually incorrect. One imagines the error is usually unwitting, but it is at least possible the fact claim could slip past critical review because the erroneous read might be useful for the purposes at hand.

⁸⁴³ Codes may distinguish “evidence” from “facts.” *California Evidence Code* § 140, for example, states: “‘Evidence’ means testimony, writings, material objects, or other things presented to the senses that are *offered to prove the existence or nonexistence of a fact*” (emphasis added). Much of the time, however, lawyers join historians in treating the terms as synonymous and interchangeable. A related provision, CCP § 190 defines it as “the establishment by evidence of a requisite degree of belief concerning a fact in the mind of a trier of fact or the court.” Thus we have *evidence* offered toward the *proof* (or disproof) of a *fact*.

in history) are unavailable; direct the production of the “best evidence” available (for just one example, original documents, where available, over copies, and considering the chain of custody); outline rebuttable evidentiary presumptions (e.g., that a writing is truly dated, that ancient documents are authentic, or that some circumstances are *res ipsa loquitor* [the thing speaks for itself]); allow for expert witnesses and translators under certain conditions; discuss witness credibility; define “hearsay” and various exceptions to the hearsay exclusion rule; and speak to several other matters too space-consuming to detail here. A point of general application in the above list is the use of evidence to move fact claims past the merely plausible to the highly probable, even to the established.

As for verifying facts aside from those the parties admit or otherwise establish, in law, as in history, occasional resort is made “common knowledge.” Evidence codes empower courts (usually on a lawyer’s motion) to take “judicial notice” of certain laws and rules, the true significations of words and phrases, and “*facts and proposition of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.*”⁸⁴⁴ To make a like point for factual dignity in history, Ginzburg showed how proof-aiding rhetoric dating back over 2,300 years made similar allowances. In the fifth century B.C., Herodotus (8.26) had discussed “the crown of olive that was given to the victor” at the Olympic festival. A century later, Aristotle (in *Rhetoric* 1.2.13) reasoned: “to prove that Dorieus was the victor in a contest in which the prize was a crown, it is enough to say that he won a victory at the Olympic games; there is no need to add that the prize at the Olympic games is a crown, *for everybody knows it.*” Ginzburg further argued, regarding the codes that thread through everyday life, that “[s]uch rules

⁸⁴⁴ See. e.g., *California Evidence Code* § 451 (italics added).

exist in all societies; in a sense they make societies work.”⁸⁴⁵ Some fifty-five years earlier (in discussing the need for caution in assessing written records), Bloch had employed much the same touchstone: “*Everyone knows* that the official reports of a judicial examination seldom reproduce the words just as they were spoken”⁸⁴⁶

An overarching point here is that actual or anticipated *contestation* – in law practice and, by extension, in history writing – is, rather counterintuitively, often helpful in verifying or otherwise validating important facts and fact clusters. It is equally essential to note that in adversarial law, the “discoverers” of facts are *not* judges (or only rarely so), but rather lawyers advocating a particular position. Likewise, historians arguing the superior attributes of their interpretations over other treatments (or over the lack thereof) anchor their cases with clusters of battle-tested, high probability facts and supporting evidence. The late Eric Hobsbawm, with his typical mix of clarity and iconoclasm, spoke of the bridge between these initial matters and next steps: “Without the distinction between what is and what is not, there can be no history. Rome defeated and destroyed Carthage in the Punic Wars, not the other way around. How we assemble and interpret our chosen sample of verifiable data . . . is another matter.”⁸⁴⁷

⁸⁴⁵ Ginzburg, *History, Rhetoric, and Proof*, pp. 40-42 (emphasis added). In pointing to wide accord as verification of fact claims, one risks a degree of relativism. The approach works most of the time, but an astronomical example suggests problematic exceptions: in some older traditions, a lunar eclipse would elicit broad if not unanimous reports within a society that a wolf or a frog or a spirit had devoured some portion of the moon. “Scientific” explanations still acknowledge (agree to) the visual effects, but the social dimension of human facts (see the quote from Cohen a few pages up) is in play.

⁸⁴⁶ Bloch, p. 177 (italics added).

⁸⁴⁷ Eric J. Hobsbawm, *On History* (New York. 1997), p. viii.

(5) Historians and lawyers direct their narratives largely to matters of causation

The causes of events are ever more interesting than the events themselves.
Marcus Tullius Cicero (Roman philosopher, politician, lawyer)

The wisest knowledge of things is, to know them in their causes.
Archbishop Leighton (Scottish scholar and minister)

*After the collection of facts, the search for causes.*⁸⁴⁸
Hippolyte Taine (French historian)

While it is not difficult to be in accord with Cicero and Leighton, historiographers have split mightily on Taine's formula,⁸⁴⁹ with the most cynical suggesting that historians follow the exact opposite sequence in inquiry and analysis – postulating first some causal chain, then searching for facts to verify it. But one aspect, and possible blessing, of the deep epistemological questioning of the latest half-century (see Chapter 2, Section 7, *supra*) was the suspicion of proposed binaries. In the more common middle perspective, research as to cause and effect is a matter of starting with an educated hunch and a corpus of material consistent with it, and then engaging in a manner of rolling inductivism, continually recalibrating the exploration in the light of newly uncovered evidence.⁸⁵⁰

⁸⁴⁸ Less vibrant translations of the original “*la recherche des causes doit venir après la collection des faits*” (itself not very crisp) include “we must search out the causes after we have collected the facts.” Compare Hippolyte-Adolphe Taine, *Histoire de la littérature anglaise* (Paris, 1866 [1863]), p. xv, and H.A. Taine, *History of English Literature*, Henry Van Laun, trans. (New York, 1873), p. 21.

⁸⁴⁹ Taine himself at mid-career (c. 1850) had shifted from an hyper-abstract deductive approach to the “scientific” inductivism then first beginning to dominate (see again, Chapter 2, Section 1, *supra*). Until a later-career partial retrenchment, Taine was one of the foremost champions of documents-based classification, formulation, determinism and positivism, pointedly contesting Cicero's view of history as a great oratorical work (*opus oratorium maxime*). See, *inter alia*, Patrizia Lombardo, “Hippolyte Taine between Art and Science,” *Yale French Studies* No. 77, *Reading the Archive: On Texts and Institutions*, E.S. Burt and Janie Vanpée, eds. (New Haven, 1990), pp. 117-133.

⁸⁵⁰ One of several descriptions of this process is by E.H. Carr: “For myself, as soon as I have got going on a few of what I take to be the capital sources, the itch becomes too strong and I begin to write – not necessarily at the beginning, but somewhere, anywhere. Thereafter, reading and writing go on simultaneously . . . the more I write, the more I know what I am looking for, the better I understand the significance and relevance of what I find . . . I am convinced that, for any historian worth the name, the two processes of what economists call ‘input’ and ‘output’ go on simultaneously and are, in practice, parts of a

In any of these approaches, historical writing largely centers on questions of causality. Some historians, careful to avoid positivist excess, have favored terms like “explain” or “understand” to describe the effort, but those concepts, however useful elsewhere, are *historically* meaningless without some reference to cause and effect. Georges Lefebvre, professor of history at the Sorbonne, neatly distinguished the matter: “The moralist must praise heroism and condemn cruelty; but the moralist does not explain events.” That is a job for historians, and in the opening sentence of his early masterpiece, *The Coming of the French Revolution*, Lefebvre left no doubt that in history writing, explanation and causation are conjoined: “The *ultimate cause* of the French Revolution of 1789 goes deep into the history of France and of the western world.”⁸⁵¹ Thus Bloch instructed: “The fault is only in accepting any explanation *a priori* . . . in history, as elsewhere, the causes cannot be assumed. They are to be looked for.”⁸⁵² In this respect he was in line with Gibbon much earlier. Though an admirer of continental Enlightenment figures, Gibbon believed a deep understanding of history, not (only) the rational cognition of the present world, could unveil truth: “[w]here others only perceived the wanton caprice of chance . . . knowledge of history is to the philosopher that of causes and effects.”⁸⁵³ Likewise, when E.H. Carr in our era opined that “[t]he function of the

single process.” Carr, *What is History?*, p. 33. “[T]he historian is engaged on a continuous process of moulding his facts to his interpretation and his interpretation to his facts. It is impossible to assign primacy to one over the other.” Ibid., pp. 34-35.

⁸⁵¹ Georges Lefebvre, *The Coming of the French Revolution, 1789*, R.R. Palmer, trans. (New York, 1947 [1939]), p. 3 (emphasis added). Officials for the German occupation banned the book in 1940.

⁸⁵² Bloch, *The Historian's Craft*, p. 163.

⁸⁵³ From *Essai sur l'étude de la littérature*, one of Gibbon's short essays in French, translated to English in 1761; Edward Gibbon, *and An Essay on the Subject of Literature*, London (1764), p. 99. Ostensibly about ancient literature, the *Essay* also reveals much of Gibbon's historiographical thinking.

historian is neither to love the past nor to emancipate himself from the past, but to master and understand it as the key to the understanding of the present,” it was in prelude to his main thrust, developed in an entire chapter: “The study of history is a study of causes.”⁸⁵⁴

Carr’s view of history was one of “an unending dialogue between the present and the past,” in which humans strive to understand the present (and future), and any lessons for them, in reference to the historical path to date. As such, Carr acknowledged the inescapability of presentist concerns when contemplating and seeking to trace historical cause and effect. A satisfactory explanation thus relies on generalization: “The historian is not really interested in the unique, but what is general in the unique.”⁸⁵⁵ Carr had company in deeming generalization key to a grasp of causation. Social historian Gordon Leff named his analytical start point: “Human behavior is governed by norms.”⁸⁵⁶ British historian Willson H. Coates concurred: “History would be an impossible area of human reflection if there were no recurrent attributes of human nature.”⁸⁵⁷ These statements echoed to some extent Machiavelli’s far older (c. 1517) observation: “Whoever considers the past and the present will readily observe that all cities and all people are and ever have been animated by the same desires and the same passions; so that it is easy, by diligent study of the past, to foresee what is likely to happen in the future”⁸⁵⁸

⁸⁵⁴ Edward Hallett Carr, *What is History?* (New York, 1961), pp. 29 and 113, respectively.

⁸⁵⁵ *Ibid.*, pp. 35 and 80, respectively.

⁸⁵⁶ Gordon Leff, *History and Social Theory* (London, 1969), p. 5; further, for Leff, “[t]here can be no generalization without comparison and no meaningful social comparison without history.” *Ibid.*

⁸⁵⁷ Coates co-authored an early book with Hayden White and J. Salwyn Schapiro, *The Emergence of Liberalism: An Intellectual History of Western Europe* (New York, 1966).

⁸⁵⁸ Niccolò Machiavelli, *The Discourses*, First Book, XXXIX, in *The Prince and The Discourses* (New York, 1950), p. 216. Machiavelli wrote portions of *The Discourses* first, borrowing extensively from such drafts for the much shorter 1513 work *Il Principe (The Prince)*, then returned to finish the lengthier piece.

Accordingly, what distinguishes the historian from a mere antiquarian is the intent and ability to do more than present a number of interesting claimed facts. Voltaire cut to the heart of the matter: “If you have nothing to tell us other than that one Barbarian has replaced another Barbarian on the banks of the Oxus and the Jaxartes, in what way are you useful to the public?”⁸⁵⁹ Most historians and most readers seek some ordering of facts or fact clusters into a proposed causal chain, its links recognizable because they are generalizable (and useful, as Voltaire urged). Otherwise, issues of causation would seem to matter far less.⁸⁶⁰ But chains of interrelated events comprise the core of virtually all narrative histories, lest the given recounting be considered nothing more than chronology. As stated E.E. Evans-Pritchard, reflecting on the history of anthropology: “History is not a succession of events, it is the links between them.”⁸⁶¹ Butterfield before him had held much the same: “History is not the study of origins; rather it is the analysis of all the mediations by which the past was turned into the present.”⁸⁶² And Bloch’s reasoning:

⁸⁵⁹ *Si vous n'avez autre chose à nous dire, sinon qu'un Barbare a succédé à un autre Barbare sur les bords de l'Oxus & de l'Iaxarte, en quoi êtes-vous utile au public?* Voltaire, Vol. 8, p. 225 of *Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers* (see footnote 137, *supra*).

⁸⁶⁰ A minority view: “History creates comprehensibility primarily by arranging facts meaningfully and only in a very limited sense by establishing strict causal connections. The knowledge it provides answers the questions ‘what’ and ‘how?’, and only as an exception the question ‘why?’ – though both the scholar and the reader usually have the illusion that the latter question is the one that is being answered.” Johan Huizinga, *Men and Ideas: History, the Middle Ages, the Renaissance* (Princeton, NJ, 1984), p. 55. Huizinga’s essays were collected posthumously in 1948-1953 (he died in 1945), i.e., two decades before the linguistic and literary turns would challenge the historiographical distinction between the three questions *what*, *how* and *why*, their posing and the proposed interpretations of their answers. Moreover, his use of the qualifier “strict” suggests some flexibility in his position; else Huizinga would be hard pressed to detail what he meant by “arranging facts *meaningfully*.”

⁸⁶¹ E.E. (Edward Evan) Evans-Pritchard, *Anthropology and History* (Manchester, 1963), p. 3. Although Evans-Pritchard argued that anthropology better fit the humanities than the natural sciences, his view on linkages in history meshed well even with adherents of historiographical scientism, such as Henry Adams, who had opined in his 1894 AHA presidential address: “Any science assumes a necessary sequence of cause and effect, a force resulting in motion which can not be other than what it is.” Thus, one sees throughout the historiographical spectrum a central emphasis on causality.

Supposing a hundred specialists had divided the past of France according to lot, do you think that, in the end, they would have written the history of France? I very much doubt it. At the very least, they should miss the linkage of facts: now, *this linkage is itself a historical truth.*⁸⁶³

The claim of historical truth recalls the issue of contestation, and how historians and lawyers in similar fashion try to overcome similar constraints in linking circumstances, behaviors and outcomes. Here again Appleby, Hunt and Jacob are helpful:

Historians . . . seek to understand the internal dispositions of historical actors: what motivated them, how they responded to events, which ideas shaped their social worlds. Such understandings depend on convincing, well documented and coherently argued interpretations that link internally generated meanings to external behavior.⁸⁶⁴

These historians were careful to note that human actions take place in a context of ideas and events (other historians emphasized as well geography, climate, technology, etc., i.e., with Butterfield, “all the mediations”), such that the intersection of circumstances and mental state is key, as it very often is in the legal world. In contract law, for example, mutual assent, a “meeting of the minds,” is an essential element in determining the existence of a contract; in tort law, the awareness of a duty and of others’ potential vulnerability can be important factors (the defendant “knew or should have known”); in criminal law most charges require the state to show *mens rea* (criminal intent).⁸⁶⁵

But of course in law and history, human intention often remains merely thought, or otherwise fails to translate to effective, or even cognizable, activity of the type history

⁸⁶² Butterfield, *The Whig Interpretation of History*, p. 47.

⁸⁶³ Bloch, p. 128 (italics original).

⁸⁶⁴ Appleby, Hunt and Jacobs, p. 259.

⁸⁶⁵ See, e.g., Arthur Rosett, *Contract Law and its Application* (Westbury, NY, 1988); Marc A. Franklin and Robert L. Rabin, *Tort Law and Alternatives* (Minneapolis, NY, 1987); Sanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and its Processes* (Boston, 1989). An exception to the requirement to show intent in tort or criminal law is where “strict liability” attaches to the behavior.

or law recognize.⁸⁶⁶ In each field, tracing how one set of variables had notable effect on another is a central concern, as is the related question of “causal directionality.” Where Supreme Court justice and scholar Oliver Wendell Holmes, Jr. noted “[t]he character of every act depends on the circumstances in which it is done” and “history is the selection of those threads of causes or antecedents that we are interested in” he was quite naturally extrapolating from considerations as central in law as in history.⁸⁶⁷ From the history side, Gottschalk might have just as readily applied to lawyers his observation that “[t]he historian . . . is distinguished from other scholars most markedly by the emphasis he places upon the role of individual motives, actions, accomplishments, failures, and contingencies in historical continuity and change.”⁸⁶⁸ The same cross-field application holds for this comment by Leff: “History is concerned with the contingent; its criteria are qualitative. It must take account not only of what happened, but how it happened and need not have happened.”⁸⁶⁹

⁸⁶⁶ Gibbon was skeptical about the self-serving nature of much documentation, including letters and memoirs, deeming actions a better guide in history than statements: “There is no preparatory disguise to trivial actions. We undress only when we imagine we are not seen; but the curious will endeavor to penetrate the most secret retirement. Should I undertake to determine, whether virtue prevailed in the character of a certain age, or people, I should examine into their actions, rather than their discourse.” Gibbon, *An Essay on the Subject of Literature* (London, 1764), pp. 102-103.

⁸⁶⁷ First quote from the Holmes-authored opinion in *Charles T. Schenck v. United States*, 249 U.S. 47, 52 (March 3 1919), the decision best known for articulating a “clear and present danger” exception to First Amendment free speech rights; second quote as found in Ferenc M. Szasz, “The Many Meanings of History, Part I,” *The History Teacher*, Vol. 7, No. 4 (Aug., 1974), p. 557. Not all legal matters focus on causation. “Declaratory relief” actions, for example, are often aimed at obtaining a pronouncement of the parties’ rights in a variety of circumstances. Still, a great many, if not most, law cases do involve causal analyses. In history, it is not clear how one can have a true “understanding” of events and movements without some focused discussion as to cause and effect.

⁸⁶⁸ Gottschalk, 1953 *AHA Presidential Address*. “Contingencies” can of course include accidents, as remarked H. Cord Meyer, a specialist in modern European history: “The course of History reflects a continual contest between limited, orderly processes of development and historical accident.”

⁸⁶⁹ Gordon Leff, *History and Social Theory* (London, 1969), p. 3. Gottschalk separately alluded to inevitability in history, where the facts are properly understood (in his view): “But once the . . . event has

The shared vocabulary reflects also a common concern with narrowing the focus to the most critical and relevant causes, so as to bring order out of the chaos that would otherwise reign were attempting to trace and treat every potential cause. It is from chaos theory that concepts such as the “Butterfly Effect”⁸⁷⁰ have sprung to highlight the role of “sensitivity dependence on initial conditions.” The metaphor has been stretched far beyond its original meteorological context, with non-scientists now conjecturing how perturbations of small amplitude could theoretically reverberate through systems to trigger large-scale (and potentially drastic) results. Historians and lawyers strive to avoid the trap of what has become a popular trope in fictional treatments, i.e., the endless play of possible causal chains. But on this point, one might propose, as did Bloch, some degree of contrast between argumentation in law and history, namely, in the number of causal variables typically addressed:

Whether as a prejudice of common sense, a postulate of logicians, or a habit of prosecuting attorneys, the monism of cause can be, for history, only an impediment. History seeks for causal wave-trains and is not afraid, since life shows them to be so, to find them multiple.⁸⁷¹

Bloch was half correct. As a general observation, a historical work does tend to suggest more causes than does a legal analysis. But Bloch’s focus on “prosecuting attorneys,”

passed into history and the outcome is known, the historian, if he feels obliged to explain why and how it came about, has to consider all its relevant antecedents and concomitants, and cannot easily escape the conclusion that, in view of the now apparently sufficient or, in any case, satisfying explanation, nothing else could have happened.” Gottschalk, 1953 *AHA Presidential Address*. Isaiah Berlin (1954) found it not at all “sufficient” or “satisfying” to conclude that “nothing else could have happened,” holding that such a stance denied freedom of action and thus moral responsibility. See again, Berlin, *Historical Inevitability*. See also Eric Foner, *Who Owns History? Rethinking the Past in a Changing World* (New York, 2002), p. 4: “[E]vents are only inevitable after they happen.”

⁸⁷⁰ The phrase arose from a 1972 conference presentation by meteorologist Edward N. Lorenz entitled “Predictability: Does the Flap of a Butterfly’s Wings in Brazil Set Off a Tornado in Toronto?” (Lorenz claimed the organizer drafted the title). Lorenz noted that Henri Poincaré, Norbert Wiener and others had anticipated much of the dynamic. See Edward N. Lorenz, *The Essence of Chaos* (Seattle, 1993).

⁸⁷¹ Bloch, p. 160.

who usually deal in guilty/not guilty binaries, does not well reflect broader legal practice. Even within criminal law, the state occasionally prosecutes more than one defendant for a mix of similar and differing roles in the given crime, while on the defense side counsel might explore any number of exculpatory themes. Outside of criminal law, i.e., in civil cases, especially those sounding in tort law, lawyers sometimes have good reason to argue multiple causation, multiple victims and shared liability.⁸⁷² A monistic approach to causation, then, is inherent neither to historical writing nor in legal casework.

The historian may not be, in Bloch's term, "afraid" of multicausality, yet is nonetheless attentive to the need to streamline the account where reasonably possible. As noted in Section 3, *supra*, both producers and consumers of argumentation in history and law face cross-demands on their time, focus and energy, and thus have limited resources. At some point, expansive causal tracing overtakes audience patience, such that even where robust theories engage, descriptive elegance and its sibling, parsimony in explanation, are high virtues.

Those realities translate to a greater focus on the distinction between causation generally and what lawyers call "proximate cause."⁸⁷³ Not every remote precondition or incidental occurrence in a chain of events is enough to establish legal liability, especially in the context of some other weighty intervening event or circumstances not reasonably foreseeable. Bloch seemed to recognize the parallel in history by this example: "But it [the specific antecedent] was distinguished from all the rest by several striking

⁸⁷² There is also a "probable cause" hurdle (though not set high) in most cases in order early to weed out some of the most frivolous and vexatious litigation.

⁸⁷³ Among the string of definitions in *Black's Law Dictionary*: "That which is nearest in the order of responsible causation. That which stands next to causation to the effect, not necessarily in time or space but in causal relationship. . . . The dominant, moving or producing cause. The efficient cause; the one that sets the other in operation."

characteristics: it occurred last; it was the least permanent, the most exceptional in the general order of things; finally, by virtue of this greater particularity, it seems the antecedent which could have been most easily avoidable.” And by another: “I am well aware, from the outset, that there would be no fire if the air contained no oxygen: what interests me, *what demands and justifies an attempt at discovery, is to determine how the fire started.*” Geoffrey Barraclough further urged an orientation to matters of near(er) causal connection to present concerns: [W]e should not evade *the test of relevance*; for although the past may have existed for itself, history – the attempt to discover, on the basis of fragmentary evidence, *the significant things* about the past – exists for us.”⁸⁷⁴

Hence, while historians enjoy more freedom to propose multiple causes in their interpretations, some practical realities push back against the instinct. A lawyer might offer one, two or maybe three causes, usually in some descending (or ascending) order, whereas a historian could choose to treat twice that. But they often elect otherwise. Daniel Walker Howe, for example, organized his 855-page Pulitzer Prize winning history, *What Hath God Wrought: The Transformation of America, 1815-1848*, around two main causal chains: revolutionary developments in transportation and communications – most prominently, the railroad and the telegraph – sparked and accelerated the remodeling of political, economic, social, cultural, religious and psychological dimensions of American life over the period studied and beyond.⁸⁷⁵

The elegance achieved in such an approach has a perhaps surprising analog in the fields of management and engineering, where a rough and informal “80-20 rule” often

⁸⁷⁴ Geoffrey Barraclough, *History in a Changing World* (Oxford, 1957), pp. 29-30 (emphasis added).

⁸⁷⁵ Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford, 2007), a contribution to the multi-volume *The Oxford History of the United States*.

influences the use of scarce resources. Simply expressed, roughly 80% of the achievable utilities derive from 20% of the feature complexity (whether in engineering design or in management resources), with the obverse true also – highly disproportionate costs attach to marginal utilities near the top end. Might it be also that for interpretations in history and law, somewhere around 20% of the possible independent variables explain 80% of the given dependent variable? The actual numbers are impossible to verify, but what is obvious in both fields is the essential dynamic of aesthetics tied to some practical sense of audience limitations, needs and inclinations.

(6) From a selective basket of (arguably) objective facts, and with skillful phraseology and paratext, the historian defines, shapes and directs the terms of rhetoric within a recognizable, orderly, plausible and compelling narrative

Let the science and research of the historian find the fact and let his imagination and art make clear its significance.

G. M. Trevelyan

*Stern accuracy in inquiring, bold imagination in describing,
these are the cogs on which history soars or flutters and wobbles.*

Thomas Carlyle

One might reasonably protest that Trevelyan's style, and particularly Carlyle's, were among the most florid in an age of romantic histories and thus are not terribly instructive for our day. But while (most) writing since the modernists is much less ornamental, the need to offer a compelling story has not waned. Historians, like lawyers, attempt to win sympathy for a proposed point of view, that goal at some risk where the course of argument steers through (or languishes in) soporific waters. In this respect, Voltaire's exhortation to historians applies equally to lawyers worried about sleepy jurors: "A historian has many duties. Allow me to remind you of two of some importance. The first

is not to slander; the second is not to bore.”⁸⁷⁶ Against imaginable renewed protests of staleness or obsolescence here (Voltaire predated even Carlyle) has come 2012 AHA president William Cronon to emphasize much the same point:

For historians, the peril of antiquarianism has always been to assume that everyone else in the world loves our subject as much as we do, when very nearly the opposite is true. It is our job, not theirs, to persuade them of its importance and teach them its fascinations. Other professionals can perhaps afford to be boring, but not us.⁸⁷⁷

It is less a call simply to entertain than the recognition of one of the historian’s central function: “The human intellect demands accuracy while the soul craves meaning. History ministers to both with stories.”⁸⁷⁸ Professional privilege carries with it a special burden to master a special additional talent: “History is the only science enjoying the ambiguous fortune of being required to be at the same time an art.”⁸⁷⁹ Put otherwise: “At the heart of good history, *even the most rarified and scholarly history*, is a naughty little

⁸⁷⁶ The quote is part of a reply to a certain Chaplain Nordberg who had quibbled about some peripheral fact claims in Voltaire’s *The History of Charles XII, King of Sweden*. The fuller passage, of greater mordancy yet: “A historian has many duties. Allow me to remind you of two of some importance. The first is not to slander; the second is not to bore. I can excuse you for neglect of the first because few will read your work; I cannot, however, forgive you for neglecting the second, for I was forced to read you.” Cited in Ernst Cassier, *The Philosophy of the Enlightenment*, Fritz C.A. Koelln and James P. Pettegrove, trans. (Princeton, NJ, 1968), pp. 222-223.

⁸⁷⁷ William Cronon, *2012 AHA Presidential Address*. A related topic for Cronon was whether the digital revolution would change how consumers – students and other readers – process historical works. Shifts in such aspects as attention spans, language skills and understanding of nuances create challenges for the central traditional means of engaging history works, i.e., what Cronon labels “*long-form* reading.” His solution: “simply *storytelling*. We need to remember the roots of our discipline and be sure to *keep telling stories* that mean as much to our students and the public as they mean to us . . . [even in] this digital age, the human need for storytelling is not likely ever to go away.” Ibid.

⁸⁷⁸ Appleby, Hunt and Jacob, *Telling the Truth About History*, p. 262.

⁸⁷⁹ Johann Gustav Droysen, *Outline of the Principles of History (Grundriss der Historik)*, E. Benjamin Andrews, trans. (Boston, 1893), p. 110. Droysen was among the cluster of nineteenth century German historians whose approach incipient professionals world-wide employed as models. Historians, of course, now understand the “science” of their field in the broader sense, dependent presently as much as ever on a mix of skills, including artistic expression.

secret: good storytelling.”⁸⁸⁰

So it is for lawyers, who, in the same spirit the last several quotations capture, aim to persuade audiences about something important and meaningful by accurate yet also arresting exposition. The parallel lingers about Jacques Barzun’s succinct formula for historical writing: “What, then, are the criteria of history? There are four: Narrative, Chronology, Concreteness, and Memorability.”⁸⁸¹ Can one imagine at trial an effective argument to jurors in the absence of these story elements? The tools and techniques of persuasive storytelling common to the two fields are also so necessary that they have grown nearly instinctive, although the best practitioners consciously refine and hone these insights and talents.

Slightly recasting elements from Barzun and others further explicates the matter. *Order and narrative frame, humanization, rhetorical supposition and paratext* – each is an aspect of effective storytelling in law and history alike. I discuss such aspects in turn shortly below. First, the briefest backtrack, in line with Becker’s wisdom: “To establish the facts is always in order, and is indeed the first duty of the historian; but to suppose that the facts, once established in all their fullness, will ‘speak for themselves’ is an illusion.”⁸⁸² The discussion in Section 4, *supra*, showed the possibility of meeting, at least in part, the initial duty to establish facts or fact clusters. While a transcendental level of proof eludes both historian and lawyer, each investigates, discovers, interrogates,

⁸⁸⁰ Journalist Stephen Schiff, “Scurvy Rascal Sees It Through,” Book Review, *New York Times*, May 4, 1986 (emphasis added). Schiff continued: “A history that isn’t implicitly a colorful, twisty yarn is at best fodder for other specialists – and not particularly nourishing fodder at that, for a historian’s richest insights generally come when he asks himself what it would have been like to be there, to have confronted the personalities, conditions and conundrums of which history is made.”

⁸⁸¹ Jacques Barzun, “History: The Muse and Her Doctors,” *American History Review* 77 (Feb. 1972), p. 55.

⁸⁸² Carl Becker, 1931 *AHA Presidential Address*.

triangulates and cross-examines documents, witnesses and other sources of evidence to generate fact claims locating at the higher end of the confidence scale.

But even where facts are numerous and in the main undisputed, one sifts through them for causal interconnectedness, relevance and enlightening effect, none of which is demonstrable in the absence of some *order and narrative frame*. As Becker noted, the data craft no argument on their own. Becker's contemporary Beard also distinguished data from expression: "True enough, where the records pertaining to a small segment of history are few and presumably all known, the historian may produce a fragment having an aspect of completeness . . . but the completeness is one of documentation, not of history."⁸⁸³ It has not been just the relativists who have posited the need to impose some tidiness onto the mishmash. G.R. Elton, an adherent of "old-fashioned convictions and practices" (unsubtly titling a 1991 work *Return to Essentials*), concurred: "[W]hat we call history is the mess we call life reduced to some order, pattern and possibly purpose."⁸⁸⁴ As did the far more liberal (though no relativist) Henry Steele Commanger: "History is a jangle of accidents, blunders, surprises and absurdities, and so is our knowledge of it, but if we are to report it at all we must impose some sort of order on it."⁸⁸⁵

Slightly different from order is narrative framework. Dutch cultural historian Johan Huizinga spoke to its essence: "History, as the study of the past, makes the coherence of what happened comprehensible by reducing events to a *dramatic pattern*

⁸⁸³ Charles A. Beard, 1933 *AHA Presidential Address*.

⁸⁸⁴ Geoffrey Rudolph (G.R.) Elton, *The Practice of History* (London, 1967), p. 96. See also, G.R. Elton, *Return to Essentials: Some Reflections on the Present State of Historical Studies* (Cambridge, 1991).

⁸⁸⁵ Henry Steele Commanger, et al., *The Nature and the Study of History* (Columbus, OH, 1965), p. 86.

and seeing them in a *simple form*.⁸⁸⁶ One can read Huizinga's reference to drama and form in both their structural-theatrical and psycho-emotional aspects: history as facts and fact claims presented artistically, i.e., arranged in a manner consistent with the storytelling conventions of the underlying culture; history as an appeal to universal human understandings and concerns (I return to this second facet a few pages below).

As for history as narrative, again we need not assume the starting elements are anything but verifiable facts or fact clusters (the reality that some historians and lawyers act otherwise does not negate the general point here). Still, even where all the specific facts at hand are uncontested – not always the case of course – rarely if ever in a given historical treatment can one use them all. Section 3, *supra*, covered at length the necessity and dynamics of selecting data in or out. A full recounting of all related facts, if even possible, would dull the senses and tax the powers of concentration and interest levels of researcher and consumer alike.⁸⁸⁷ And here is where fact, interpretation, form, message and purpose become impossible to disentangle, a far less controversial state of affairs in law, where techniques of advocacy comprise an openly valued norm, than in history, where (for some) pretensions remain otherwise.

The ubiquity of competing historical renderings shows that a single interpretation rarely prevails, even where the underlying evidence is largely undisputed. In the same

⁸⁸⁶ Huizinga viewed form an important element in historical writing. See, e.g., *Men and Ideas: History, the Middle Ages, the Renaissance* (Princeton, NJ, 1984). Hermann Hesse, 1946 Noble Prize winner in Literature, captured some of the double-edgedness of the theatrical theme here: "To study history means submitting to chaos and nevertheless retaining faith in order and meaning. It is a very serious task . . . and possibly a tragic one." Father Jacobus, in *The Glass Bead Game* (New York, 1990 [1943]), p. 169.

⁸⁸⁷ M.R. Cohen paraphrased Max Weber on this issue: "Selection is unavoidable because what goes on in the world at large at any time or the human phase of it is too vast in extent and too complicated in intension to be fully described or understood in any finite time." He illustrated the point by discussing how Proust, in *À la Recherche du temps perdu*, needed several hours to describe thoughts and events occurring over a few minutes. M.R. Cohen, *The Meaning of Human History*, p. 24.

manner, seldom can one point to universal accord on the “right” form of expressing the given argument, or the correct mix of facts in the subset employed. Thus, the nature, extent and direction of the winnowing and streamlining process – what gets cut and what stays in – are functions of the ultimate interpretation, which of course can and does vary considerably. So reflected Jacob Burckhardt, long before open relativism in history:

In the wide ocean upon which we venture, the possible ways and directions are many; and the same studies which have served for my work might easily, in other hands, not only receive a wholly different treatment and application, but lead to essentially different conclusions.⁸⁸⁸

Burckhardt’s acknowledgement that the direction, fashion and results of an inquiry were interconnected, however, was certainly amenable to the sort of historiographical musings later (and still) attacked as relativist. Becker again comes to mind:

Since history is not part of the external material world, but an imaginative reconstruction of vanished events, its form and substance are inseparable: in the realm of literary discourse substance, being an idea, *is* form; and form, conveying the idea, *is* substance. It is thus not the indiscriminated fact, but the perceiving mind of the historian that speaks: the special meaning which the facts are made to convey emerges from the substance-form which the historian employs to recreate imaginatively a series of events not present to perception.⁸⁸⁹

But here also Becker was not alone in emphasizing the literary and creative aspects of history, on how idea and narrative structure overlap and mesh. Robin Collingwood then stressed the central role of a novelist-like “constructive imagination.”⁸⁹⁰ And shortly thereafter V.C. Wedgwood further explored the interplay of material, inspiration, message and form: “In two senses it may be said that history embraces the whole of

⁸⁸⁸ Jacob Burckhardt, *The Civilization of the Renaissance in Italy* (New York, 1878), p. 1.

⁸⁸⁹ Becker, 1931 *AHA Presidential Address* (emphasis in original).

⁸⁹⁰ Robin G. Collingwood, *The Idea of History* (Oxford, 1946), p. 242. Collingwood noted a vital distinction between history and fictional literature: “As works of imagination, the historian’s work and the novelist’s do not differ. Where they do differ is that the historian’s picture is meant to be true.” *Ibid.*, p 246.

literature; first, because the creation of all literature occurs within the limits of history, and secondly, because all literature arises directly or indirectly out of history . . . The writer . . . [thus] may express himself in romance or fantasy, poetry, drama or satire.⁸⁹¹

All of which echoes in Hayden White's *The Content of the Form*.⁸⁹² There and elsewhere (as discussed at length in Chapter 2, Section 7, *supra*) White explored the notion that historians *invent* narratives, rather than discover them, and that these crafted forms convey as much if not more meaning than the evidence within them, a stance that champions of proof in history, Ginzburg prominently among them, viewed with dismay. For White, historical works require some recognizable narrative frame, as in fictional literature: "[J]ust as there can be no explanation in history without a story, so too there can be no story without a plot by which to make of it a story of a particular kind." The specific types include "epic, romance, comedy, tragedy, satire, as the case may be."⁸⁹³ Later commentators acknowledged the importance of White's studies and ventured to modify and then integrate select elements. Cronon offered one such adaptation:

White sought to demonstrate the extent to which historians more or less unself-consciously emplot their work by deploying metahistorical tropes and narrative structures. My own purpose is to invite them to be more explicit about their own literary choices as they do their work, one reason I have tended to favor the word 'storytelling' over 'narrative'⁸⁹⁴

⁸⁹¹ V.C. Wedgwood, "History and Imagination" (1955) in her *History and Hope* (London, 1987), p. 456. On that note: "Imagination is of the power of depicting, and fancy of evoking and combining." William Taylor (of Norwich), *English Synonyms Discriminated* (London, 1813), p. 242. A British scholar and essayist, Taylor's many interests included the translation and promotion of German romantic literature.

⁸⁹² Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore, 1987).

⁸⁹³ White, *Tropics of Discourse*, p. 62 (both passages). But White also spoke to some limit to the variation: "If, as Lévi-Strauss correctly observes, one *can* tell a host of different stories about the single set of events conventionally designated as 'the French Revolution,' this does not mean that the *types* of stories that can be told about the set are infinite in number." *Ibid.*, p. 60 (*italics original*).

⁸⁹⁴ William Cronon, *2012 AHA Presidential Address*, note 15.

Indeed, “narrative” seems to have become shorthand or code for excessive standpointism or other relativism and, relatedly, the preordained and thus premature gridding down of form, mode and even conclusion. Ginzburg, for one, in suggesting that White’s formulation endorses just such an exercise, urged a more organic read:

I find the current approach to historical narratives highly simplistic, since it usually focuses on the final literary product, disregarding the research (archival, philological, statistical, and so forth) that made it possible. Our attention should shift instead from the end result to the preparatory stages, in order to explore the mutual interaction between the empirical data and narrative constraints *within the process of research itself*.⁸⁹⁵

Such questions about truth content and predetermined emplotment invite yet another comparison to the lawyer’s set of tasks. As for empirical data, Sections 7 and 8, *infra*, explore how the law and history professions employ similar means of testing and grading truth claims and omissions.⁸⁹⁶ As for emplotment in litigation, certain narrative forms may well enhance some types of case stories. Thinking back on my own prior career in law, I recognize variations of the epic or heroic/romantic quest and tragedy as common emplotments. An example here is a “whistleblower” lawsuit, where the picture is one of a courageous lone plaintiff, holding fast to ethics and conscience through repeated severe retaliation from entrenched, powerful, dastardly wrongdoers and their minions. Lawyers beseech jurors to join the quest in a very real sense – by helping the client/hero complete it they become direct factors in restoring the cosmic order, with justice achieved both personally and metaphorically.

⁸⁹⁵ Ginzburg, *History, Rhetoric, and Proof*, p. 101 (italics original).

⁸⁹⁶ Although omissions are the natural result of selection, they raise suspicions, in both law and history, of deliberate misrepresentation: “[T]he historian selects those data that fit into the scheme of the ideas he brings to his subject matter and . . . thus he gives meaning to what otherwise would be meaningless. It must be admitted even that all selection involves an arbitrary cutting off and even a distortion in the picture of the past.” M.R. Cohen, p. 49. Section 7, below, explores some checks against abuse of this reality.

As for possible preordination of form, in adversarial legal systems with liberal discovery regimes (as described in Sections 2 and 4, *supra*), lawyers (the good ones, anyway) act much more in line with Ginzburg's observation/prescription, i.e., developing both a select body of evidence and the storytelling form *as the investigation progresses*. The client's version of the circumstances as delivered during the initial office visit is often skewed or otherwise flavored by some combination of perceived self-interest and ignorance of the fuller facts, particularly as they fit the applicable law. In this respect, discovery and case development in litigation are aspects of a *learning process* for all concerned. Returning full circle to literature likenesses, we find novelist Margaret Atwood's depiction: "When you are in the middle of a story it isn't a story at all, but only a confusion. It's only afterward that it becomes anything like a story at all. When you're telling it, to yourself or someone else."⁸⁹⁷ The construction of narrative form in law and history is perhaps more mechanically serendipitous – an "organic operation" of sorts – with some opening purpose in mind, but nonetheless open to, even dependent on, surprise, revelation, innovation, reconsideration, and the flexibility to accommodate.

Bernard Bailyn, 1981 AHA president, although bemoaning that "the one thing above all else this [recent] outpouring of historical writing lacks is coherence," cautioned also against other extreme, sterile taxonomy:

The drama of people struggling with the conditions that confine them through the cycles of limited life spans is the heart of all living history, and the development of that drama itself, not a metahistorical scheme of classifying events, must provide the framework for any effective interpretation of history."⁸⁹⁸

⁸⁹⁷ From Atwood's *Alias Grace*, as quoted by Kenneth Turan in a review of the film *Stories We Tell*, Los Angeles Times, 17 May 2013, p. D6.

⁸⁹⁸ Bernard Bailyn, "The Challenge of Modern Historiography," *1981 AHA Presidential Address*.

Bailyn's reminder was that beyond sketching order, form and narrative emplotment, the historian and lawyer must breathe life into the facts, must strive to lend color and immediacy to the problem studied, must in essence *humanize* it for the account consumer, whether reader or juror. Ginzburg noted the long legacy here: "Within the classical tradition, historical writing (and poetry as well) had to display a feature the Greeks called *enargheia*, and the Romans, *evidentia in narratione*: the ability to convey a vivid representation of characters and situations."⁸⁹⁹ He might well have pointed also to how Terence, a comic playwright in republican Rome ("I am a human being; I consider nothing that is human alien to me") echoed all the way through to twentieth century poet/novelist E.M. Forester ("The historian must have...some conception of how men who are not historians behave. Otherwise he will move in a world of the dead").⁹⁰⁰

Ginzburg had much prior (nineteenth century) company on the point. Hannah Farham Sawyer Lee, for example, had expounded: "A mere compilation of facts presents only the skeleton of History; we do but little for her if we cannot invest her with life, clothe her in the habiliments of her day, and enable her to call forth the sympathies of succeeding generations." And regarding Lee's contemporary, Thomas Carlyle, the very epitome of descriptive rubicundity, James Russell Lowell reflected: "The figures of most historians seem like dolls stuffed with bran, whose whole substance runs out through any hole that criticism may tear in them; but Carlyle's are so real in comparison, that, if you prick them they bleed." Although the gnarl and frenzy of romanticist prose in time fell

⁸⁹⁹ Carlo Ginzburg, "Checking the Evidence: The Judge and the Historian", p. 80.

⁹⁰⁰ Terence quotation (*Humo sum, humani nihil a me alienum puto*) from his play *Heauton Timorumenos*; Forester quotation from "Captain Edward Gibbon" in *Abinger Harvest* (New York, 1936), p. 225. On the present theme, of note is Forester's epigraph to his 1910 novel *Howard's End*: "Only connect . . ."

out of favor, historians still strive to transcend, or at least surmount, the stereotypical “dry-as-dust” pedantry against which the romantics had revolted. The present middle course has prevailed for over a century (as extreme scientism also mostly waned), early typified perhaps in William Nye’s 1894 description: “History is but the record of . . . acts of human beings. It is our object, therefore, to humanize our history and deal with people past and present; people who ate and possibly drank; people who were born, flourished and died; not grave tragedians, posing perpetually for their photographs.”⁹⁰¹

So too the lawyer must elicit sympathy – better yet, *empathy* – for clients and circumstances (Ginzburg’s “characters and situations”). Most anyone who has viewed a courtroom drama or served on a jury can recall, lawyers attempt to humanize the parties’ aspirations, struggles, disappointments and dilemmas. Bailyn’s thinking about an emphasis on the personal in history writing applies equally well to historical and causal reconstruction in the lawyer’s realm: “To leave these private worlds isolated from the public is to keep the internal separated from the external and to ignore the problem of the effects of the one upon the other; it is to evade *the central obligation of history*, which is to describe how and to explain why the course of events took the path it did.”⁹⁰²

⁹⁰¹ Hannah Farham Sawyer Lee, *The Huguenots in France and America* (Cambridge, MA, 1843), p. xi; James Russell Lowell, “Carlyle,” in *The Writings of James Russell Lowell in Prose and Poetry*, Literary Essays, Vol. II (Boston, 1897), p. 118; Edgar William “Bill” Nye, *Comic History of the United States*, (Chicago, 1894), Preface. As for long-enduring stereotypes about the antiquarian cast of the profession, see Beverly Southgate, “Why Dryasdust?: Historians in Fiction,” *Historically Speaking*, Vol.10, No. 2 (April 2009), pp. 12-13. As for the later nineteenth century backlash against full-blown romanticism in history writing, Carlyle became a prime target. Lowell, in the same article excerpted above, turns to castigate Carlyle’s florid exuberances (“The ‘French Revolution’ is a series of lurid pictures . . . all painted by eruption-flashes in violent light and shade”) as a cover for exhausted insight (“It has long been evident that he had no more ideas to bestow upon us and that no new turn of his kaleidoscope would give us anything but some variation of arrangement in the brilliant colors of his style”), pp. 89 and 84, respectively.

⁹⁰² Bailyn, 1981 *AHA Presidential Address* (italics added). However, “establishing the relation of outward events to the submerged world of private awareness is difficult and bound to be controversial.” Ibid.

Hence, to a large degree, truth-exploring rhetoric involves a focus on matters one can express in terms of human commonalities. Ginzburg hinted at the task dimensions: “In order to ascertain the truth, the historian needs as much *accuracy* and *insight* as any judge or physician – a particularly intriguing double *analogy*.”⁹⁰³ This pronouncement is dense with implication (although we are reminded again that lawyers more than judges employ rhetoric). I have already discussed the matter of accuracy, and will again in Sections 7 and 8, below. As for the other two dimensions in Ginzburg’s phrase above, the lawyer, physician and historian in similar fashion first gain insight partly through the use of analogy, then share those insights partly through express or implied analogy. There is no argument that these observations are particularly new. University of Glasgow scholar William MacNeile Dixon, for one, writing in the mid-1930s on the philosophy of language, literature and history, made a similar point: “If I were asked what has been the most powerful force in the making of history . . . I should have to answer, metaphor figurative expression.”⁹⁰⁴

On that note, despite his caution against prematurely fixing Whitean emplotments upon the available data pool, Ginzburg overall conceded a reliance on rhetorical tropes,⁹⁰⁵ recognizing the long tradition in the West of such devices, even for example in the conservative and authoritative context of explicating biblical canons:

⁹⁰³ Ginzburg, *History, Rhetoric, and Proof*, p. 64 (italics added for emphasis).

⁹⁰⁴ William MacNeile Dixon, *The Human Situation: The Gifford Lectures Delivered in the University of Glasgow, 1935-1937* (New York, 1937), p. 65.

⁹⁰⁵ To amalgamate and paraphrase a number of attempts to define the term, now so laden, in the Barthean sense, with literary turn usages, tropes are conventions and other devices for communicating meaning that very likely are present in the mental expectations of those contemplating the given argument.

Augustine observed that a knowledge of tropes – allegory, enigma, parabola, and so forth – is indispensable to resolve the apparent ambiguities in the sacred texts With his rich experience as translator, Luther pointed out to his readers the tropes that are scattered in the sacred texts. Christ, he wrote, often resorts to allegories and parables, which, like painted images, move the populace . . . Paul uses allegory – that allegory that only a perfect acquaintance with Christian doctrine permits him to employ without risk – *like a great artist*.⁹⁰⁶

“Eloquence is a painting of thought,” he might have added from Pascal. Or this from Chateaubriand: “History . . . is a painting; it is necessary to combine narration with the representation of the subject, that is, it is necessary simultaneously to design and to paint.” And maybe from Blake: “What is it sets Homer, Virgil and Milton in so high a rank of art? Why is the Bible more entertaining and instructive than any other book? Is it not because they are addressed to the imagination, which is spiritual sensation, and but mediately to the understanding or reason?” Nearer our time, from Benedetto Croce: “And when it is proved that narrative is not science but art, how is any harm done, may we ask, to the seriousness of history?” and from Huizinga: “What the study of history and artistic creation have in common is a mode of forming images.”⁹⁰⁷

The art of rhetoric takes account of the need both for careful, logical exposition and for symbolic immediacy on conscious and subconscious tiers alike. This highly personal appeal meets the reality that while humans acting for any number of reasons make history, history constantly (re)makes society and therefore the set of inducements:

⁹⁰⁶ Ginzburg, *History, Rhetoric, and Proof*, p. 14 (italics added).

⁹⁰⁷ Blaise Pascal, *Pensées, or Thoughts on Religion*, Gertrude B. Rawlings, trans. and ed. (Mt. Vernon, NY, 1900), p. 72; François-René de Chateaubriand, *Oeuvres complètes de Chateaubriand* (Paris, 1832); William Blake, Letter to Reverend John Trusler (23 August 1799), *The Letters of William Blake*, Archibald G.B. Russell, ed. (New York, 1906), pp. 62-63; Benedetto Croce, “*La storia ridotta sotto il concetto generale dell’arte*” (“History Brought Under the General Concept of Art: A Lecture Read to the *Accademia Pontaniana* of Naples, March 5, 1893” p. 26); Johan Huizinga, “The Aesthetic Element in Historical Thought” in *Dutch Civilization in the Seventeenth Century and Other Essays* (New York, 1968), p. 226.

No individual can be understood without knowing the social scene in which he lives and which has molded his personality, but no historical event can be understood without knowing the fundamental principles of human motivation, which are the dynamic driving force behind the ever-shifting scenes of history.”⁹⁰⁸

E.H. Carr concurred: “The men whose actions the historian studies were not isolated individuals operating in a vacuum; they acted in the context, and under the impulse of a past society.”⁹⁰⁹ Bloch as well had spoken to the tie between strong insight about human nature and good historical research: “But to establish the fact of [for example] forgery is not enough. It is further necessary to discover its motivations, if only as an aid to track it down.”⁹¹⁰ The same, of course, holds true for the historian, as Carr noted: “Like other individuals, he is also a social phenomenon, both the product and the conscious or unconscious spokesman of the society to which he belongs.”⁹¹¹ Accordingly, Wedgwood urged historians in all humility to recognize their own foibles (the same holds for lawyers), with one result a better ability to craft a humanized message: “The historian’s first duty is not to his subject, but to his audience – not that he should tamper with the truth as he sees it, but he should write nothing without considering the weakness, prejudice and ignorance with which he is surrounded *and which he shares*.”⁹¹²

Self-understanding, then, is quite helpful when contemplating the historian’s (and lawyer’s) further tasks, for beyond detection and comprehension is the task of presentation, also improved with strong insight. The “imaginative understanding” Carr

⁹⁰⁸ Franz Alexander, “Psychology and the Interpretation of Historical Events” in Caroline F. Ware, ed., *The Cultural Approach to History* (New York, 1940), p. 48.

⁹⁰⁹ E.H. Carr, *What is History?*, pp. 41-42.

⁹¹⁰ Bloch, p. 77.

⁹¹¹ E.H. Carr, *What is History?*, p. 42.

⁹¹² Wedgwood, “The Historian and the World” in *History and Hope*, p. 491 (emphasis added).

describes as key to penetrating the minds of those studied⁹¹³ has an additional application in historical expression in the form of history writing, presumably for an audience (surely even authors of the most focused monographs hope for appreciative readers).

In this respect, where Carr stated that “History is concerned with the relation between the unique and the general,” he was mindful that “[t]he *reader, as well as the writer*, is a chronic generalizer, applying the observation of the historian to other historical contexts with which he is familiar – or perhaps *to his own time*.”⁹¹⁴ And thus returns the issue of presentism (first discussed in Chapter 2, Section 3, *supra*). “*Each age writes the history of the past with reference to the conditions uppermost in its own time,*” declared Frederick Jackson Turner in 1891.⁹¹⁵ Later historians would return to more traditional stances as to objectivity (before the various “turns” in the later twentieth century) but held much the same view on the (separate) strength of presentism. Hilaire Belloc, for example, in 1938 reflected: “Now the most difficult thing in the world in connection with history, and the rarest of achievements, is the seeing of events as contemporaries saw them, instead of seeing them through the distorting medium of our later knowledge.”⁹¹⁶ And then Carr in 1961: “[We historians] can view the past, and achieve our understanding of the past, only through the eyes of the present.”⁹¹⁷

⁹¹³ Carr, p. 26.

⁹¹⁴ Ibid, at pp. 83 and 81, respectively (italics added).

⁹¹⁵ Turner, “The Significance of History,” *The Early Writings of Frederick Jackson Turner*, compiled by Everett E. Edwards (Madison, 1938), p. 52 (italics original).

⁹¹⁶ Hilaire Belloc, *The Great Heresies* (New York, 1938), p. 190.

⁹¹⁷ Carr, p. 28. Carr overall found the matter unproblematic: “Great history is written precisely when the historian’s vision of the past is illuminated by insights into the problems of the present.” Ibid., p 44.

The presentist directive of course almost always exists also in litigation, where at stake is a verdict or other decision or outcome (including settlement) disposed in the present or future but based on assessments of past actions and circumstances. Historians grapple with a similar linking impulse on the part of most of their readers, even should the given historian be able (somehow) to evade presentism. Indeed, the predicament is perhaps greater in history, where the audience is mostly *voluntary*, certainly more so than a jury in law. Outside certain specialty circles, potential readers are under no compulsion to select – from a mountainous and ever growing hoard (and a great body even within specialties) – any particular offering, such that their decision to engage is largely a presentist assessment of self-interest (pleasure, self-enrichment, careerism, etc.). And potential readers poised to select a historical treatment may well seek the guidance of heuristic sorting devices, reviews prominent among them, which in turn often comment on such matter as style and cogency. One might think of a sort of demand continuum here – the less specialist the audience, the greater the insistence on flow and dynamism, even for journal articles. The pressures mount considerably for those intending to publish in book form. Even work intended for the middle reader zone (i.e., work aimed at disciplinary and sometimes cross-disciplinary generalists) brings publisher pressure to cover costs and perhaps even realize a modest profit. As historians approach the popular history endpoint they face pressures sufficient, according to Huizinga, to cause *some* authors (Huizinga did not claim all) to self-regulate according to market realities:

[Historians] can only reach this broad circle by respecting and even currying to their cultural idiosyncracies: repugnance toward everything reminiscent of school; a strong need for emotion, color, and sentiment in their intellectual nourishment; and a preference for the personal, and subjective, and the biased. And, finally, a certain philosophic vagueness. It is not necessary for the publisher to urge the

author in so many words to take all these characteristics into account. The author usually shares them himself. The more he yields to general and emotional inclinations, the more acceptable the work becomes for publication.⁹¹⁸

Huizinga's historiographical writings echo much of the cultural elitism of continental historians and other thinkers (e.g., the Frankfurt School) in the interwar period, i.e., the sense that democratizing culture likely debases it.⁹¹⁹ Trevelyan's more sanguine view of the tradeoffs allowed the possibility of some gain: "People will read history if it fascinates them. It is therefore the *duty* of history to make it as fascinating, or at any rate not to conceal its fascination under the heap of learning which ought to underlie but not overwhelm written history."⁹²⁰

However, it might also be that several very important topics in history are far from naturally engaging, much less transporting. What is the "duty" there? Wedgwood explored the terrain with typical uplift:

[T]here are many subjects which have to be studied and which ought to be studied, but which no historian could or should wish to turn into literary history. The underlying mechanism of administration, the slow development of institutions, the intricate interlocking of economic and social facts, which must of necessity be studied in meticulous detail and infinite variety unless we are to be misled by facile generalizations – all these things are of the greatest importance in the study of history, but very few of them can be adequately or even honestly treated in an essentially literary manner. Writing about them is none the less an art, and a very difficult one; and some works on these highly unliterary subjects are most certainly literature.⁹²¹

⁹¹⁸ Johan Huizinga, "The Task of Cultural History" in *Men and Ideas* (Princeton, 1984), p. 45. The essay was first published in *Cultuurhistorische verkenningen* (Haarlem, 1929), pp. 1-85.

⁹¹⁹ "Yet the oppressing question with which Rostovtzeff concludes his *Social and Economic History of the Roman Empire* is still unanswered: 'The ultimate problem remains like a ghost, ever present and unaid: Is it possible to extend a higher civilization to the lower classes without debasing its standard and diluting its quality to the vanishing point? Is not every civilization bound to decay as soon as it begins to penetrate the masses?'" Huizinga, *Men and Ideas*, p. 51.

⁹²⁰ G.M. Trevelyan, "History and the Reader" in his *An Autobiography and Other Essays* (London, 1949), p. 65 (emphasis added).

⁹²¹ Wedgwood, "Art, Truth and History" in *History and Hope*, pp. 253-254.

Even so, a historian might adopt the stance (and it would help to be a tenured academic) that reader numbers matter hardly at all, that honoring the call of refined scholarship somehow creates its own value. But for the majority who desire some level of influence (and the chance to publish again, no little factor in promotion), readership remains a key concern. Under the whole of normal circumstances, then, historians need consider an interwoven set of reader appeals – an inherently intriguing topic, on some level linking the unique and the general, expressed in clear, clean and at times even elegant prose.

Finally, in both history and law practice a subtle but efficacious rhetorical element is *paratext*, a topic that might easily generate a full essay of its own (I will be much briefer). While lawyers do not typically use the term, they regularly employ the rhetorical technique, and in coordination with other narrative devices such as modes of emplotment. For example, the plaintiff's counsel in the initial pleading stages of a civil lawsuit enters on the cover sheet a descriptive caption providing at a quick glance an understanding of what the case is about (e.g., "Breach of Contract"). Occasionally, more exacting labeling is critical. In two employment law cases, instead of the unadorned caption of "Wrongful Termination" typical in notice pleading, we entitled the lawsuits *Retaliatory Wrongful Termination in Violation of Public Policy*, for it was important to shake the defendants and opposing counsel out of their nonchalance as to the seriousness of their tortious actions and to create for them and their insurers a different mindset about what was the expected range of damages (the captions also signaled to judges, courthouse clerks, and even the press that the matters were not at all prosaic). Of course, the evidence must merit the extra drama, lest over-inflation invite multilateral disdain, not a

problem in these two matters.⁹²² The lawyer's bearing and diction,⁹²³ dress and even support staff send messages tailored to the varying audiences and types of cases.

In pretrial pleadings, motions and hearings, the critical consumers are the aforementioned judges,⁹²⁴ clerks, opposing counsel and insurers. The critical audience at trial is the jury, with whom the lawyer attempts to build credibility and to strike some rapport (some adopt a “folksy” mien, with no little failure rate if not natural). The given case quite often turns on the clients' credibility, involving the lawyer's success in (as in history) linking the unique to the general, i.e., in humanizing for the jury the client's plight and actions under the circumstances. Paratext is thus a sort of quasi-evidence.⁹²⁵ The lawyer strives to mitigate the client's “otherness”—far better if jurors recognize some commonalities of hopes, perspectives, dreams, frustrations and motivations. Hence the client (most of the time, depending on the claim) is “a regular person, one of us” shown in all manners (family in the gallery, allusions to bill pressures, hobbies and the like). It follows that lawyer and client confer about attire, jewelry, cosmetics and comportment to ensure these paratextual variables align with the central and more overtly textual theme. Occasionally (and the exception that demonstrates the rule) lawyers position the client as

⁹²² Each case involved retaliation for reporting extremely disturbing illegal behavior: chronic abuse at a children's home; gross and systematic sexual harassment. Each settled for considerably over \$1 million, with extensive internal reform, including wide overturn of management and procedures.

⁹²³ “There is as much eloquence in the tone of voice, in the eyes, and in the air of a speaker as in his choice of words.” François de La Rochefoucauld, *Maxims and Moral Sentences*, No. 261.

⁹²⁴ In Chapter 1 I noted how the courtroom contains symbols of prestige and authority – an elevated bench (more so at appellate levels), robed judge, on whose entry all in attendance must rise, solemn oaths, armed peace officers in uniform, flags and seals, and counsel's normally formal attire and demeanor.

⁹²⁵ “It is well known to all experienced minds that our firmest convictions are often dependent on subtle impressions for which words are too coarse a medium.” George Eliot (Mary Ann Evans), *Adam Bede* (New York, 1883), p 332.

a maverick, or themselves act the part (sometimes in full cowboy resplendence).⁹²⁶

So goes history writing, wherein paratextual expressions help to establish and reinforce legitimacy, credibility and the sense of trust essential to persuasiveness. Their effect is often subliminal, but not always or necessarily so. Most arise from the author's (and publisher's) strategic considerations according to the intended audience. We might see paratext in history is one aspect of, or perhaps a cousin to, Michel de Certeau's notion (briefly noted in Chapter 1) of a "double discourse" – the narrative and discursive – at play in historical works. One observes how with footnotes, for example, the deliberate coordination of "above the line" and "below the line" messages has at least two functions. One is simply to preserve the narrative flow of the main text. Another is to lend further credence to the central arguments by demonstrating the author's impressive range and depth of scholarship, sometimes affected but often quite genuine (Ginzburg is one such case), including, for just one example, a real mastery of philology, as a generous sprinkling of words and phrases in Greek, Latin, French, German, Spanish, Farsi, etc. would seem to attest. It follows that the occasional choice to eschew most if not all footnotes or endnotes is likewise purposeful toward some communicative ends. White's avoidance of even one in his manifesto "The Burden of History" seems, to this reader anyway, much in line with his raillery against conceptual anachronism ("the expulsion of history from the first rank of sciences") and his deep reservations as to received authority ("we require a history that will educate us to the discontinuity more than ever before.")⁹²⁷

⁹²⁶ Famed trial lawyer Gerald Leonard "Gerry" Spence, plaintiff's counsel in the Karen Silkwood case and several other high profile matters, was one such character. See the memoir, Gerry Spence and Anthony Polk, *Gunning For Justice: My Life and Trials* (New York, 1982).

⁹²⁷ White, "The Burden of History" in *Tropics of Discourse*, pp. 31 and 50, respectively.

Paratextual signaling also includes provocative titles (Schama's *Dead Certainties*, White's *The Content of the Form* and *Metahistory*, Novick's *That Noble Dream*, Howard Zinn's *The Politics of History*, Trouillet's *Silencing the Past: Power and the Production of History*, Wedgwood's *History and Hope*, Berlin's *Historical Inevitability*, Foner's *Who Owns History?*, Evans's *In Defense of History*, etc.) meant not only to attract initial interest but also to set the discursive course and tone and foreshadow the core argument (all these points hold as well for chapter headings and titles of journal articles). Clever and at times profound epigraphs serve similar foreshadowing and sponsoring functions, and hint again at the historian's broad knowledge. Subtler cues are embedded in the cover design (including color and font), book size and heft (or purposeful slenderness), paper texture and quality and text font. And woven throughout what one thinks of as the text proper are other subtleties, such as the judicious seeding of authoritative quotations aimed once more at enhancing credibility and, of course, the writer's tone – cerebral, witty, brooding, populist, analytical, poetic, ironic, “street,” restrained, biting, lilting, polemical, folksy, moralistic, elegant, or some attempted combination thereof – partly a question of personality and training, quite often partly strategic.

Relatedly, vocabulary is sometimes intentionally dense and daunting, or in other instances studiously accessible. Across the spectrum it is often highly allusive to analogical terminology in other fields, with the natural sciences, visual arts and of course judge-centered law three favorites. Moreover, as Barthes argued (see again Chapter 2, Section 7), “language is never innocent,” with words shifting meaning over time but concealing (imperfectly) the value-laden legacy of prior uses. Thus, the historian's choice of one descriptor over another tends to channel the reader's thinking in a specific

direction. Bloch noted how, by his time, terms like capital and capitalism, feudal and feudalism, revolution, atom, and proletariat, after intervening centuries of political and theoretical wrestling, had come to symbolize ideas (presentist and ideological) far afield of their original conceptions: “Our symbols are variable according to time or place; they become coefficients of emotivity” in historical writings.⁹²⁸

Thus, and finally, in both law and history one remarks in the admixture of text and paratext a certain aesthetics of narrative.⁹²⁹ Kuhn described how some propositions win favor on such bases: “These are the arguments . . . that appeal to the individual’s sense of the appropriate or the aesthetic – the new theory is said to be “neater,” “more suitable,” or “simpler” than the old . . . the importance of aesthetic considerations can sometimes be decisive.”⁹³⁰ The practitioner can be said to “weave” a compelling tapestry-story along recognizable narrative (modal-tropical) lines. Another such analogy is to music orchestration, which like legal and historical argumentation requires the careful arrangement of data in both the “positive” (inclusion) and “negative” (omission) sense. The legal/historical composer understands with poet Martin Tupper (who trained in law) that at times “well-timed silence hath more eloquence than speech,”⁹³¹ and thus never fills every possible line with every possible note. Historians, lawyers, visual artists

⁹²⁸ Bloch, p. 142. Carr (at p. 28) also made this point: “The very words which [the historian] uses – words like democracy, empire, war, revolution – have current connotations from which he cannot divorce them.”

⁹²⁹ I leave for analysis elsewhere the question of whether it delivers more confusion than clarity to posit that all text (including references to evidence and experts’ conclusions) is in some manner also paratext.

⁹³⁰ Kuhn, pp. 155-156. As a graduate student in Political Science, I encountered the rough equivalent of those terms in the descriptors “elegant” and “parsimonious.”

⁹³¹ Martin Farquhar Tupper, *Proverbial Philosophy* (Auburn, 1848), p. 62. Tupper’s comment was closely contemporary to Carlyle’s “silence is more eloquent than words” (from *On Heroes, Hero-Worship, and the Heroic in History* [London, 1841], p. 150) and may have been meant as a corrective version of it.

and music composers all orchestrate positives, negatives and tonalities to achieve the intended rhythm, drama and effect.⁹³² While lawyers openly mine that dynamic in the context of an adversarial legal system, some practicing historians have been reticent to acknowledge such considerations, although most are conscious of them, as exchanges over the past few decades demonstrate. Form, subliminality and aesthetics are rhetorical devices tailored to specific audiences to enhance credibility, trust and persuasive power.

(7) Notwithstanding all the above, external pressures – including the devices of formal and informal counteradvocacy and critical review – help reinforce the historian’s presumed objectivity, fairness and trustworthiness

How difficult it is for error to escape its own condemnation.
Publius

The amazing thing since so many variables enter into historical judgments, is not that historians disagree but that they agree as often as they do.
Louis Gottschalk, *Understanding History*

Historians have always cared about veracity and error. “For who does not know history’s first law to be that an author must not dare to tell anything but the truth?” Cicero’s question-admonition from 55 BCE is of course far too neat.⁹³³ As discussed at length in the preceding chapters, for some long time now historians have understood that truth explorations are multifaceted – on one plane historians propose, demonstrate and question fact claims, on others they conceptualize, articulate and test historical interpretations arising from such facts and the surrounding circumstances, with some

⁹³² Any musical analogy to argumentation in law and history must omit atonal constructions, save where the lawyer or historian points out “dissonance” in opponents’ arguments. Thinkers in several fields have noted how efforts to preserve “cognitive consonance” sometimes skew perception. See, e.g. Robert Jervis, *Perception and Misperception in International Politics* (Princeton, 1976).

⁹³³ *Nam qui nescit, primam esse historiae legem, ne quid falsi dicere audeat?* Marcus Tullius Cicero, *De Oratore* (Book I, XV), E.W. Sutton, trans. (London, 1967), pp. 242-245. The follow-up challenge was equally unrealistic: “And its second that he must make bold to tell the whole truth?” (*Deinde ne quid veri non audeat?*) Ibid.

measure of presentist concerns most often guiding all these activities. These tasks are much like the lawyer's, with certain field dynamics similar to those in law in the manner they provide some corrective to overstatement.

No few commentators outside the field have waxed doubtful (and sarcastic) about the historian's ability or even willingness to achieve exacting verity.⁹³⁴ Presumably, and as is necessary in law practice, one thickens the skin against barbs from outsiders who do not grasp the cross-pressures of the practice field and the essential integrity of (most) of its actors.⁹³⁵ Harder to dismiss are historians' own statements. For example, from Macaulay in 1827 (anticipating the story-telling dynamics covered in Section 6 above):

The best portraits are perhaps those in which there is a slight mixture of caricature; and we are not certain that the best histories are not those in which a little of the exaggeration of fictitious narrative is judiciously employed. Something is lost in accuracy; but much is gained in effect.⁹³⁶

From Henry Adams in 1903, in one of the most captious takes ever: "The historian must not try to know what is truth, if he values his honesty; for if he cares for his truths, he is

⁹³⁴ Anatole France: [*L*]es livres qui ne mentent pas sont tous fort maussades ("When a history book contains no lie it is always tedious"), *Le crime de Sylvestre Bonnard, membre de l'Institut* (Paris, 1893), p. 5; Mark Twain: "Get your facts first, and then you can distort them as much as you please" in Rudyard Kipling, "An Interview with Mark Twain" in *From Sea to Sea: Letters of Travel* (New York, 1899), p. 180; Ambrose Bierce: "History: an account mostly false, of events unimportant, which are brought about rulers mostly knave, and soldiers mostly fools," *The Devil's Dictionary* (Cleveland, 1911), p. 138; Nietzsche: "To be truthful means to employ the usual metaphors. Thus, to express it morally, this is the duty to lie according to a fixed convention, to lie along with the crowd and in a style binding upon everyone," as quoted in Ginzburg (1999), in turn citing to "On Truth and Lies in a Nonmoral Sense," *Philosophy and Truth: Selections from Nietzsche's Notebooks of the early 1870s*, trans. and ed. D. Breazeale (Atlantic Highlands, NJ, 1979), pp. 79ff; Anonymous: "Historians, it is said, fall into one of three categories: those who lie; those who are mistaken; those who do not know."

⁹³⁵ Here I acknowledge many people hold at least some lawyers in lower regard than historians. My own experience is that too-large numbers in law in fact are disingenuous, but also that an abundance of others are highly ethical in their every dealing, the heated intensity of the duties having disjoined gold and dross.

⁹³⁶ Thomas Babington Macaulay, *Machiavelli* (1827) in *English Essays from Sir Philip Sidney to Macaulay*, ed. Charles W. Eliot (New York, 1910), pp. 419-420.

certain to falsify his facts.”⁹³⁷ Barraclough (1957) expressed just a bit less doubt: “Man is an historical animal, with a deep sense of his own past; and if he cannot integrate the past by a history explicit and true, he will integrate it by a history implicit and false.”⁹³⁸ Slightly earlier, Bloch (1944) reminded his colleagues how personal beliefs might overly steer the analysis: “Montaigne has always warned us on this head: ‘Whenever judgments lean to one side we cannot help distorting and twisting the narrative in this direction.’”⁹³⁹ For all such reasons and more, according to Cambridge professor G. Kitson Clark (1967), “[n]o version of history ought to be believed without question. No historian should be trusted implicitly.”⁹⁴⁰ To wit, Sol Cohen (1999) noted how Michael Katz, labeled a “radical revisionist” in education history, seemed to have taken advocacy to the far frontier of historical writing, and arguably beyond:

Given [his] view of the social crisis of his time and the illocutory or performative intent of his work, he never wanted to achieve a judicious “balance” Factual inaccuracies? Conceded on all sides. But factual information was not the point Katz, as an ironic historian, can be seen in part as trying to perform a therapeutic function, seeking to expose [liberal and progressive] illusions about American school and society.⁹⁴¹

How does the history profession encourage even fervid champions of a position to honor the field tradition of careful scholarship, including fidelity to the facts? Are there now no bounds at all consistent with what one typically imagines in a “discipline”? The answers

⁹³⁷ Henry Adams, “The Grammar of Science” (1903) in *The Education of Henry Adams: An Autobiography* (Boston, 1918), p. 457.

⁹³⁸ The comment was part of an exhortation to careful historians to fill the void so that lesser talents would not; it continued: “The challenge is one which no historian with any conviction of the value of his work can ignore.” Geoffrey Barraclough, *History in a Changing World* (Oxford, 1957), pp. 24-25.

⁹³⁹ Bloch, p. 116.

⁹⁴⁰ G. Kitson Clark, *The Critical Historian* (London, 1967), p. 10.

⁹⁴¹ Sol Cohen, “Revisiting the History of Urban Education: Historiographical Reflections,” Chapter 2 in *Challenging Orthodoxies*, pp. 44-45.

are the long standard ones – systemic review and checks – though perhaps understood a bit differently in the instant legal analogy. As in litigation, *persuasion* is the very essence of the historical work, both the means and ends of the production. Arguments do not unfold in a void. The individuals who articulate them, it seems reasonable to believe, share the fundamental assumption that someone is listening, or will someday listen – else there is little point to the exercise. Even in writings like the one Cohen described above, where the historian’s thrust (and thus narrative style) is openly confrontational in challenging field tenets,⁹⁴² the author’s intent is, again, to *persuade* colleagues that some aspect of the status quo is unacceptable, and why. In the absence of such an appeal, the challenge, no matter how sincere, proves inconsequential, and fades away without any lasting influence.

Historians, who describe their subjects largely in social terms, are in turn, like other knowledge creators, sensitive to the social dynamics of their field, as Kuhn so widely demonstrated (Section 5 of Chapter 2, *supra*). Lawyers, of course, expect a regular testing of propositions. This social dynamic is less overt in history, but no less real. Even a relativist *par excellence* like Becker understood the existence of professional checks via the collective. On the one hand, he largely dismissed historians’ ability or even (because of presentism) their desire to render fully unimpaired historical recountings: “Let us admit there are two histories, the actual series of events that once occurred; and the ideal series that we affirm and hold in memory.” This affirmed ideal

⁹⁴² “Few historians of education were equipped to handle the radical revisionists’ aggressive, in-your-face rhetorical style, their arrogance in argument, and their imputations of ignorance, bad faith, or self-seeking aimed at anyone who disagreed with them.” *Ibid.*, p. 48. According to Novick, such behavior went far beyond education history; he devoted Chapter 13 of *That Noble Dream* to what he called “the collapse of comity,” making clear it was not limited to any particular subspecialty, but rather resounded field-wide.

series is what the historian (and the lawyer) would have the readers (and jury) hold in memory and reaffirm. On the other hand, where Becker's "Mr. Everyman" crafts a history in line with his own ends, "there are, nevertheless, limits which [he] may not overstep without incurring penalties. *The limits are set by his fellows.*"⁹⁴³

For less relativist historians, it is easier to countenance, even embrace, the sense of systemic corrective. Appleby, et al., for example, expounded considerably on the topic from a perspective of historical writing as an emphatically democratic pursuit. They pointed to "the fact that history-writing and history-reading are a shared enterprise in which the community of practitioners acts as a *check* on the historian." The checking function begins with an assumption that historians, despite good intent, simply cannot attain the supposed ideal of "judicial" distance in their analyses, a reality that leads very often to contestation: "Our version of objectivity concedes the impossibility of any research being neutral . . . and accepts the fact that knowledge-seeking involves a lively, contentious *struggle* among diverse groups of truth-seekers." The adjudicating body is an audience able to engage in critical review precisely because field norms compel practitioners to reveal all pertinent sources of the fact claims behind the interpretation: "An audience of *peers* derives its power from equal access to the evidence and to publication, a reminder that democratic practices have an impact far beyond the strictly political." In this model, objective assessments of historical claims have an interactive dimension: "Validation . . . comes from *persuasion* more than proof."⁹⁴⁴

⁹⁴³ Becker, *1931 AHA Presidential Address* (italics added for emphasis).

⁹⁴⁴ Appleby, Hunt and Jacobs, pp. 261, 254 and 262 and 261, respectively (italics added for emphasis). That stated (and as quoted earlier in Chapter 2, Section 8, *supra*), "without proof there is no historical writing of any worth." Ibid, p. 261.

Contestation, critical review of the facts, context⁹⁴⁵ and relevance, proof-based advocacy of viable and plausible interpretations – in all, a set of efforts meant to persuade the author’s peers (as in “trial by a jury of one’s peers”) – each and all support the comparison of historical writing to adversarial law practice. The string of comments by the trio of historians just above thus further underscores that in any neo-judicialist analogy the proper focal point is the *lawyer* rather than the (Anglo-American) judge.

Certain mechanics in law and history help to alleviate doubt for consumers of the fact claims. In law, formal interrogations (deposition and trial testimony) take place under oath, with the understanding also that “penalty of perjury” engages. Perjury is difficult to prove, and far too many individuals struggle with truthfulness, especially when it cuts against their perceived interests. Thus, trial testimony⁹⁴⁶ is subject to cross-examination, at times rather vigorous. Many are those who come to regret ignoring Scott’s enduring caution: “O, what a tangled web we weave, when first we practise to deceive!”⁹⁴⁷ Yet only some witnesses *mean* to deceive – a great many souls are simply uncertain about the sequence of events, subject to mistaken impressions, their sometimes

⁹⁴⁵ “The significance of context . . . [is that] words and events can only be understood in terms of the situation in which they were spoken or enacted, that to take them from that context and present them in isolation is necessarily to falsify.” Clark, *The Critical Historian*, p. 204.

⁹⁴⁶ Depositions, which fall into the category of “discovery,” are not occasions for cross-examination. Deposing attorneys are allowed to ask questions “reasonably calculated to lead to the discovery of admissible evidence.” Only rarely is deposition testimony itself admissible, largely because of the absence of cross-examination. However, counsel may introduce deposition transcripts to impeach the credibility of a witness at trial if the trial testimony is inconsistent with the earlier deposition testimony, also given under oath, an uncomfortable state of affairs for the witness, who must find a graceful way to answer the caustic query “were you lying then, or are you lying now?”

⁹⁴⁷ Sir Walter Scott, *Marmion* (1808), Canto VI, Stanza 17. Scott’s musings on narrative skills in law echo the much later observations in history by, *inter alia*, Hayden White and Franklin Jameson: “A lawyer without history or literature is a mechanic, a mere working mason; if he possess some knowledge of these, he may venture to call himself an architect.” In *Guy Mannering*, Chapter 37 (1815).

hazy memories at times influenced by repeated suggestion.⁹⁴⁸ Hence, one utility of cross-examination is that it encourages an effort to maximize internal coherence, an important value in any narrative. The same principle, and similar checks, engage in historical writing, where presumably forthright scholars face tremendous time pressures, other resource limits, and have various personal and professional goals at stake, all heightening the temptation (not always consciously recognized) to cut corners or otherwise massage a felicitous evidentiary fit. Cicero's observation that historians "dare not" wander from verity, seen in this light, reflects the complementary dynamic of the historian's personal integrity and systemic checks, two forces cutting in the same direction.

All of which comes back full circle to the interrelated issues of judgment and objectivity in the two fields. Because opposition is part and parcel of litigation, the better lawyers assiduously prepare to overcome or neutralize it. In looking to preempt, deflect or otherwise nullify the potency of opposing interpretations, lawyers must be willing to recalibrate, where necessary, their own beginning argument. For it is a near certainty that opposing counsel will scrutinize every offered fact (including silences and other partial or full omissions) and every citation to statutory or case law, and will ferret out any other facts or law harmful to the preferred narrative. Good lawyers therefore do not ignore or gloss over inconvenient facts and law, but instead devote considerable attention to

⁹⁴⁸ As previously discussed, the term "History" derives from medicine. In that field also, practitioners encounter "testimony" of varying reliability. Medical interns learn early how to "take the patient's history" and thereafter speak of patients as "good historians" or "poor historians" in recounting the path of events leading to the medical intervention sought. Pediatricians, geriatricians and physicians specializing in brain injuries, mental retardation, mental disease or other mental compromise are acutely aware of the possibility of impaired or otherwise imprecise patient-recounted history. Some of these issues arise even with family caregivers, to whom physicians often turn to fill in the gaps, but who sometimes have their own reliability issues for an assortment of reasons. The reliability of sources is of course a problem in many fields – including most if not all of the human sciences – where experimental "controls" cannot be established so as to repeat and test the input-outcome relationship.

anticipating them so as to explain them in proper context.⁹⁴⁹ These precautions compel lawyers to practice, for internal purposes, a “devil’s advocate”⁹⁵⁰ role, i.e., to attempt to distill a more objective assessment of their own arguments and supporting evidence by viewing them from a skeptical outsider’s perspective. Critically testing possible weaknesses – again, under the reasonable assumption that talented opponents (with enough resources) will try to find and exploit them – allows legal advocates to reinforce, improve or, as occurs frequently, shift the original course of argument, sometimes to the point of abandoning it. In law, then, contestation requires and potentially enhances good judgment and objectivity.

Statements by historiographers suggest, here again, some striking similarities in how practitioners in law and history build their arguments: “[T]he historian requires the honesty of mind which ‘*throws itself into the mind of one’s opponents,*’” exhorted Powicke.⁹⁵¹ And while contestation in history is not as fully certain as in litigation, it arises frequently enough to have parallel salutary effect: “Criticism has always been a prophylactic derived from disciplined common sense, against absurdity and extravagance and, when it is fully awakened, against error.”⁹⁵² Yosef Hayim Yerushalmi indicated the nearly boundless terrain subject to questioning: “The historian does not simply come in to

⁹⁴⁹ Justice Learned Hand described with great approval a colleague’s approach: “Like John Stuart Mill, he [Benjamin N. Cardozo] would often begin by stating the other side better than its advocate had stated it himself.” Learned Hand, “Mr. Justice Cardozo” (1939), reprinted in *The Spirit of Liberty: Papers and Addresses* (New York, 1952), p. 131.

⁹⁵⁰ The phrase, now widespread in the vernacular, originated in the Roman Catholic church, which in 1587 under Pope Sixtus V initiated the use of a “devil’s advocate” office to test the validity of claimed miracles and other prerequisites in the canonization process. Under Pope John Paul II in 1983 the church modified the arrangement, considerably reducing the power and role of the office.

⁹⁵¹ F.M. Powicke, *Modern Historians and the Study of History*, p. 202, (emphasis added).

⁹⁵² *Ibid.*, p. 228. See again Diderot’s call (Chapter 1, *supra*) that “[a]ll things must be examined, all must be winnowed and sifted without exception and without sparing anyone’s sensibilities.”

replenish the gaps of memory. He constantly challenges even those memories that have survived intact.”⁹⁵³ In such an environment, John Ashton Cannon remarked, “every historian needs to be both lumpner and splitter, formulating his hypothesis and then doing his best to punch holes in it, *preferably before the reviewers do.*”⁹⁵⁴

Bloch implied a learning curve tied to exploring and testing doubt: “We are enabled henceforth both to expose and to explain the imperfections of evidence. We have acquired the right of disbelief, because we understand, better than in the past, when and why we ought to disbelieve.”⁹⁵⁵ His further comments on the point (as seen before in Section 4, *supra*) bear repeating, in how they overtly equate historical and legal scrutiny:

There is nothing arbitrary in the coincidence. In both roles, the need for intellectual discipline is the same Obligated always to be guided by the reports of others, legal action is no less interested than pure research in weighing their accuracy. The tools at its disposal are not different than those of scholarship.⁹⁵⁶

In turn, because testing claims is also a learning process, it sometimes leads lawyers or

⁹⁵³ Yosef Hayim Yerushalmi, *Zakhor: Jewish History and Jewish Memory* (Seattle, 1982), p. 94.

⁹⁵⁴ John Ashton Cannon, ed., *The Historian at Work* (London, 1980), p. 3 (emphasis added). Cannon’s description was in response to (and contested) J.H. Hexter’s over-simple bifurcation: “Historians who are splitters like to point out divergences . . . they carry around in their heads lists of exceptions to every rule. They do not mind untidiness and accident in the past . . . Lumpers do not like accidents . . . instead of noting differences, lumpers note likeness; instead of separateness, connection. The lumpner wants to put the past into boxes.” From J.H. Hexter, “The Burden of Proof,” *Times Literary Supplement*, 24 October 1975, pp. 1250-52. References to splitter-lumper distinctions apparently arose in discussion about biological taxonomy. Darwin often gets credit for first use, having raised it in an 1857 letter to John Dalton Hooker.

⁹⁵⁵ Bloch, p. 112. One is tempted to perceive a hint of neo-positivism (but certainly anti-nihilism) in this comment, and in one by Clark: “If men have learnt to doubt what they ought to doubt clearly something valuable has been achieved.” G. Kitson Clark, *The Critical Historian*, p. 9.

⁹⁵⁶ Bloch, pp. 112-113. Bloch’s comparisons to the legal world were sometimes at the systemic level and other times pointed to specific actors. In the latter, case, and likely due to his location in France, he tended to speak of judges (again, Bloch was a strong influence on Ginzburg and Davis): “The good judge, whatever his secret heart’s desire, questions witnesses with no other concern than to know the facts, whatever they may be.” Bloch 114-115. It is a major premise in the present essay that adversarial legal systems are the better comparator for historical writing than inquisitorial systems, in that it is not the good judge, but the good *lawyer* who – as does the good historian – “questions witnesses” toward gaining a reasonably objective understanding of the facts. Nor do judges face *opposition*, a critical distinction here.

historians to recalibrate their own approaches as the merits of the data become clearer: “Naturally, the method of cross-examination must be very elastic, so that it may change its direction or improvise freely for any contingency, yet be able, from the outset, to act as a magnet drawing findings out of the document.”⁹⁵⁷ Moreover, as Macaulay noted, critical review goes beyond a body of documents or other facts to whole interpretative constructs: “A history in which every particular incident may be true may on the whole be false.”⁹⁵⁸ Winks opined about an additional step in that assessment: “The historian, as an interrogator, wishes to know what fact may lie behind an untruth rather than merely to prove the statement to be untrue.”⁹⁵⁹ Indeed, John Lukacs recently reiterated, the historian must “struggle against all kinds of falsification, against many kinds of untruths, detecting them and exposing them for the sake of us all; aware that the pursuit of truths involves, ever and ever, hacking your way through a jungle of untruths.”⁹⁶⁰

With contested stories, of course, just what constitutes truth and untruth is a central matter. In law and history both, perspective and objectivity sit in what *can be* a healthy tension. As Lukacs put it:

But detachment, too, is something different from separation; it involves the ability (issuing from one’s willingness) to achieve a stance of a longer or higher perspective. The choice for such a stance does not necessarily mean a reduction of one’s personal interest, of participation – perhaps even the contrary.⁹⁶¹

⁹⁵⁷ Ibid., p. 54.

⁹⁵⁸ Thomas Babington Macaulay, “The Task of the Modern Historian” (1828), reprinted in *Little Masterpieces: Lord Macaulay*, Bliss Perry, ed. (New York, 1898), p. 11.

⁹⁵⁹ Winks, *the Historian as Detective*, p. 39. This was part of the approach in what Ginzburg describes as “a forerunner of the developing critical approach to history,” i.e., Lorenzo Valla’s 1440 oration on the *Donation of Constantine*, exposing as a forgery an important and widely known article of propaganda favoring the papacy. Ginzburg, *History, Proof and Rhetoric*, pp. 54-55.

⁹⁶⁰ John Lukacs, *The Future of History* (New Haven, 2011), p. 23.

⁹⁶¹ John Lukacs, “Putting Man Before Descartes,” *The American Scholar* (Winter 2009).

The several foregoing statements do not translate into believing all interpretations are equally sound, or even that a multiperspectival view, generally helpful, is *necessarily* superior: “The validity of each reconstruction would depend on the accuracy and completeness of the observations, not on the perspective itself.”⁹⁶²

Such interpretative validity begins to grow where historians first acknowledge the need to be *objective about their subjectivity*, and thus move in some countering or at least balancing fashion. That behavior seems more likely for those historians who operate with a theory of conflict something along these lines: contestation as to assumptions, evidence and interpretation is unavoidable, but historians can harness its energy in such a way that it yields helpful and even constructive guidance. For contestation places a premium on *persuasion*. In turn, one’s measure of persuasive power, as noted a number of times herein, is largely a function of the effort and *good judgment* invested. It prominently includes an appropriately high level of *respect* for consumers of the argument so that one works diligently to gain their *trust* by treating the evidence, including those facts perhaps inconvenient to the interpretation, with *competence* and *fairness*. Passion is fine, but the argument ultimately must generate more light than heat. Where the historian meets these conditions, the fact that historical interpretation cannot escape instrumentalism, presentism and advocacy is not insurmountably problematic.

Just who, then, sits in review? In law trials, many if not most courts⁹⁶³ in the adversarial Anglo-America legal system empanel a jury of the client’s “peers” (persons

⁹⁶² Appleby, Hunt and Jacobs, p. 257.

⁹⁶³ In some situations the parties may waive the right to jury trial, such that the judge takes on the jurors’ role as the trier of facts. Also, in an increasing number of disputes, particularly in commerce, the parties present their arguments to arbitrators working either solely or in small panels (usually no more than three).

drawn from the general community) to hear the advocates' narrative presentation of evidence and overarching interpretations thereof in context of the legal issues at bar, and then to pass judgment. The judge is a referee of sorts, who as the guiding administrative body enforces decorum and rules on admissibility and the like, but who leaves verdicts to the jurors. In this sense, the rough equivalent of the law judge in the history world is the institutional collectivity of the history profession and academy – universities, associations, book publishers, journals – i.e., to the extent they regularize processes of admission and exchange (as opposed to the actual content of such exchange). It is when historians critically review their colleagues' historical work (the presenting historian's "client"), in essence pass judgment on it, that they perform as jurors.

It follows that when and where presenting their own arguments historians are *not* jurors. Judgment on the merits is not – cannot rightly be – the domain of the same historian providing the interpretation. It instead belongs to the community of readers, writ narrow or wide. As to the former, Appleby, et al., joined Kuhn and others⁹⁶⁴ in discussing a community of reviewers concentrated in the same profession (see again, Chapter 2, section 8, *supra*). In the litigation comparison such a group would closely approximate a jury of peers, by one measure at least. By another measure, because jury pools draw from across the population, representing a broad range of background, training and experience, an equivalent in history would be a mix of readers: academic historians in other specialties, non-academic professional historians, non-historian academics, the literate laity (including students), with some remaining portion historians from the same specialty (much in the way law juries, after recent reforms, now

⁹⁶⁴ As noted in Chapter 2, Section 8, *supra*, even Derrida suggested that a discourse "community" of sorts could alleviate the problem of poor communication by functioning as "interpretive police."

occasionally include lawyers).⁹⁶⁵

However diverse the community of reviewers may be, the historian's task is to engage it in order to inform it, and along the way to reflect critically about the modes and meanings – and defensibility – of that engagement. That process includes carefully and methodically laying a factual and logical foundation adequate for the construct of claims built thereupon.⁹⁶⁶ That groundwork may well include reference to analyses by experts in archeology, numismatics, philology, et al., much in the way lawyers utilize a variety of expert witnesses to speak to documents, artifacts, context, and other circumstances, and reasonable inferences therefrom as to validity, proof and relevance. To the extent it makes sense to conceptualize the ultimate product as one emerging from a team of contributors, historians like lawyers have the final responsibility to direct and coordinate the packaging and persuasive presentation of the collected efforts.

Sub-par performance on these fronts exacts a toll often enough to encourage good lawyers and good historians to back good intentions with all appropriate focus, skill, imagination and diligence. Losing parties in litigation are very disappointed, sometimes enough to contemplate suing counsel. Historians risk excoriation in the journals⁹⁶⁷ (and

⁹⁶⁵ As briefly discussed in the preceding Section 6, lawyers and historians both have more than one audience. Among potential audiences, other than the jury, for the lawyer at various stages during the litigation cycle are the judge (who hears and rules on various motions, both oral and briefed), law clerks, opposing counsel, the opposing party, the lawyer's own client and the client's supporters, insurers, colleagues, both the general and professional press, potential future clients, and in some cases "posterity." For historians, audiences might include departmental colleagues, tenure and promotion review groups, professional journals, award-granting bodies (Pulitzer, et al.), graduate students, undergraduate students, the popular press, legislators, and at times even judges, especially at the appellate court level.

⁹⁶⁶ Lawyers and laypersons alike are familiar with the frequent protest: "Objection – lacks foundation."

⁹⁶⁷ Two further observations about professional history journals come to mind. One is the interesting similarity to how arguments often unfold at the briefing stages in civil law practice – a principle argument (the motion), then critical comments (the opposition to the motion), finally the original author's response (the reply). See *California Code of Civil Procedure*, §§ 1003-1005. The second is more a question as to

for works aimed at larger audiences, poor sales for current and future works) where reviewers deem the product or methods particularly objectionable. Thus, it seems something more than just “cooperation under anarchy”⁹⁶⁸ is in play in similarly systemic fashion in history and law to reinforce interpretive integrity.

The historian, like the litigating lawyer, offers a fact based argument packaged in a recognizable narrative, its coherence, objectivity and fairness in treating evidence, context and questions of relevance all kept in line by probable critical review and the need to win the trust of the audience to be persuaded. Truth approximations are gainful byproducts, no small matter in fields where so much cynicism abides. That stated, the mature historian recognizes, with Gottschalk, “the provisional tenability of more than one qualified interpretation of the same historical data”⁹⁶⁹ Practitioners rightly emphasize questions of proof in historical writing, but also rightly surmise that while challenges and systemic checks can result in higher confidence levels, they rarely deliver utter certainty.

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whether the history profession is so divided into subspecialties that any systemic check has become rather diluted. Novick (p. 580) plaintively suggested as much: “By the early 1980s there were seventy-five specialist historical organizations affiliated with the AHA; many more, including some of the most important, with no formal affiliation.” Anecdotal evidence (personal conversations with several practicing historians) indicates there has been no let-up in the perceived intensity of critical review.

⁹⁶⁸ A term used in discussing game theory and other strategic thinking in international politics, where regimes, however formally arrived at and outlined, ultimately have limited coercive power. See, e.g., Kenneth A. Oye, *Cooperation Under Anarchy* (Princeton, NJ, 1986).

⁹⁶⁹ Gottschalk, 1953 *AHA Presidential Address*.

(8) The historian’s realistic standard of proof is cast in probabilities similar to those in jurisprudence – not “beyond a reasonable doubt” (criminal law) but rather “more likely than not” (civil law)

For so great is the obscurity and variety of humane affairs, that nothing can be clearly known, as is truly said by our Academicks, the least insolent of all the Philosophers.

Desiderius Erasmus (from *The Praise of Folly*)

For now we see through a glass, darkly . . .

Paul, the Apostle (I Corinthians 13:12)

Throughout Paul’s New Testament writings one normally sees the cool logic of someone trained in law, as he was.⁹⁷⁰ By the words above, however, Paul’s message seems to be that in worldly attempts to approach truth, human perception is but an obscure medium, much like the imperfect and discolored glass of the first century Mediterranean region. Some commentators translate the term “a glass” (εσοπτρον) as instead “a mirror,” which in that time would have been a polished metal surface. The symbolism in the latter case (“we see *in a mirror*, darkly”) touches not only the flawed and nebulous nature of human reflection but also the omnipresence, the inescapability of the self in perception.⁹⁷¹ But either reading of the passage suggests the inherently impaired and thus always puzzling and enigmatic nature of human truth-seeking. One might thus view Paul as having been a blend of lawyer and historian, where learning, tradition, order, language and logic supported narrative argument. He professed the existence of truth (even Truth), but with

⁹⁷⁰ Paul’s earliest years were in the Greek city of Tarsus, and Paul employed Greek language and logic in his travels and writings. At a young age Paul traveled to Jerusalem to train under the celebrated Jewish scholar Gamaliel – “a teacher of law . . . an expounder of law,” so much so that contemporaries called him “the Beauty of the Law.” The instruction was in the Pharisee tradition, which emphasized knowledge of Jewish legal traditions and legal minutiae, to the point that Pharisees attracted criticism for seeming to undervalue the purpose or spirit of the law. See Albert Barnes, “Early Training of the Apostle Paul,” Chapter 1 in *Scenes and Incidents in the Life of the Apostle Paul* (Philadelphia, 1869), pp. 1-23.

⁹⁷¹ Compare, e.g., John Wesley, *Explanatory Notes upon the New Testament* (New York, 1754); Adam Clarke, *Commentary on the Bible* (New York, 1831); Albert Barnes, *Notes, Explanatory and Practical, on the New Testament* (London, 1844).

Erasmus after him acknowledged that while transcendence may eventually come (“but *then* I shall know” is later in the verse), in this life certainty as to human affairs is simply not achievable.⁹⁷²

As shown at several points in the pages above, historians and historiographers have for the most part showed considerable awareness of the issue. Some more examples introduce the main thrust of this Section. Ginzburg acknowledged that in the quest to produce proof-based historical works, conjecture plays almost a structural role: “Thus, the hypotheses, the doubts, the uncertainties became part of the narration; the search for truth became part of the exposition of the (necessarily incomplete) truth obtained.”⁹⁷³ Hence we return to Bloch’s notion of the historian as a craftsman, rather than a builder of uninteresting constructs from pre-fabricated, inorganic elements. What *is* organic is limberness and modesty. To Barzun (although no hyper-relativist), “*that* is the triumph of history – truth absolute is not at hand; the original with which to match the copy does not exist.”⁹⁷⁴ Blueprints and precision molding must therefore give way to something closer to heuristic triangulation, or so one could reasonably infer from Trevelyan’s comment: “History, in fact, is a matter of rough guessing from all the available facts.”⁹⁷⁵

⁹⁷² Modern era theologians have mused about the practical limits of centering teleology within history, deeming it no longer acceptable – for academic history purposes – to become too cosmically speculative. In the view of Shailer Matthews, Professor of Historical and Comparative Theology and for 25 years (1908-1933) dean at the University of Chicago Divinity School: “When a historian enters into metaphysics, he has gone to a far country from whose bourne he will never return a historian” – little doubt an adaptation of Shakespeare’s musing: “But that the dread of something after death, The undiscover’d country from whose bourn no traveller returns, puzzles the will . . .” (*Hamlet*, Act III, Scene I).

⁹⁷³ Ginzburg, “Microhistory,” p. 24. Reflecting on the validity nonetheless of his work, *The Cheese and the Worms*, Ginzburg continued: Could the result still be defined as ‘narrative history’? For a reader with the slightest familiarity with twentieth-century fiction, the reply was obviously yes.” Ibid.

⁹⁷⁴ Barzun, *Clio and the Doctors*, p. 146 (emphasis added).

⁹⁷⁵ Trevelyan, *An Autobiography and Other Essays*, p. 56.

Geyl struck a middle course between admiration and reserve: “I believe in the great indispensable value of historical insight for civilized society. But we must not expect of history what history cannot possibly give – certainty.”⁹⁷⁶

But what history *can* give – at the very least – are imaginative questions along the lines of “what if it had been?” and all the fruitful and delightful ruminations that follow. Beyond that, and in my view this is most often the case, historians arrange defensible evidence in readings handily meeting the standard of *plausibility*,⁹⁷⁷ with some good portion of interpretations also achieving reasonable measures of *probability*. No doubt certain observers will find an emphasis on such quasi-metrics of truth thoroughly unromantic and therefore regrettable.⁹⁷⁸ But the historian (and lawyer) looks to persuade by demonstrating proof wherever possible and by suggesting plausible inferences where, as always, hard evidence does not come pre-arranged or is otherwise incomplete. A quip by author Robertson Davies (in a novel touching on law, knowledge, history and overall multiperspectivalism) is appropriate here: “Imagination is a good horse to carry you over the ground – not a flying carpet to set you free from probability.”⁹⁷⁹

Scholars (either historians or those intrigued with history) have long employed

⁹⁷⁶ Pieter Geyl, *Debates With Historians* (Cleveland, 1966), p. 164.

⁹⁷⁷ Eugen Weber, writing at the beginning of the great history wars of the 1970s-1990s, wrapped up a ponderous tome with this rather humble assessment: “[A]ll the historian may hope to do is to record a passing point of view as honestly and as thoughtfully as he knows how: not to provide [merely] a chronicle of the facts or cut a slice out of the pie of Truth, but to suggest *plausible interpretations*.” Eugen Weber, *A Modern History of Europe: Men, Cultures, and Societies from the Renaissance to the Present* (New York, 1971), p. 1125 (emphasis added). Most historians probably believe the bar can be set somewhat higher.

⁹⁷⁸ Faulkner, no historian, comes to mind: “So vast, so limitless, in capacity is man’s imagination to disperse and burn away *the rubble-dross of fact and probability*, leaving only truth and dream.” *Requiem for a Nun*, Act 2, scene 1 (emphasis added).

⁹⁷⁹ The preceding sentence (“when I say imagination I mean capacity to see all sides of a subject and weigh all possibilities”) also is *a propos* in law and history. Robertson Davies, *The Manticore* (1972), p. 227.

such language and distinctions. Ginzburg demonstrated how the Greek term for “proof” (*pistis*) in the fourth century B.C. corresponded to “*a sphere of probable truth*.”⁹⁸⁰ Accordingly, Aristotle’s *Rhetoric* implied that “historians deal with what is likely (*eikos*) . . . *they never deal with certainty*”⁹⁸¹ (although of course high levels of likelihood attach to certain fact clusters and the like). Voltaire (as noted in Chapter 2, Section 1, *supra*), opined, “there is no history, only fictions of varying degrees of plausibility,” a sentiment consistent with an entry in Diderot’s *l’Encyclopedie* from the same period on how a philosopher discriminates among claims: “He does not confuse truth with plausibility; he takes for truth what is true, for forgery what is false, for doubtful what is doubtful, and probable what is probable.”⁹⁸² Goethe overtly extended to history what the last statement implied: “The historian's duty is to separate the true from the false, the certain from the uncertain, and the doubtful from that which cannot be accepted.”⁹⁸³ Bloch, commenting in 1944 with some relief that the interim and long-reigning fetish of scientism in historiography had begun to wane: “We find it far easier [now] to regard certainty and

⁹⁸⁰ Probable truth, in turn, “coincides neither with sapiential truth, guaranteed by the person who proposes it and as such beyond proof, not with the impersonal truth of geometry, entirely accessible and demonstrable to anyone.” Ginzburg, *History, Rhetoric, and Proof*, p. 24 (italics on first clause added). As defined in Ian Worthington, ed., *A Companion to Greek Rhetoric* (Oxford, 2007), *pistis* in classical rhetoric connotes proof, belief or state of mind. In the plural, “*Pisteis* (in the sense of means of persuasion) are classified by Aristotle into two categories: artless proofs (*pisteis atechnoi*), that is, those that are not provided by the speaker but are pre-existing, and artistic proofs (*pisteis entechnoi*), that is, those that are created by the speaker.” Here again, then, is the notion of persuasion as relying on both evidence and interpretation.

⁹⁸¹ Ginzburg, *History, Rhetoric, and Proof*, p. 46 (emphasis added).

⁹⁸² *Il ne la confond point [la vérité] avec la vraisemblance; il prend pour vrai ce qui est vrai, pour faux ce qui est faux, pour douteux ce qui est douteux, et pour vraisemblance ce qui n'est que vraisemblance.* English version from an entry on “Philosophers” by César Chesneau Dumarsais in *The Encyclopedia of Diderot & d’Alembert Collaborative Translation Project*, Jeremy Caradonna, trans. (Ann Arbor, 2006).

⁹⁸³ Johann Wolfgang von Goethe, *The Maxims and Reflections of Goethe*, trans. Bailey Saunders (New York, 1906), p. 164. Goethe (1749-1832) was among the Romantics reacting to the first wave of scientism; the second crested as the implications of work by Darwin and others worked its way through the community of thought, as discussed in Chapter 2, *supra*. Goethe’s maxims appeared in assembled form posthumously, many by several decades.

universality as questions of degree.”⁹⁸⁴ Kuhn, also remarking about science and history, noted the absence of full proof where scholars once deemed it possible:

Few philosophers of science still seek absolute criteria for the verification of scientific theories. Noting that no theory can ever be exposed to all possible relevant tests, they do not ask about whether a theory has been verified but rather about *its probability in the light of the evidence that actually exists*.⁹⁸⁵

And even that position assumes no real conflict as to the evidence itself. Substituting “theory of the historical case” for Kuhn’s terser “theory” accents the reality historians confront. As Leff a few years later (1969) reflected:

There is a *gradation* from certainty, in which the conclusion conforms with what is, to mere possibility. Much of our knowledge lies between the two, where we proceed upon hypotheses which are probable or tentative or incomplete as well as sometimes wrong.⁹⁸⁶

In order to convert raw data into historical facts, the historian “has to employ a full critical and interpretive apparatus of selection, evaluation, interpolation and rejection – which rests upon inference as opposed to observation, and hence *can never pass beyond a high degree of probability*.”⁹⁸⁷

As covered at length in Chapter 2, Section 7, *supra*, debates during the ensuing quarter century cast doubt on any claims of a “high degree” of probability, with that sense

⁹⁸⁴ Bloch, p. 15. Bloch’s comment seems to refer mostly to the second wave of positivist scientism in historiography (see prior footnote).

⁹⁸⁵ Kuhn, p. 145 (emphasis added), in turn citing to Ernest Nagel, *Principles of the Theory of Probability*, Vol. I, No. 6 of the *International Encyclopedia of Unified Science*, pp. 60-75.

⁹⁸⁶ Leff, *History and Social History*, p. 19 (emphasis added). Goethe long prior had also mused about the struggle to flesh out a beginning skeletal proposition: “Hypotheses are the scaffolds which are erected in front of a building and removed when the building is completed. They are indispensable to the worker; but the worker must not mistake the scaffolding for the building.” Goethe, *Maxims and Reflections*, trans. Elisabeth Stoop, ed. Peter Hutchinson (New York, 1998), p. 154.

⁹⁸⁷ *Ibid.*, p. 23 (emphasis added). That upper level limitation, for Leff, reflects differing tools for analysis in the human and natural sciences: “[C]ause in history cannot go beyond calculations of probability since the historian lacks scientific means to establish one thing as the cause of another.” *Ibid.*, p. 61.

of skepticism attaching more emphatically to interpretations, of course, than to isolated facts and fact clusters (which were themselves at times assailed, albeit less vigorously). As much as anything, the new school seemed certain of historical uncertainty. Joining the chorus we have already heard was historiographer Robert Berkhofer, Jr., a self-styled “ambivalent” relativist: “What we call history is in reality only an image or *hypothetical conception* of the actual past.”⁹⁸⁸ And revisiting Schama, one finds a typically animated read of “the inventive faculty” in history, although here the author overstretched a bit his otherwise exquisite instinct for matching concept and diction:

This is not a naïvely relativist position that insists that the lived past is *nothing* more than an artificially designed text. (Despite the criticism of dug-in positivists, I know of no thoughtful commentator on historical narrative who seriously advances this view.) But it does accept the rather banal axiom that claims for historical knowledge must *always* be *fatally circumscribed* by the character and prejudices of its narrator.”⁹⁸⁹

The eventual counter-wave aiming at some middle synthesis (see again Chapter 2, Section 8, *supra*) did not (and does not now) take much umbrage at the general idea of “circumscribed” claims, having conceded, as seen above, some degree of interpretive (un)certainty.⁹⁹⁰ But it would not surprise should this group protest as rather too strong

⁹⁸⁸ Robert F. Berkhofer, Jr. *A Behavioral Approach to Historical Analysis* (New York, 1969), p. 12 (emphasis added). Berkhofer was for a time Hayden White’s colleague at UCSC, as the sentence just following the one above attests: “Historical facts are really only propositions about the past, based upon the remaining evidence and how these propositions *fit into a general interpretive scheme already postulated.*” *Ibid.* (emphasis added).

⁹⁸⁹ Schama, *Dead Certainties*, p. 322 (first use of italics original; the remainder added). In the preceding sentence, Schama listed several aspects of “the inventive faculty”: selecting, pruning, editing, commenting, interpreting and delivering judgments. *Ibid.*

⁹⁹⁰ In this respect, acceptance here, however halting, ultimately can be liberating, for it helps to dismantle a wall of some degree of alienation between author and reader. Consider, for example, Goethe’s summary of how normal historical writing in his time depended on such a gap in perceptions and expectations: “The historian has a twofold duty: firstly towards himself and then to his reader. On his own account he must submit to precise certainty what might actually have happened, and for his reader’s sake he must establish what in fact did happen. How he deals with his own attitude can be agreed with his colleagues; the public,

the qualifiers “always” and especially “fatally.” As for the former, it is reasonable to believe that a modest slice of historical work concerns subject matter and leads to conclusions that are nearly uncontroverted. But as for *fatally*, it is a mainspring of the neo-centrist movement that community-adjudicated contestation provides a modicum of check against – to some extent circumscribes the effect of – the author’s “character and prejudices.” Thus, by 1994 Appleby, Hunt and Jacobs lent voice to a growing insistence that not all hope was lost, even as the historical community acquiesced to the new norm of vigorous and overt contestation. In this moderated view, critics leaning toward nihilism in historical writing “have failed to understand that just because our definitions of descriptions change, does not mean that the phenomenon being described does not exist or cannot ultimately be known *with some certainty*.”⁹⁹¹

It is the further view in this essay, analogizing some of the history writing realities to some of those in civil litigation, that vigorous and overt contestation may actually enhance or otherwise lend to higher certainties, because the reviewing community must contemplate the question of relative or comparative probabilities. As previously argued, advocacy under conditions of near certain and adjudicated contestation forces good and ethical practitioners in law and history to adhere to best instincts and intentions in their presentations and interpretations of the evidence. Utter certainty is rarely achievable, but is also not necessary to state matters in useful terms.

however, must not be let into the secret of how little in history can be deemed to be definitely settled.” Goethe, *Maxims and Reflections*, p. 32.

⁹⁹¹ *Telling the Truth About History*, page 6 (emphasis added). The authors slightly altered the wording of their Introduction to a subsequent (1995) edition, which otherwise remained identical. In the later version, they follow the sentence above with this illustration: “The relativist argument about history is analogous to the claim that because definitions of child abuse or schizophrenia have altered over time, in that sense having been socially constructed, then neither can be said to exist in any meaningful way.” Ibid.

Jurists have long grappled with the need to operate in mottled shadow and light. The felicitously named Justice Learned Hand offered a note of practical wisdom here: “Life is made up of a series of judgments on insufficient data, and if we waited to run down all our doubts, it would flow past us.”⁹⁹² Hence, one finds in law the consideration of a factor that also addresses an important dimension of the present historian-lawyer analogy, i.e., the appropriate *standard of proof*. Most citizens have an understanding that in law, criminal and civil cases differ dramatically as to the standard applied. In the former, and for a combination of due process and other socio-legal concerns, a very strict standard of proof – *beyond a reasonable doubt* – applies to “every fact necessary to constitute the crime charged,” such that the prosecution does not prevail where jurors find shortcomings there.⁹⁹³ Sitting in high contrast is the standard of proof to prevail in civil cases – *more likely than not* – as applied to plaintiffs’ and defendants’ competing fact-based arguments.⁹⁹⁴ In practical terms, lawyers in a civil trial need only to persuade the jury (or in non-jury matters, just the judge) that the argument in support of the client’s case has achieved a 51% probability of relative likelihood, i.e., relative to the opponent’s interpretation. In many civil cases, of course, jurors have stronger leanings in one

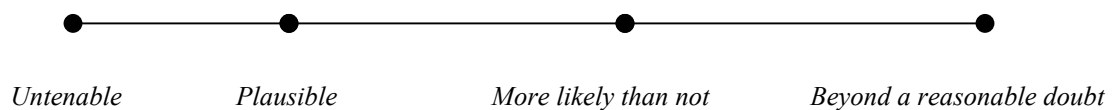
⁹⁹² Justice Learned Hand “On Receiving an Honorary Degree” (1939) reprinted in *The Spirit of Liberty: Papers and Addresses* (New York, 1952), p. 137.

⁹⁹³ Stanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and its Processes: Cases and Materials* (Boston, 1989), p. 39, citing the U.S. Supreme Court decision in *In re Winship*, 397 U.S. 358, 364 (1970). As with other important matters in law, several lengthy analyses have arisen as to the essential definition. Kadish and Schulhofer (ibid., p. 42) provided the representative sample of *Cal. Jury Instructions – Criminal* §2.90 (4th ed. 1979): “Reasonable doubt is . . . not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge.”

⁹⁹⁴ Alternative phrasings of the civil litigation standard include “more probable than not,” “more likely true than not true” or a party prevailing on the “preponderance of evidence,” all considerably laxer and thus easier to satisfy than the criminal law standard.

direction or the other, but it is probably rare that all jury members are united in near certainty – partly because few civil cases with such inherent dynamics would make it all the way to trial before dismissal or settlement.

So it seems in history; seldom do historians explore territory and/or employ perspectives where all the key facts and each string of interpretations therefrom yield unanimous accord. In those rare cases, rarely do they engage many readers, who after all generally prefer fresh and provocative insights of the sort inviting critical review and perhaps alternative treatments. The zone of operation might therefore be illustrated with (another) continuum, here indicating the degree of persuasive probability as applied variously to facts, fact clusters, causal threads, or whole argumentative interpretations:



The broader or higher and more causally exacting the level of analysis, the more the probability point tends to slide leftward. As historiographer Allen Johnson explained: “Whether the historian’s aim is to tell ‘how it really was’ or ‘how it really came to be,’ he can never reach mathematical certainty, and he is fortunate indeed if he can reach a high degree of probability, a probability beyond reasonable doubt.”⁹⁹⁵ As for calculations, Section 4, *supra*, included a brief discussion of how Bloch conceptualized gradations of probability, using (with caveats) a mathematical equation to show the cumulative effects of uncertainty. We saw how even where (only) five fact clusters each carry a strong

⁹⁹⁵ Allen Johnson, *The Historian and Historical Evidence* (New York, 1934), p. 141.

(95%) certainty measure, the overall confidence yield of the five taken together drops markedly, i.e., to 77.4% ($.95^5 = .774$), already some distance from the far right endpoint of the continuum. Adding questions about selection, characterization, arrangement, causal complexities, then even the most reasonable suppositions about the effect of deselected data (and silences), and the probability range for the narrative interpretation quickly slides to the middle zone of the civil law standard.

Bloch's view was that actual assessments of historical works, however, did not well convert to numbers, especially the further the proponent moves past mere compiling or chronicling and into the realm and mode of interpretation:

[T]he majority of the problems of historical criticism are really problems of probability, but such that the subtlest calculation must own itself incapable of their solution. It is not only that its data are extraordinarily complex. Most frequently, by their very nature they are unamenable to any mathematical translation.⁹⁹⁶

Likewise, jury instructions in criminal law cases steer away from the quantitative.⁹⁹⁷ And while civil court jury instructions also tend to be silent as to mathematics,⁹⁹⁸ the essential logic of a “more likely than not” standard nudges jurors toward the 51% threshold mentioned above, however organically arrived.

The present discussion assumes that for cases touching on issues recognized as historically important, more than one interpretation will have arisen, or eventually will arise (work in a “new” area may convince others that the topic had previously been

⁹⁹⁶ Bloch, p. 107.

⁹⁹⁷ As the Nevada Supreme Court opined: “The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify.” *McCullough v. State*, 657 P.2d 1157, 1159 (Nev. 1983), as cited in Kadish and Schulhofer, *Criminal Law and its Processes*, p. 42.

⁹⁹⁸ *California Civil Jury Instructions* §200 states: “A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true.”

underexplored). Comparison naturally follows. In fact, historians themselves initiate them by comments in their own interpretations, i.e., by their discussion of prior findings, methods and perspectives or, as raised in Section 1, *supra*, the (sometimes surprising) absence of prior good work on the matter. One might reasonably protest, of course, that comparison is not always between two or more *directly* opposing historical reads, that the separate renditions sometimes treat varying aspects of a historical matter with different lenses and techniques, even divergently defining and framing the central problem(s).

Foner in this vein remarked:

Historical truth does exist, not in the scientific sense but as a reasonable approximation of the past. But the most difficult truth for those outside the ranks of professional historians to accept is that there often exists more than one legitimate way of recounting past events.⁹⁹⁹

While Foner's main point is correct, one could reasonably argue he underestimated the sophistication of the reading public, or at least slices of it. For example, we can again see some parallel in law cases, where an early and ongoing struggle is the characterization or framing of the key issues, whether in factual, symbolic or social terms. Indeed, many of the "perspectives" so prominent in recent historiography – touching on power relations imbued with class, race, gender and other interest and identity dynamics – receive close scrutiny and attention also in law practice, wherever such grounds offer a plausible and effective argument. Thus, in a real way, contestants in legal cases, as in history, tell very dissimilar stories, employing different lenses to emphasize and explain nonidentical subsets of the evidence, prominently including circumstantial evidence. The court asks jurors to attempt to choose the most persuasive version, but then consumers of historical treatments – policymakers, educators selecting course materials, critical reviewers – often

⁹⁹⁹ Eric Foner, *Who Owns History? Rethinking the Past in a Changing World* (New York, 2002), p. xvii.

find themselves deeming one work or another more persuasive, i.e., more insightful, cogent, robust, thorough, elegant or some other comparative term from the academic lexicon. Elton, ever the anti-relativist, offered his own distinctions: “Some historical writing is simply and obviously right, some is a good deal more likely to be correct than not, some is pretty doubtful, some even good work may be wild.”¹⁰⁰⁰

Fair enough. But whatever the exact terminology employed, the “verdict” is neither deterministic nor mechanical. In fact, it is not always even inevitable. Law cases provide a fairly neat parallel. In many jurisdictions, a civil case jury need not arrive at a unanimous decision; moreover, as most laypersons are aware, in instances of a “hung jury” no recognizable verdict at all issues. Still, most of the time, judgments as to alternative accounts in law and history do occur, although not (as mentioned a bit above) as a function of robotistic calculation. As Kuhn explained:

Verification [when dealing with probabilities] is like natural selection: it picks out the most viable among the actual alternatives in a particular historical situation. Whether that choice is the best that could have been made if still other alternatives had been available or if the data had been of another sort is not a question that can usefully be asked.¹⁰⁰¹

This reservation is also partly because “judgments of simplicity, consistency, plausibility, and so on often vary considerably from individual to individual.”¹⁰⁰² Moreover, and referring back to the continuum shown a few pages above, those same comparisons are usually two or more arguments for which the probabilities cluster in the middle zone, with most historians’ only reasonable aspiration a grade of “more likely than not” – no

¹⁰⁰⁰ G.R. Elton, *The Practice of History* (London, 1967), p. 95.

¹⁰⁰¹ Kuhn, p. 146.

¹⁰⁰² *Ibid.*, p. 185.

small feat in all. Again, while it seems reasonable that a few strains of historical work, as Wedgwood surmised (Section 6, *supra*), might locate on the fringes – there are outliers in most every distribution – how difficult it is for the great remainder to escape the weight of cumulative historical uncertainties.

For a prime example, we turn once more to Ginzburg, who has devoted great effort to reinvigorating the centrality of proof in historical writing. His writings show much respect for Bloch and thus, presumably, Bloch’s counsel to historians to build confidence by openly signaling probability issues: “Every historical book worthy of the name ought to include a chapter, or if one prefers, a series of paragraphs inserted at turning points in the development, which might almost be entitled: ‘How can I know what I am about to say?’”¹⁰⁰³ Thus we see in Ginzburg’s widely admired microhistory, *The Cheese and the Worms*, the author wrestling with the tensions inherent in his seeming triple goals: (1) to transport modern minds to the rhythm, logic and culture(s) of medieval villages and courts to reveal both distinctions between and human universals shared by the two eras; (2) to do so by weaving a richly imaginative tapestry from the threads of the known and the less known strung through the broader and often shadowy circumstances, while limited to some degree, as is typical in microhistories, by the paucity of written references to the principal characters outside of official legal records (with their own built-in biases and distortions) and other traces; all while (3) advocating a speculative interpretation, yet attempting to display intellectual honesty as to how closely the evidence supports or at least suggests that reading.

¹⁰⁰³ Bloch, p. 59.

A content analysis of a sort reveals Ginzburg's rather copious use of claim "modifiers" of the type leading to a conclusion that the main thrust of the study must lie in the central zone of the above persuasion continuum. These modifiers fall into several sub-categories, three of which I describe as:

- (a) a *vocabulary of verity*;
- (b) the *nomenclature of feasibility*; and
- (c) the *rhetoric of supposition*.¹⁰⁰⁴

Ginzburg's *vocabulary of verity*, the first sub-category, includes such terms as: "actually" (used 13 times), "can claim with certainty" (1), "it's clear/clearly" (9), "compels us" (1), "confirms[ed]" (4), "doubtless/undoubted(ly)/no doubt" (9), "unquestionable" (1), "impossible to doubt/not to think" (2), "fact[s]" (6), "in fact/as a matter of fact" (15), "proved" (2), "demonstrates" (1), "invariably" (1), "it's true/truly" (3), "literally" (2), "more definite" (1), "we know" (7), "it is well known" (1), "verified" (1), "sure[ly]" (3), and "it was really"(1) – in all, 84 instances, or about two for every three pages of the slim book (128 pages of main text). Some of these terms, e.g., "undoubtedly" and "clearly," might reasonably well fall into the third grouping, suppositional devices.

The second sub-category – the *nomenclature of feasibility* – contains what essentially are admissions of a middle degree of (un)certainty: "may (have/be)" (20), "could have" (4), "perhaps" (14), "apparently" (11), "most likely" (2), "hypothesis" (8), "suggest(s)" (6), "might (have)" (5), "appears/appeared/appearance" (9), "historically plausible" (1), "possible/possibility" (9), "probably/probable" (23), "less improbable" (1), "in all probability" (2), "seem(s)(ed)" (29), "more definite" (1), "isn't definite" (1) "may

¹⁰⁰⁴ I acknowledge the likelihood of some subjectivity in selecting and categorizing these terms; adding to the challenge is a degree of uncertainty as to the author's (and interpreters') intended inflection.

constitute one of the proofs” (1), “partial (picture)(similarities)” (2), “provisionally” (1), “more or less” (4) “conjecture(al)s” (4), “gaps/discrepancies” (3), and that the record is a “distortion” or is “distort(ed)(ing) or contorted” (7) – in all, at least 167 such instances, easily more than one indicator per page of evidence presented to persuade but not sponsored as meeting the beyond-a-reasonable-doubt standard.¹⁰⁰⁵

The third sub-category – the *rhetoric of supposition* – is made up of adroit but often rather conclusory phrases and words of the sort one expects a lawyer to employ in appealing to jurors’ instincts about the implications of the evidence and circumstances: “for this reason” (1), “can be explained by/the explanation/explains” (4), “strange indeed if by chance” (1), “significant” (2), “would be obliged to see” (1), “corresponds (to)” (2), “consistent with” (1), “(extraordinary) coincidence” (4), “suffices (to explain)” (2), “must not have been exceptional” (1), “isn’t difficult/not hard to imagine” (2), “indication” (2), “resemble(s)” (4), “implicit/implies(d)” (3), “would have [been able]” (5), “testify” (2), “(we)(can) reconstruct” (4), “permit(s) (us to)” (3), “one can see” (1), “suppose(d)” (2), “must not have seemed” (1), “none of this can be ruled out” (1), “difficult not to see” (1), “should be seen” (1), “similar/similarity(ies)” (10), “clue” (1), “could never have” (1), “not surprising” (1), “should be considered (if true)” (1), “can understand how” (1), “almost as if” (1), “not difficult to understand” (2), “indirect (testimony)” (1), “all this may help us to understand” (1), “shouldn’t mislead us” (1), “if it actually occurred” (1),

¹⁰⁰⁵ Other candidates for this cluster include: “vague” (1), “unconfirmed (evidence)” (1), “we lack specific information” (1), “hardly [or] doesn’t seem possible” (2), “it’s difficult to estimate” (1), “no reason to suppose” (1), “unidentified” (1), “indemonstrable” (1), “seems impossible” (1), “difficult to penetrate” (1), “isn’t easy to understand” (1), “aren’t sufficient to explain” (1), “we don’t have/have no [evidence]” (2), “(doesn’t/may not) explain (everything/anything)” (1) “can’t be explained by” (1), “we don’t know” (12), “we know nothing (of)” (2), “incomplete/fragmentary [record]” (3), “we could not reconstruct” (1), “we don’t have proof/no proof for it” (2), “incapable (of shedding light)” (2), “doesn’t fit” (1), “suspect” (1) and “complicated” (1).

“unwittingly/unconsciously/involuntary” (4), “would have been unthinkable” (1), “far removed” (1), “we can only imagine” (1), “demonstrates” (1), “can be traced/one can discover traces” (4), “we can discard” (1), “arbitrary” (1), “presumed” (1), “contexts” (1), “contradicted” (1), “it is natural” (1), “should ask if” (1), “evident(ly)” (4), “impression” (2), and the catch-all rhetorical terms “must have” (25) and “obvious(ly)” (14).¹⁰⁰⁶

Adding the 139 usages assigned to this last grouping to the 167 from the second yields some 306 instances of phrasing indicating middle likelihood or employed in interpretive argumentation, i.e., easily more than thrice the number (84) reflecting high certainty.¹⁰⁰⁷ The critical reviewer need not suspect that any of these numerous expressions are fabrications or lies.¹⁰⁰⁸ It is more constructive to understand them as the *open* hedging language necessary where historians attempt to strike a sustainable balance between fairness and honesty on the one side and, on the other, proof-referencing interpretative argument as to what is plausible, tenable and/or probable in history. Rhetoric in the service of persuasion is unavoidable, such that we should embrace the best of its imaginative power, but too much conclusory language weakens credibility.¹⁰⁰⁹

¹⁰⁰⁶ Further possible examples here are “at any rate/in any case” (6), “in some way” (1), “unexpected” (2), “rarely” (1), “relatively” (2), “knowingly or not” (2), “intended” (1), “who knows if/what” (2), “impossible (that)” (3), “perceive” (2), “[inferential] leap” (1), “of course” (1), “symbolic” (1), “persuade” (1), “generally” (1), and a number of references to interiority, i.e., state of mind.

¹⁰⁰⁷ This ratio may be more severe in microhistory than in other specialties where richer documentary troves await the researcher. However, as Ginzburg and others have so ably demonstrated, and as argued in Section 2, *supra*, the microhistory specialist can call on great volumes of other pertinent data, including the important evidence attendant to silences. See again, Ginzburg, “Microhistory: Two or Three Things I Know About It,” *Critical Inquiry* Vol. 20, No. 1 (Autumn 1993), pp. 10-35. But as in all historical genres, the entirety of evidence is silent without selection, arrangement and of course interpretation, much of it employing probability language similar to that examined above.

¹⁰⁰⁸ Causing greater discomfort (for me) was Ginzburg’s several references to the main character’s state of mind – what he felt, was thinking, feared, etc. – similar to the suppositions Davis offered in *The Return of Martin Guerre* (see again the discussion in Chapter 2, Section 6, *supra*).

Therefore, and because historical interpretations (in contrast to specific facts or small fact clusters¹⁰¹⁰) seldom meet the beyond-a-reasonable-doubt standard, a lexicon of modesty is appropriate much if not most of the time.

Finally, a somewhat counterintuitive dynamic reveals itself in the comparison of the standards of proof discussed here. It is at the same time both too hard and too easy for historians to operate in a beyond-a-reasonable-doubt sphere – too formidable a task to forge an original interpretation satisfying that exacting scale, but also too unburdensome to defeat others’ offerings, merely by identifying areas of some reasonable doubt.

Drawing again the parallel to legal work, counsel for defense in criminal law has a far shorter path to tread than either plaintiff’s or defendant’s counsel in civil litigation, where one must cross the probabilities midpoint to prevail.¹⁰¹¹ Similarly, the historian contesting a prior treatment must prevail on a fuller measure of the merits – a much harder endeavor than simply damning on the margins.

¹⁰⁰⁹ Thus it is entirely fair to subject Ginzburg’s own writings to close scrutiny as to language, textuality, nomenclature and the like, much as he did in discussing how Nietzsche had distorted and thus disrupted the then-prevailing view of language as an active medium of Truth and Reality: “The Word that is truth, the Word through which everything that exists has been created, the Word that communicates by means of rhetorical tropes: all these themes Nietzsche resurrected and overturned in a radically skeptical direction.” *History, Rhetoric, and Proof*, p. 15.

¹⁰¹⁰ It bears repeating (see Section 4, *supra*) that certain aspects of a historical recounting, just as in a legal case, carry a very high degree of probability. Here, M.R. Cohen’s observation continues to be correct: “The *facts* of history do not change. What has happened cannot ‘unhappen.’ Nor do competent historians ordinarily differ *where the evidence is sufficient to warrant a definite conclusion.*” *The Meaning of Human History*, p. 67 (italics added).

¹⁰¹¹ Here the concept of probabilities goes chiefly to a critical assessment of the likelihood a given offering is correct, or at least more persuasive than known alternative interpretations. Nothing in the present essay is meant to suggest that historians, as part of their arguments, should not address exceptional facts, events, circumstances or other phenomena of the sort that defy typical expectations. Indeed, as Aristotle noted, “it is probable that a thing may happen contrary to probability.” *The Poetics of Aristotle* (XXV), trans. S.H. Butcher (London, 1895), p. 99.

Law and history have extensive crossover in subject matter, and the occasional historical treatment revisits a criminal law case wrongfully decided, which verdict the historian-lawyer methodically dismantles (with advantage of hindsight, but also an easy standard).¹⁰¹² But that exceptional type of treatment in fact demonstrates the rule – the analogy to civil litigation, in which reviewers assess arguments that range from plausible through the ascending ranges of probable, works better for most historical interpretations. “The grace of certainty” has little dominion in human affairs, law and history included, but a “comparison of likelihood” approach can still be quite useful. It operates at the fertile intersection of idea, inquiry, imagination, corroboration and other fact testing, and good judgment in selecting evidence and crafting narratives, all with understanding how contestation plays a critical role in reinforcing probity. In sum, knowledge need not equate to certainty to be fruitful, but in historical writing that conclusion suggests the distancing of “all or nothing” constructs.

As echoed throughout this essay, it is axiomatic that most historians care deeply about factual accuracy and the integrity of the larger interpretation. In this sense Cronon attested:

For us, the deepest challenge of our discipline – the maddening constraint that is also the wellspring of our creativity – is that we are not permitted to argue or narrate beyond the limits of our evidence.¹⁰¹³

¹⁰¹² Ginzburg once more provided a prominent example. He assigned his *The Judge and the Historian* (London, 1999) the subtitle of *Marginal Notes on a Late-Twentieth Century Miscarriage of Justice* and presented the work as much in the style of an *amicus curiae* (“friend of the court”) brief as that of a historical piece, fervently but logically arguing – and here he appeared every bit the lawyer – for the overturn of convictions for three men (one a personal friend) on murder charges (with political overtones). Although, as shown elsewhere in this essay, Ginzburg’s neo-judicialism has referred mainly to judges, his closing words here revealed the extent of his historian-lawyer merger: “The trial . . . must be reopened. This shameful page in the history of Italian justice must be erased – and as soon as possible.” Ibid., p. 205.

¹⁰¹³ Cronon, “Storytelling,” *2012 AHA Presidential Address*.

Most historians seem to interpret that charge broadly – they make arguments consistent with the evidence, that fall somewhere between plausible and highly likely in the context of the evidence, but which nonetheless are only rarely amenable to proof beyond a reasonable doubt and thus require some degree of rhetorical expression. Those realities do not inherently weaken confidence in the overall enterprise, for where historians demonstrate fairness by acknowledging areas of uncertainty they deepen the sense of trust so vital to persuasion.

CHAPTER 4. Discussion and Reservations

The first thing we do, let's kill all the lawyers.
Shakespeare, *Henry VI*

This popular witticism is widely misunderstood. Shakespeare had given it voice through the character Dick the Butcher, a follower of the rebel Jack Cade, who aspired to become king and believed the disintegration of law and order would advance that goal.¹⁰¹⁴ Thus Shakespeare in roundabout fashion was acknowledging that legal actors, for all their contestation (and despite their oft-reactionary effect and other argued shortcomings¹⁰¹⁵), are essential vehicles for stability and justice in society.

As are historians. By offering analyses of small and large disruptions within the context of longer-rhythm realities they potentially help to reinforce a sense of continuity and therefore community. Yet despite the several similarities in approach and process between the two professions (as argued at length throughout this essay), some reviewers might point to areas of reservation about a historian-as-civil-litigator analogy. I will address a number of those potential concerns shortly below. First, and as a quick refrain to passages in the Introduction (Chapter 1, *supra*), historians have long used analogy to help dissect and explain their craft, with judicialist imagery a prominent component in many of those efforts. But why did this writer believe a refinement of that model necessary or somehow helpful?

A half century of vivacious but quite often acrimonious discourse touching virtually all knowledge fields revealed in historiography at least two poles of orientation: one school epitomized by Hayden White and another by Carlo Ginzburg. With some risk

¹⁰¹⁴ *Henry VI*, Part II, Act IV, Scene II, line 73.

¹⁰¹⁵ See again the discussion of Critical Legal Studies in Chapter 2, Section 6, *supra*.

of oversimplification, one could characterize the essence of these positions as fundamentally incongruous – “history as (merely) narrative” and “history as truth-proof” respectively. The duration and intensity of the stand-off might then lead one to conclude that existing approaches have not resulted in theoretical and practical stability, thus inviting further (Kuhnian) testing.¹⁰¹⁶ A close read of works ostensibly so opposed reveals more potential common ground than generally recognized. White, et al., did not deny a place for proven fact in history, while Ginzburg attempted to close the gap by examining the historical roots and nature of *rhetoric*, which in his view should be seen as inextricably interwoven with proof testing and persuasive explication.¹⁰¹⁷ As part of that effort Ginzburg traced the lengthy tradition of judicialist historiography with an eye toward reviving a key component of it, namely that historians need employ judge-like “accuracy and insights.” While repeatedly alluding to a resurrected historian-as-judge analogy, Ginzburg has seemed not fully satisfied with it, (presumably) because it does not well reflect places and roles for interiority and tropes and imaginative recounting aimed at persuasion – simply not the judge’s job. Even in the Continental system, while judges may voice or otherwise direct critical inquiry, they do not, in the fashion of historians, create a narrative.¹⁰¹⁸

¹⁰¹⁶ Although one might consider the varying approaches seemingly in conflict more as “models” than “paradigms,” Kuhn’s observation using the latter terms remains applicable: “[P]aradigm-testing occurs only after persistent failure to solve a noteworthy puzzle has given rise to crisis.” Kuhn, p. 145.

¹⁰¹⁷ “My solution transfers to the actuality of research the tensions between narration and documentation.” Ginzburg, *History, Rhetoric, and Proof*, p. 2.

¹⁰¹⁸ The fallacy has been surprisingly persistent, even for historians operating in Anglo-American settings. For example, Allen Johnson, a Yale professor of American History, appeared to miss the distinction almost entirely: “The modern historian – Griffet [France, 1769] is the first writer to use the analogy – is like a judge in court who must confront witnesses, examine them, and ascertain the truth by painstaking study and comparison of the evidence.” Johnson, *The Historian and Historical Evidence*, p. 114. As argued at several points in this essay, such characterization is not even fully accurate in prosecutorial systems, but is

A principal aim of this dissertation is to reconcile, where possible, certain elements in historiography widely seen as disparate. Operating in synthesis, it proposes that the modes and techniques of historians are strikingly similar to those lawyers employ in amassing, selecting, testing, organizing and presenting evidence in persuasive support of arguments made to appropriately critical reviewers. If neo-judicialist historiography has any continued salience (and the lengthy forgoing examination suggests it does), then a modest adjustment – the primary comparative reference to *lawyers*, rather than judges – eliminates much of the remaining awkwardness and confusion. The suggestion here is that recognizing some modal and methodological similarities between historical writing and civil litigation is not terribly distinct from how Kuhn recognized parallels in the sociology of natural and human sciences.¹⁰¹⁹ That stated, what is proposed here is only an analogy, or at the strongest some variant of a “rule”¹⁰²⁰ or analytical tool, and although the analogy draws from realities in the legal world, no claim of a “law” of historiography (in the covering law sense) arises.¹⁰²¹

far from the realities of adversarial legal systems, in which *lawyers* conduct discovery, examination and argumentation toward persuading the jury (save in non-jury cases), with the judge most often closer to a referee in the proceedings.

¹⁰¹⁹ Here a passage from Bloch already presented in Chapter 3 bears repeating: “There is nothing arbitrary in the coincidence. In both roles, the need for intellectual discipline is the same . . . [o]bligated always to be guided by the reports of others, legal action is no less interested than pure research in weighing their accuracy. The tools at its disposal are not different than those of scholarship” Bloch, pp. 112-113.

¹⁰²⁰ Hayden White, describing Frye’s sense of narrative historiography, touched on the possibility of rules in the field: “[History writing] would not operate capriciously, as Lévi-Strauss appears to suggest. It operates, rather, according to well-known, if frequently violated, literary conventions which the historian, like the poet, begins to assimilate from the first moment he is told a story as a child. There are, then, “rules,” if not “laws” of historical narration.” White, *Tropics of Discourse*, p. 59. My view assumes a greater distance in gradation between a rule and a law than what White suggests, the former more sensitive to human idiosyncrasy and thus more appropriate for both the historical and legal professions.

¹⁰²¹ The best known attempt to define a covering law of sorts in history was Carl Hempel’s 1942 article, “The Function of General Laws in History,” *Journal of Philosophy* 39 (2), pp. 35-40, now largely ignored. Historiographer Fischer issued a typically disdainful remark about the attempt to graft Hempel’s construct

Attempting to plow new ground and/or offer syntheses of prior work typically gives rise to a number of imaginable reservations, as here also. I now address eight of them, albeit briefly (given by this point some exhaustion for both reader and author).

The first concerns a writer's qualifications to comment so expansively on historiography. The following observations supplement the several points already raised as to that issue in the Introduction (Chapter 1, *supra*). We see how historiographer Charles Seignobos, for example, in asserting that “[h]istory is not a science; it is a method,”¹⁰²² argued that historical method(s) could be and should be applied across the social sciences. Powicke warned of the dangers of overly narrow strictures against observations from afield: “The greatest enemy of truth is the self-contained category of thought.”¹⁰²³ Indeed, the present essay has included several fruitful examples of multidisciplinary work in historical writing – with White¹⁰²⁴ and Ginzburg two of many such practitioners – the latter devoting particular focus to historical events involving legal

onto historical evidence: “Some extraordinarily ingenious arguments have been invented, but the enterprise is, at bottom, absurd.” Fischer, *Historians' Fallacies*, p. 130. Only in the most informal sense, then, would I contend that “the law of history is that history is much like law.” However, it appears the conversation is not entirely over; a recent modified exploration of the topic is John Jefferson, “Toward Laws in History: Carl G. Hempel and the Evidence Dilemma,” *Nebula* 1.3 (January 2005), pp. 40-58.

¹⁰²² L'histoire n'est pas une science, elle n'est qu'un procédé de connaissance. Charles Seignobos, *La méthode historique appliqué aux sciences sociales* (Paris, 1901), p. 3.

¹⁰²³ Powicke, *Modern Historians and the Study of History*, p. 238.

¹⁰²⁴ Some of the most humility-urging statements about the historian's special training, or perhaps the relative absence of it, have come from historians themselves. Of these, Hayden White's pronouncement might induce the highest pique: “Nor can historians plead that the judgments of artists and scientists about how the past ought to be studied are irrelevant. After all, historians have conventionally maintained that neither a specific methodology nor a special intellectual equipment is required for the study of history. What is usually called the ‘training’ of the historian consists for the most part of study in a few languages, journeyman work in the archives, and the performances of a few set exercises to acquaint him with the standard reference works and journals in his field. For the rest, a general experience of human affairs, reading in peripheral fields, self-discipline, and *Sitzfleisch* are all that are necessary. Anyone can master the requirements fairly easily. How can it be said then that the professional historian is peculiarly qualified to define the questions which one may ask of the historical record and is alone able to determine when adequate answers to the questions thus posed have been given?” White, *Tropics of Discourse*, p. 40.

matters.¹⁰²⁵ The great epistemological debates of recent decades featured several key figures from outside history.¹⁰²⁶ And the stretch from the legal field is not a long one. It is reasonable in fact to contemplate how the porosity of method and subject matter boundaries in History encourages cross-pollination with other fields to a degree equaled perhaps only in Law, a field that touches and concerns itself with nearly every aspect of human behavior. Once historiographers deepened the connection by employing judicialist constructs and imagery, they opened the door to bidirectional commentary, all the more widely after Ginzburg argued for the (re)centering of rhetoric in the analysis.¹⁰²⁷ As part of that effort, Ginzburg identified fifteenth century scholar Lorenzo Valla as “a forerunner of the developing critical approach to historical evidence,” and showed how Valla considered rhetoric “the mother of history.”¹⁰²⁸ But going further back yet, Ginzburg noted how Aristotle stated at the outset of his *Rhetoric* that the topic deals, like its counterpart, dialectic, “with matters that are in a manner *within the cognizance of all men and not confined to any special science.*”¹⁰²⁹ A legal analogy enhanced with a strong endorsement of rhetoric *invites* commentary by those formally trained and experienced in that exact intersection of proof-based persuasive narrative – it is reference to lawyers, even more than to judges, that fulfills the promise of neo-judicialist historiography.

¹⁰²⁵ Ginzburg’s model Bloch also typified an emphasis on multidisciplinary training, “arguing that local historians needed to draw on the skills of archaeologists, paleographers, specialists in law, and so on.” Peter Burke, Introduction to Bloch, *The Historian’s Craft*, p. ix.

¹⁰²⁶ Chapters 1 and 2, *supra*, cover this point at length. And Kuhn once more was prescient as to the potentially helpful role of external influences: “[A]t times of revolution, when the normal-scientific tradition changes, the scientist’s perception of his environment must be re-educated – in some familiar situations he must learn to see a new gestalt.” Kuhn, p. 112.

¹⁰²⁷ We are reminded that Bacon, Vico, Fontenelle, Gibbon, among others, received training in law.

¹⁰²⁸ Ginzburg, *History, Rhetoric, and Proof*, pp. 55 and 64, respectively.

¹⁰²⁹ *Ibid.*, p. 74 (my italics), citing to Aristotle’s *Rhetoric* (1354a).

A second reservation – regarding the question of finality or closure – has found voice many times. Lukacs was broadly representative in stating:

There is a difference between history and law, [which] . . . in most civilized nations, does not permit multiple jeopardy: an accused person may be tried only once. But history consists of an endless reconsideration of men and events of the past – of evidence of their acts but also of their thinking, evidence permissible in history but not in law. That is not only due to the rediscovery of ‘new’ evidence – for history does not consist of documents alone; it is both the recorded and the remembered past. It is also due to the unavoidable condition that we see the past from an ever-moving and changing present.¹⁰³⁰

The degree of finality aspired is a real beginning distinction, but not as absolute as it might appear at first glance. Under closer scrutiny a number of supporting elements in the passage above fade in significance as well. First, retrials even in criminal cases are allowable in certain circumstances.¹⁰³¹ And in legal charges and defenses the thinking of involved persons is in fact quite often a critical element.¹⁰³² Moreover, many issues in law concern the proper interpretation of statutes, a body of laws constantly changing over time as legislative bodies enact new statutes or expand, reorient, strike or otherwise alter existing statutes, often as a result of new or newly understood facts. When interpretations, in the form of judicial decisions, are published in certain official channels, they have controlling or persuasive effect (depending on the jurisdiction) as legal precedent. Such opinions also issue as to prior judicial interpretations (rather than just to statutes). Some of these opinions uphold and/or expand prior law in whole or in part, while others limit and/or overturn it in whole or in part. Thus, while the legal principle called *stare decisis*

¹⁰³⁰ Lukacs, “Seventy Years Later,” *The American Scholar*, Essays (Winter 2010).

¹⁰³¹ These include hung juries, attorney misconduct, jury tampering with evidence, defendant’s breach of a plea bargain, mistrials where a key witness or party becomes ill, other serious errors in the original trial.

¹⁰³² For example, in addition to the *mens rea* element discussed in Chapter 3, Section 5, *supra*, is the common charge of “assault” – in one formulation, an action intended to cause another to have a reasonable fear of imminent battery.

(“to abide by, or adhere to, decided cases”¹⁰³³) is a strong factor in legal review, it is not insurmountable. For even where well-etched appellate procedures eventually yield definitive rulings by the highest courts (a multi-step process that can take several years), new legislation occasionally trumps existing case law – at times in plain reaction to it – thus beginning a new cycle of interpretative argumentation. But as noted shortly above, even in the absence of new legislation, prior court decisions do get further articulated, distinguished, or partially or completely overturned with regularity – hence law library shelves groaning with thick case reporters. And of course among the most famous U.S. Supreme Court cases are those overturning prior rulings. But for every high-profile shift, such as the *Brown* court overturning *Plessy v. Ferguson*, thousands of less broadly recognized revisions take place, many of them affecting parties with specialized needs and knowledge (here is perhaps a comparison to history specialists). Thus closure in law – once contemplating it outside specific parties – is much more a long-cycle matter than historiographers have posited. The 1954 decision in *Brown*, after all, came 58 years after the *Plessy v. Ferguson* opinion (1896) it overturned, and now in 2014 it is no longer unimaginable that we might see partial reversals in such cases as *Roe v. Wade* (1973) and *University of California v. Bakke* (1978). It is also notable that the circumstances leading up to and including cases such as *Plessy v. Ferguson* and *Brown* now are material subject as much to historical analysis as to legal study,¹⁰³⁴ a condition further evidencing the extensive topical overlap of the two fields. In sum, specific parties in even drawn-out law cases do indeed experience closure (however satisfying or disappointing) on the

¹⁰³³ *Black’s Law Dictionary*.

¹⁰³⁴ I leave to others the question of how mature events must be before they merit historical treatment.

matter at bar, but the underlying legal issues may crop up again and again for several decades or more, much in the way that deep social, economic and other causal currents survive and occasionally resurface after a formal treaty has marked the closure of hostilities historically recognized as a war. In that sense, potential new interpretations stand ready (at least latently) to augment, challenge or replace existing versions, but once released their plausibility/probability will be subject to contestation and critical review (in the civil litigation analogy discussed throughout this essay). Here an observation by Carlos Torres aimed at all epistemology seems to apply also to historical and legal analyses: “[E]ven if all explanations, by their very nature, are transient – that is, they are works in progress until a better explanation is constructed – they are to be judged by their ability to explain”¹⁰³⁵ Historical interpretations (like their legal equivalents) shift and spike and evolve over long periods – a key point is that in *each* historical rework, the proponent of the new argument follows the pattern detailed in Chapter 3, *supra*.

The reference shortly above to appellate court review brings to mind a third set of reservations as to the present model, in essence, that *lawyers make poor historians*. Again, space constraints prevent a lengthy treatment here, but a couple of works merit at least a brief look. In one, “History ‘Lite’ in Modern American Constitutionalism,” Martin S. Flaherty looked at historical arguments by legal academics concerning what he called “the Founding” (“the efforts that culminated in the drafting and ratification of the Federal Constitution”).¹⁰³⁶ As the title suggests, Flaherty found such work wanting, referring to familiar target of that decade Robert Bork (“who cast off the constraints of

¹⁰³⁵ Torres, *Democracy, Education and Multiculturalism*, p. 251.

¹⁰³⁶ Martin S. Flaherty, “History ‘Lite’ in Modern American Constitutionalism,” 95 *Columbia Law Review* 523 (April, 1995); quoted language from p. 527.

the judge without accepting the discipline of the scholar”) and a handful of others to suggest a general pattern of bleakness.¹⁰³⁷ The thrust of the paper criticizes legal scholars by dint of their standing (in most instances) as lawyers, who Flaherty suggests via both script and tone to be uninterested and inept in the finer skills of true historical writing:

Lawyers, including legal academics, place a premium on making arguments. By contrast, historians emphasize explanation, context, and secondary works, as well as primary sources Where historians must sift through primary sources, lawyers need concern themselves with only minimal research, and then mostly in prepackaged reporters or databases. . . . Conversely, where the historical profession generally allows far more time for pursuing a project, its legal counterpart places a premium on speed and productivity Legal academics, in short, generally lack the perspective, time, or knowledge of sources to pursue historical study well.¹⁰³⁸

This peculiar set of claims makes one wonder whether this author, a legal academic, had ever participated in a major lawsuit (his current bio listing is silent on the point), for otherwise he would better understand the tremendous resources devoted to deep research, much of it original and imaginative, with cumulative attorney hours easily surpassing those spent on a single journal article like his and sometimes rivaling those spent in producing weighty academic tomes. His point is correct only where considering garden variety “fender bender” or “slip and fall” cases, but like in historical writing, as a general rule the more high-profile or otherwise “important” the matter, the more high-skill resources will be dedicated to it; moreover the gestation period for prominent efforts in

¹⁰³⁷ Ibid., p. 525 and note 12, citing to Bruce Ackerman, “Robert Bork’s Grand Inquisition,” 99 *Yale Law Journal* 1419. Flaherty on the same page called out Paul Kahn, Steven Calabresi and Saikrishna Prakash.

¹⁰³⁸ Ibid., pp. 526-527, in a lengthy footnote (16) citing for apparent authority William E. Nelson, “History and Neutrality in Constitutional Adjudication,” 72 *Virginia Law Review* 1237 (1986), Alfred Kelly, “Clio and the Court,” 1965 *Supreme Court Review* 119, Kenneth Lasson, “Scholarship Amok: Excesses in the Pursuit of Truth and Tenure,” 103 *Harvard Law Review* 926 (1990) and John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA, 1980), p. 56, respectively.

either field can reach several years. Flaherty not only neglects to support¹⁰³⁹ the final claim in the string above that legal academics (again, conflated with “lawyers”) somehow lack the qualities for strong historical work, he inadvertently (or so it seems) undercuts it by discussing a long string of errant analyses of the Founding by professional *historians* (over fifteen pages),¹⁰⁴⁰ then by failing to offer a helpful distinction between legal academics using history – as they must¹⁰⁴¹ – in their analyses and “historians” specializing in constitutional origins. Disdainful verbiage boiled away, the main cleavage for the author seems less a matter of training or even technique, but of conclusion. Argumentation, as this dissertation repeatedly emphasizes, is a natural component in historical works, employed in favor of or against other arguments past, present and anticipated. In this respect, then, Flaherty’s construct differs little from what I have described throughout, in that in offering an interpretation it resorts to (and now is subject to), the same type of critical ranking of the likelihood of correctness. What emerged was a small handful of thinkers the author considered relatively convincing.

One of them was John Phillip Reid, a law professor specializing in American constitutional history (but like Flaherty, not “professionally trained” in history, if that

¹⁰³⁹ All the more problematic given his indictment of constitutional legal scholars not sharing his preferred analysis: “The point of most (though not all) of them is not that the particular assertion may or may not be tenable. Rather, it is that habits of poorly supported generalization – which at times fall below even the standards of undergraduate history writing – pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution.” *Ibid.*, p. 526.

¹⁰⁴⁰ Oddly, Flaherty began this section (pp. 529, et seq.) by complaining: “For much of this [the twentieth] century (and the last), few historians took early American constitutional thought seriously.” *Ibid.* 529. One might conclude that by “seriously” Flaherty meant fairly in line with his thinking.

¹⁰⁴¹ Flaherty acknowledged the potential gains from this reality: “In theory this turn to history is a good thing.” *Ibid.*, p. 550. But his later caveat again fails to establish helpful distinctions: “[N]early every constitutional theorist believes history adds something to her account. To the extent that the history such theorists put forward falls short, whatever they had hoped to add to their theoretical accounts evaporates.” *Ibid.*, p. 555. That statement could apply to any theorist in any discipline, including every history subfield.

means formal doctoral studies). In his 1993 law journal article “Law and History” Reid denounced what he saw as poor historical scholarship on the part of Supreme Court justices in defense of their rulings. Reid was correct in understanding the high stakes:

Among the stupendous powers of the Supreme Court of the United States, there are two which in logic may be independent and yet in fact are related. The one is the power, through an articulate search for principle, to interpret history. The other is the power, through the disposition of cases, to make it.¹⁰⁴²

To buttress his point, however, he resorts to an awkward syllogism much like Flaherty’s: justices are lawyers; lawyers because of their instrumentalist duties regularly skew history; justices therefore skew history. The presumed missing link in the syllogism is that justices are unable effectively to set aside their class influences, political leanings and other demographic and personal biases. Reid thus seems to have accommodated the lessons from Critical Legal Studies (see again my discussion of CLS in Chapter 2, Section 2, *supra*). Fine so far. But then he engages in exactly the kind of interpretative excess he had taken pains to criticize. Bad history practitioners, in his view, are akin to “law office historians” whose lamentable techniques are akin to “law office history.”

Reid favorably quoted these definitions:

“The ‘law office historian,’” one critic has argued, “imbued with the adversary ethic, selectively recounts facts, emphasizing data that supports the recorder’s own prepossessions and minimizing significant facts that complicate or conflict with that bias.” [and] Law office history has been described as “the selection of data favorable to the position being advanced *without regard or concern for contradictory data or proper evaluation of the data proffered.*”¹⁰⁴³

¹⁰⁴² John Phillip Reid, “Law and History,” 27 *Loyola of Los Angeles Law Review*, p. 200, note 29. This is no new insight; see, e.g., Hegel (1805): “But it is the State which first presents subject-matter that is not only adapted to the prose of history, but involves the production of such history in the very progress of its own being.” G.W.F. Hegel, *Lectures on the Philosophy of History*, trans. J. Sibree (London, 1914), p. 63.

¹⁰⁴³ *Ibid.*, p. 197, citing to Daniel L. Dreisbach, “Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations,” *North Carolina Law Review* 69, p. 210, note 293 (1990), and Samuel Kristov, “The Amicus Brief: From

The CLS discourse arose in law schools, but Reid and his ilk were perhaps less familiar with the nature and content of critical assessments published in professional *history* journals as to colleagues' work. Else, they would easily recognize how reviewers there direct to historians the functional equivalent of the language in the first sentence in the excerpt just above (“imbued with the adversary ethic, selectively recounts facts, emphasizing data that supports the recorder’s own prepossessions and minimizing significant facts that complicate or conflict with that bias”) in varying degrees, as the given reviewer finds appropriate (such assessments of course subject to counter-critique). “The community of practitioners,” to repeat a quote from Appleby, et al., from Chapter 3, “acts as a check on the historian.” It sometimes must employ reproachful language.

The second excerpted sentence is borderline silly in its screed-like excess – it is hard to imagine anyone wanting legal counsel to act “without regard or concern for contradictory data or proper evaluation of the data proffered” – an invitation for some very rude surprises at key points in the disposition of the matter. Once again, in law and history both, persuasion is the medium of exchange – both means and ends – with trust (as it derives from fairness) a vital element in the reviewers’ verdict. As argued all along herein, in law *and* history, *empty* rhetoric weakens the case. Reid, et al., seem to have almost completely missed (or simply dismissed) the several decades of epistemological and historiographical debates noted throughout this dissertation.¹⁰⁴⁴ Else they would

Friendship to Advocacy” in *Essays on the American Constitution* (Englewood Cliffs, NJ, 1964), p. 80 (emphasis added). I reversed the order of the two statements from how they appear in Reid.

¹⁰⁴⁴ Both Flaherty and Reid, for example, look to a 1965 article by a historian who decried how simplistic and naïve historicizing by Supreme Court justices departed from the approach “that should guide a professional historian,” but without articulating, much less critically scrutinizing, the assumptions behind the latter standard, which soon thereafter became a topic of great debate. See Alfred H. Kelley, “Clio and the Court: An Illicit Love Affair,” *The Supreme Court Review* (1965), pp. 119-158, quote from p. 156. To

have noted and considered how the fully conscious inductive objectivism they apparently embraced had long gone by the wayside,¹⁰⁴⁵ such that even the neo-judicialist Ginzburg, a relative conservative in attempting to re-enshrine proof in history, tied his effort to the exercise of interpretive rhetorical exchange, i.e., to the notion that law-like testing of proof distills and strengthens rather than negates it. The binary flavor (academics vs. practicing lawyers) of Reid's analysis is thus both unnecessary and unhelpful.¹⁰⁴⁶

As such, it also misses the point of my analogy – most of the time most lawyers are *more* overtly instrumental than most historians, but the behavior of the two sets of professions is not a binary matter, but one that again is amenable to a continuum.¹⁰⁴⁷

While the way some-to-many figures in law (high court justices included)¹⁰⁴⁸ treat

the extent these scholars joined Kelley in identifying themselves as historians, another quote from Appleby, et al., seems fitting: “Just as physicians are never good at examining themselves [a bit of an overstatement], so historians may have difficulty assessing how the practice of history has been affected by the ideological warfare of the past forty years.” Appleby, Hunt and Jacobs, p. 280.

¹⁰⁴⁵ Even two decades before the great epistemological upheavals, including the linguistic/literary turn, Bloch observed the fallacies of purely inductive research and the historian's full consciousness of language choice and effect: “[E]very historical research supposes that the inquiry has a direction at the very first step. In the beginning, there must be a guiding spirit.” Bloch, p. 54; “The historian . . . arbitrarily expands, restricts, distorts the meanings – without warning his reader; without always fully realizing it himself.” Ibid., p. 145.

¹⁰⁴⁶ And overall the language betrays a whiff of certain legal scholars' disdain for “common” lawyers in practice, the conceit perhaps most infamously captured in Laurence Tribe's quip that Harvard Law School should not become “a technocratic training ground for janitors of the legal order.” Ken Emerson, “When Legal Titans Clash,” *New York Times Magazine*, 22 April 1990. Tribe's comment was posted prominently on a wallboard at UCLA School of Law at the time (and no doubt elsewhere).

¹⁰⁴⁷ Law professors Binder and Bergman provided a hint of this dynamic. On the one hand: “Litigators resemble historians, and litigation is largely a process of re-creating historical events.” On the other: “Litigators, *perhaps*, operate in a different kind of world from historians. Historians, we assume, seek ‘objective’ truth. Litigators . . . are *more overtly* instrumental.” *Fact Investigation: From Hypothesis to Truth*, pp. 4 and 164, respectively (italics added). The fullness of the present dissertation is in partial, but far from full, accord with those statements, in that (a) objective truth in fuller explanations is difficult (I do not claim impossible) to demonstrate even for the best historians, (b) the best litigators by necessity also are interested in objective truth, and (c) instrumentalism on some degree is unavoidable for all analysts.

¹⁰⁴⁸ Reid of course employed in his recounting the same selectivity of evidence he otherwise denounced, for as shown in Chapter 3, Section 3, *supra*, the sifting and selection in and out of data is unavoidable for *all*

evidence might indeed make them poor historians— and even suboptimal lawyers – the obverse does not necessarily follow. As I pointed out in Chapter 1, analogies are conceptual guides and analytical tools, not the *res* itself. Not all models require “isomorphic” or fully reciprocal properties.¹⁰⁴⁹ The principal analogy here is mostly unidirectional, having to do with how historians approach the material, arguments and presentation much like skilled lawyers. Many historians would, with legal training, no doubt make fine lawyers.¹⁰⁵⁰ But judging by their colleagues’ sometimes excoriating reviews, some do not even make skilled historians. In any case, my analogy concerns *good* historians and *good* lawyers – it does not stretch to those practitioners in either field who refuse or otherwise fail to embrace how the discipline of likely contestation can foster higher accuracy and thus greater persuasiveness.¹⁰⁵¹

historians. While he convincingly argued that *some* justices have used dodgy history to mask outcome determinative opinions, we are left with no sense of in how many other cases justices may have buttressed opinions with “better” history, if indeed Reid could have defined it other than simply suggesting it is what real historians do. This oversight led him to offer a rather tepid catch-all disclaimer: “We should acknowledge that lawyers and judges can use history in a variety of ways and that not every exercise of historical jurisprudence deserves to be dismissed as law office history.” *Ibid.*, p. 205. Any assessment there might prove just as much a function of the reviewer’s outcome preferences as the justice’s. For example, a main complaint in many academic and court debates is the claimed facile reference, pro or con, to issues of “original intent” in constitutional interpretation.

¹⁰⁴⁹ Hence analogies almost invariably are only partial, used to illuminate certain qualities and conditions by speaking to certain important similarities. For example, a billiard ball model to explain gases does not create a perfect mirror image – billiard balls are dense, numbered and colored, gas molecules are not. Another analogy in such fields as sociology and political science is the one between parent-child and state-citizen, in which many analysts strive to (and are able to) locate disconformities without rendering the comparison unimportant. See Frigg and Hartmann, “Models in Science,” *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition).

¹⁰⁵⁰ Here it is worth repeating from Chapter 3 an official statement from the American Historical Association: “*Multiple, conflicting perspectives are among the truths of history* . . . Because the questions we ask profoundly shape everything we do – the topics we investigate, the evidence we gather, the arguments we construct, the stories we tell – it is inevitable that different historians will produce different histories.” The practice norm is therefore “contesting each other’s interpretations.”

¹⁰⁵¹ One is reminded of Kuhn’s insight: “To be accepted as a paradigm [or here a useful model], a theory must seem better than its competitors, but it need not, and in fact never does, explain all the facts with which it can be confronted.” Kuhn, pp. 17-18.

Some of the concerns about Supreme Court mishandling of history spring from the recognition of significant power disequilibria in law, in this instance between the highest bench (whose members have no real check save each other) and other legal actors, and throughout Western legal systems generally. A fourth possible reservation to the proposed analogy, by extension, asks whether the legal half of the model represents the full socio-economic range as well as history can. In this view, litigators' attentions go mostly to relatively wealthy and powerful clients able to manage the steep fees. Even many "contingency" cases (where the lawyer receives a percentage of the recovery in lieu of hourly fees) are not financially attractive enough to take on, such that a large number of meritorious claims go unaddressed. In seeming contrast, historical works in recent decades, whether in the microhistory genre or one of the several standpoint approaches, have increasingly forefronted once ignored or largely glossed over social strata (and silences¹⁰⁵²) as part of more comprehensive, illuminating and interesting analyses.¹⁰⁵³

But the distinction is not as marked as it appears at first blush. Lawyers collectively devote tremendous resources – *pro bono* work, legal aid foundation services, public interest organization efforts, public defender cases – to help subaltern clients, never enough, certainly, but no small number either. As for historical writing, despite the admirable expansion of types of coverage, resource allocation realities limit the number of actual treatments to a small fraction of the millions imaginable and otherwise worthwhile. And in the realm of power dynamics, the disequilibrium in law between

¹⁰⁵² As Ginzburg noted about microhistory: "[T]he obstacles interfering with research in the form of lacunae or misrepresentations in the sources must become part of the account . . . It accepts the limitations while exploring their gnoseological implications and transforming them into a narrative element." "Microhistory: Two or Three Things That I Know About It," p. 28.

¹⁰⁵³ "The good historian is like the giant of the fairy tale. He knows that wherever he catches the scent of human flesh, there his quarry lies." Bloch, *The Historian's Craft*, p. 22.

judges and other figures finds its rough match in the academy between the professor and students. Justice Learned Hand supplied a hint as to the legal half:

The judge's authority depends upon the assumption that he speaks with the mouth of others. That is to say, the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it – if it is to stand against the passionate resentments arising out of the interests he must frustrate — for while a judge must discover some composition with the dominant trends of his times, he must preserve his authority by cloaking himself in the majesty of an overshadowing past.¹⁰⁵⁴

That perhaps necessary emphasis on tradition-honored institutional authority as augustly vested in the individual is another reason why the present analogy works better than the historian-as-judge version. For vis-à-vis each other, historians are in essence colleagues who can and do contest (with varying degrees of cordiality) published interpretations and even the published critiques thereof.

However, in the classroom we note an important exception, i.e., authority and power asymmetries that preclude much in the way of the checks historians experience in their publishing activities. Many to most students display early-stage knowledge bases and still-developing abilities to think critically. They also experience tremendous cross-pressures on their time and intellectual energies and of course are concerned with obtaining good marks from presumably expert professors who have dictated the syllabus and course materials and who direct the topic, course, duration and intensity of lectures and any discussions. Recommendations and sometimes even funding may be at stake. Moreover, at the graduate level, professors sometimes have a large role in admitting those students indicating an interest in the professor's area of focus (more the case in

¹⁰⁵⁴ Justice Learned Hand, as quoted in William Joseph Brennan, Jr., "The Role of the Court – The Challenge of the Future" in *An Affair with Freedom: A Collection of His Opinions and Speeches Drawn from His First Decade as a United States Supreme Court Justice* (New York, 1967), p. 324.

modest-sized academic departments than in large professional programs) and in helping with TAs, co-authorship, and other career development avenues. With these dynamics, it is not surprising that few students deem they have the time, leverage or knowledge to offer the sort of challenges that come from professors' field colleagues.

The arguments by Flaherty and Reid shortly above indirectly suggested that asymmetric power allows judges to be *less* attentive than lawyer-advocates to factual details and coherence. The extent to which the given judge is susceptible to temptation along these lines, they insinuated, is proportionate with the strength of one's ideological leanings. The corollary danger is that *some* tenured academics (using history directly or indirectly) might leverage the asymmetries of the syllabus, et al., in the manner Foucault predicted as part of his ruminations on power, knowledge and discourse (see again Chapter 2, Section 7, *supra*). Unchecked by some combination of internal compass and the possibility of negative external review, we at times see the historian as broker. Some academics of course argue the impossibility of non-agency in education and thus the need for corrective materials to balance (or in lieu of) supposedly ubiquitous canonical histories (see Chapter 2, Section 6, *supra*).¹⁰⁵⁵ Maybe, but this sort of activism is far less a problem in the larger arena outside the classroom, where the norm of contestation overtly prevails. There, the famed adage "the pen is mightier than the sword"¹⁰⁵⁶ makes sense, as does Churchill's wry challenge: "I consider that it will be found much better by

¹⁰⁵⁵ A poor assumption, if my own observations about the lack of much historical grounding of any sort for most students is at all representative.

¹⁰⁵⁶ Often misattributed to Voltaire, the phrase apparently first saw light in the play by Edward Bulmer-Lytton, *Richelieu; or the Conspiracy* (1839); Shakespeare in *Hamlet*, Act II, Scene II, had much earlier offered a similar observation: "[M]any wearing rapiers are afraid of goosequills."

all Parties to leave the past to history, *especially as I propose to write that history*.¹⁰⁵⁷

For there have always been plenty of interpreters able and willing to take on the Churchills of historical writing. But who in the classroom can offer a corrective to the corrective? Yes, lawyer-advocates are more overtly and more aggressively instrumentalist in their use of evidence (history), but some question remains whether the stealth approach employed by certain academic-advocates is a larger problem. Again, outside the classroom, a historian's advocacy of any given interpretation is far less worrisome. There, in each historical presentation, as in every lawsuit, one discerns a proposal about some element, omission or insufficiency, whether factual, circumstantial, ideological or epistemological – oft all intertwined. But this is not the historian in the position of a courtroom (or classroom) judge (some of each, one must acknowledge, are exquisitely fair, despite the temptations of power as Acton described); it is instead the historian as interpretative advocate, for whom the strong possibility of cross-examination by colleagues is a beneficial influence.

That reasonable supposition introduces a fifth possible reservation about the proposed model – does one find in collegial review of historians' work something akin to “tyranny of the majority”? As shown in several earlier passages, a number of historians have posited the existence of a “community of practitioners” in the context of the checks such a group might provide. In this respect one might view the collectivity of reviewing colleagues as something like a panel of review jurists (but even there, individual

¹⁰⁵⁷ Speech in the House of Commons, 23 January 1948, as cited in *The Yale Book of Quotations*, ed. Fred R. Shapiro (New Haven, CN, 2006), p. 154. The utterance is often misquoted as the pithier yet “History will be kind to me, for I intend to write it.” Partly because Churchill was at or near the center of some of the most momentous events of the last century, a good portion of his extensive historical writings has an element of autobiography, along with a certain Anglo-American triumphalism. His most known works include *Marlborough: His Life and Times*, *The World Crisis* (about the first war), *The Second World War* and *A History of the English-Speaking Peoples*.

panelists, as Flaherty and Reid argued in the law context, may have their own agendas). Scholars in legal studies and political science have long directed much attention to the tensions (healthy or not) between the majoritarian and countermajoritarian impulses and actions in democratic systems of law and governance.¹⁰⁵⁸ What about in history then? “The history we read, though based on facts, is . . . but a series of accepted judgments” suggested Barraclough.¹⁰⁵⁹ But should and can the community of writer/reviewers act collectively as a judicial panel, or perhaps more fitting, as a jury? Collingwood, for one, (1946) mused about historiography from the perspective of sole historians who can and must navigate the problems at hand according to their own compasses:

Throughout the course of his work the historian is selecting, constructing, and criticising By explicitly recognising this fact it is possible to effect what, again borrowing a Kantian phrase, one might call a Copernican revolution in the theory of history: the discovery that, so far from relying on an authority other than himself, to whose statements his thoughts must conform, the historian is his own authority and his thought is autonomous, self-authorising. . . .¹⁰⁶⁰

But Collingwood, a difficult read already, tended to the *coincidentia oppositorum*, such that he also noted how the historian must acknowledge the readership: “He must satisfy himself *and his readers* that no blind spot in his own mind, and no defect in his equipment of learning, prevents him from [ably conducting the task].”¹⁰⁶¹ That duality or tension between border-testing and conformity to disciplinary norms survived the ensuing

¹⁰⁵⁸ For a sense of how lengthy and entrenched (some might claim repetitive) the debates have been, see Barry Friedman, “The Birth of An Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five” in *The Yale Law Journal*, 112 (November, 2002), pp. 153-259.

¹⁰⁵⁹ Geoffrey Barraclough, *History in a Changing World* (London, 1955), p. 14. The author was referring partly to the “dead hand” judgments of generations of chroniclers, scribes and prior historians, but the statement has salience for the present context also.

¹⁰⁶⁰ R.G. Collingwood, *The Idea of History*, p. 236 (emphasis added).

¹⁰⁶¹ *Ibid.* p. 329.

decades and even arguably intensified for a lengthy period starting in the mid-1960s and the widespread rejection of standards, structures and authorities, eventually reaching also the history profession. Novick seemed to believe that by 1988, even beside the more confrontational aspects of postfoundationalism and standpoint relativity, an explosion of new historical subspecialties, most with their own journals, and a tidal surge of new offerings in each of them, together worked to undercut the previously prevailing sense of a stable and unified community.¹⁰⁶² Although Novick acknowledged the high quality of much of the new work, he hinted that an unintended side effect of its very volume and diversity might be to lessen the degree of “check” against abuse a tighter corpus allows.

If true, an interesting irony emerges – to the extent one asserts that lawyers, because of their duties of zealous advocacy, have less instinct or dedication to “truth” than do historians, they seem to operate with stronger certainties of effective checks against abuse of characterization, especially in that such checks come both vertically (from the jury) and laterally (from opposing counsel). That dynamic of what might be called “anticipatory corrective” exists also in historical writing, but is there perhaps less directly focused as to specific parties. It is also less predictably dichotomized. Critical assessment in history involves an odd fusion of the vertical and horizontal, in that some writers of reviews in journals (the rough equivalent of a vertical check), for one example, also have an adversarial interest in offering competing (horizontal) interpretations, in a way that jurors in a law case do not.

¹⁰⁶² Novick devoted several chapters of *That Noble Dream* to demonstrating a previous norm of disciplinary cohesion, arguing that disaggregation in the contemporary period – particularly as it related to his organizing theme of objectivity in historical writing -- represented both a quantitative and *qualitative* departure from the prior pattern of temporary upheavals and shifts in thought and fashion.

In the abstract, that dual incentive could prove rather problematic for the field. The first waves of counter-canonists no doubt perceived an unenthusiastic-to-hostile response from the putative old guard. Others now grumble that proponents of critical perspectives have become the new establishment.¹⁰⁶³ If true (it is outside the purpose of this dissertation to define the actualities here), by dominating key checkpoints they would be positioned to alter what counts as valuable, legitimate, publishable, thus in some sense allowable, given the realities of field entry and promotion. This is hardly a new concern. As the standpoint era began to unfold, Kuhn called for research into such dynamics via a “comparative study of the corresponding communities in other fields”:

How does one elect and how is one elected to membership in a particular community, scientific or not? What is the process and what are the stages of socialization to the group? What does the group collectively see as its goal; what deviations, individual or collective, will it tolerate; and how does it control the impermissible aberration?¹⁰⁶⁴

Kuhn suggested that disciplinary norms very possibly affect even perception itself – one tends to see what the dominant mode (if any) for the community instructs is possible to see: “Can it conceivably be an accident, for example, that Western astronomers first saw change in the previously immutable heavens during the first half-century after Copernicus’ new paradigm was first proposed?”¹⁰⁶⁵

¹⁰⁶³ In the absence of a demonstrated qualitative shift in institutional dynamics, criticisms aimed at what seemed the old guard are thus plausibly applicable to any new wave. See, for example, observations by Acton, [a] Historian has to fight against temptations special to his mode of life, temptations from Country, Class, Church, College, Party, Authority of talents, solicitation of friends.” Letter to Creighton, *Historical Essays and Studies* (London, 1907), p. 505; J.H. Plumb, “[h]istory is now strictly organized, powerfully disciplined, but it possesses only a modest educational value and even less conscious social purpose.” *History News Network*, George Mason University; and Hofstadter, “[the expert] becomes comfortable, perhaps even moderately prosperous, as he takes a position in a university or in government or working for the mass media, but then tailors himself to the requirements of these institutions.” Hofstadter, p. 416.

¹⁰⁶⁴ Kuhn, p. 209 (1969 Postscript).

¹⁰⁶⁵ *Ibid.* p. 116.

The sociological dynamics in any knowledge field are such that mentoring of productive efforts is hard to separate from indoctrination (even in its most benign sense). For example, Kuhn noted how “tacit knowledge” (borrowing Michael Polanyi’s phrase) “is learned by *doing* science rather than by acquiring rules for doing it.”¹⁰⁶⁶ In turn, one tends to go about “doing” in modes that well correlate to the given reward structure, such that the tacit knowledge obtained carries with it certain values and presuppositions.¹⁰⁶⁷ There is no reason to believe actors in the human sciences behave differently to those in the natural sciences in these respects, should a dominant field paradigm in fact exist.

If Novick had been correct in describing a likely enduring collapse of consensus in historiography, then a silver lining is that the same pluralism that undercut the dominant paradigm seems over time to have accommodated a healthy tension – a fuller sense of community diversity on one side while avoiding utter cacophony on the other. Indeed, in the fairly current historiographical view of Appleby, et al., the notion of the community as a check on the historian (ten pages above) does not require a unanimous, monolithic assessment, or even a stable majority. Indeed, the “pragmatic pluralism” they espoused works reasonably well in other spheres. In politics, for example, even in U.S.-style two-party systems one sees shifting cross-aisle alliances forming around particular issues, whereas in parliamentary systems temporary coalition arrangements allow the formation and operation of the government. In the commercial world, businesses contesting each other in a patent litigation on one product may at the same time forge

¹⁰⁶⁶ Kuhn, p. 191 (1969 Postscript) (emphasis added).

¹⁰⁶⁷ As Max Weber put it, “[n]o science is absolutely free from presuppositions, and no science can prove its fundamental value to the man who rejects these presuppositions.” *From Max Weber: Essays in Sociology*, trans. and eds. H.H. Gerth and C. Wright Mills (New York, 1946), p. 153.

licensing deals on another (a common occurrence in the high tech sector). In civil litigation, attorneys for strategic reasons sometimes ask jurors to divide the verdict into subportions, i.e., to render two or more “special verdicts” as to specific aspects of cognizable claims, in which case the juror tally may differ issue to issue.¹⁰⁶⁸ Likewise, in history, the community in essence delivers verdicts on particular facets of an argument but perhaps a separate one altogether as to the interpretation as a whole.¹⁰⁶⁹ Thus, while broad, stable and durable field accord on key historical issues might be exceptional, the possibility of at least partial consensus on smaller slices of reality is an important step away from pure anarchy and ultra-relativistic nihilism. “Telling the truth takes a collective effort,” was the last line in the Appleby, Hunt and Jacobs work.¹⁰⁷⁰ While historians’ differing interests, cross-disciplinary exposure and methodologies (and other variables) preclude lasting tight alignment on many historical matters, that same pluralism helps the profession as a whole to sidestep the tyranny of the majority issue, while still ensuring that excesses will be noted and discussed, thereby helping to minimize their frequency and egregiousness.

¹⁰⁶⁸ For example, in a lawsuit for enforcement of contract, where the defendant claims malpractice or some other failure as an excuse not to pay, separate jury decisions might issue over first, whether plaintiff competently performed the contracted duties and second, if so, which portion of the agreed contract amount defendant must pay. There, where one might see jury votes of 12-0 and 12-0 (for full payment), the jury could otherwise find, say, 11-1 in plaintiff’s favor on the first count, but only 9-3 on the second, and awarding only 50% of the contract amount.

¹⁰⁶⁹ Two quotes from Goethe further illustrate the law-history assessment similarities. As to distinctions between components of an argument and the whole: “One phenomenon, one experiment cannot prove anything; it is the link in a great chain, only valid in its context. If someone were to cover up a string of pearls and only show the most beautiful one, expecting us to believe that all the rest were like that, it is unlikely that anyone would risk the deal.” As to the reviewing historian (but not the proposing historian) as one member of a community-jury which may not reach unanimity, i.e., the reviewer as (only) one important voice among many: “He has only to consider how far the statement of the case is complete and clearly set forth by the evidence. Then he draws his conclusion and gives his vote, whether it be that his opinion coincides with that of the foreman or not.” *Maxims and Reflections*, pp. 18 and 94, respectively.

¹⁰⁷⁰ Appleby, Hunt and Jacobs, p. 309.

A sixth potential reservation relates to the medium of debate and review and thus returns to the issue of occasional insufficiencies of language to hold and convey meaning across knowledge sub-communities. For Kuhn, theoretical discourse depended on vigorous but reasoned exchange. However, even where the parties employ the same vocabulary, they sometimes attach different meaning to the terms, such that:

[T]heir communication is inevitably only partial. As a result, the superiority of one theory to another is something that cannot be proved in the debate. Instead, I have insisted, each party must try, by persuasion, to convert the other.¹⁰⁷¹

Such communicational friction generates a good deal of background noise, but is not fatal to the discussion. Where such vocabulary-related impasses arise, debate participants need become “translators”:

Each will have learned to translate the other’s theory and its consequences into his own language and simultaneously to describe in his language the world to which that theory applies Since translation, if pursued, allows the participants in a communication breakdown to experience vicariously something of the merits and defects of each other’s points of view, it is a potent tool both for persuasion and for conversion.¹⁰⁷²

Still, Kuhn recognized that “neither good reasons nor translation constitute conversion.” For him, at least two factors beyond dueling definitions retard conversion, and even persuasion: “In the first place, the proponents of competing paradigms will often disagree about the list of problems that any candidate for paradigm must solve” [and] “the defenders of the traditional theory and procedure can almost always point to problems that its new rival has not solved but that for their view are no problems at all.”¹⁰⁷³

¹⁰⁷¹ Kuhn, p. 198 (1969 Postscript).

¹⁰⁷² Ibid., p. 202. This sort of empathy-building exchange recalls the role and techniques of mediators in legal disputes, and good lawyers understand there is always a tacit degree of mediation in their practice, no matter how ostensibly oppositional.

¹⁰⁷³ Ibid., pp. 204, 148 and 157, respectively.

We could add other factors yet. Kuhn seemed to believe arguments flowed from more or less the same evidence base (a matter separate from differing vocabularies), such that the comparative analysis involves assessing the tightness of fit between the given competing interpretations/theories and the underlying (single) body of facts.¹⁰⁷⁴ But as discussed at length in Chapter 3, Sections 2-3, *supra*, it is impossible for historians to bring to bear on the given matter more than a small fraction of the myriad historical data plausibly related. What results quite often is a battle between treatments using bodies of facts – even highly demonstrable facts – that overlap only partially, the selection thereof emerging as an additional point of contestation.¹⁰⁷⁵

And then there are certain intellectual and philosophical frameworks that tend to resist common grounds of reference and thus any real ability to translate, much less persuade, much less yet convert. Gallie labeled them “essentially contested concepts” – although “sustained by perfectly respectable arguments and evidence,” because differing values, ends and other qualities underpin contesting approaches, it is “quite impossible to fix a *general principle* for deciding” which better accomplishes its goals, explanatory or otherwise.¹⁰⁷⁶ Moreover, because “to use an essentially contested concept means to use it

¹⁰⁷⁴ “To the historian, at least, it makes little sense to suggest that verification is establishing the agreement of fact with theory. All historically significant theories have agreed with the facts, but only more or less . . . It makes a great deal of sense to ask which of two actual and competing theories fits the facts *better*.” Ibid., p. 147 (emphasis original).

¹⁰⁷⁵ As noted previously, in law certain procedural mechanics narrow the differentiation somewhat; moreover, the good lawyer anticipates the opponent’s key facts and moves to preempt or otherwise effectively address those that will surely arise. It has been my position throughout that the most persuasive historical arguments similarly treat potentially countervailing facts.

¹⁰⁷⁶ Gallie, *Philosophy and the Historical Understanding*, pp. 158 and 168, respectively (emphasis original). Among the realms most often producing essentially contested concepts are religion, art/aesthetics, democracy, social justice, and even (as Kuhn later showed) some aspects of science. Gallie illustrated the point by pointing out how differing views of democracy resulted in differing views about the proper reach of personal liberty. In contemporary society we witness, for example, seemingly unbridgeable

both aggressively and defensively” the question arises whether a separate analyst can view any such clashes as “*genuine* disputes, i.e., such that the notions of evidence, cogency and rational persuasion can properly be applied to them.”¹⁰⁷⁷

All of which brings us back to the question of persuasion/conversion in knowledge fields, including historical writing. Kuhn suggested that “each party must try, by persuasion, to convert the other” and that, in turn “[t]o persuade someone is . . . to convince him that one’s own view is superior and ought therefore to supplant his own.”¹⁰⁷⁸ My view is that proponents of clashing historical interpretations, like opposing parties in litigated disputes, rarely if ever persuade the other side to convert views.¹⁰⁷⁹ Better, then, to abandon that chimera in order to direct persuasive efforts toward achievable stakes, also more critical to one’s aspirations, i.e., the opinions of *third parties* – in this case the community of colleagues (once more, the history equivalent of a jury of one’s peers). Decisive majority opinions may not be forthcoming, but again it is reasonable to believe that addressing one’s arguments to this forum helps to average out the biases inherent to and reflected in incommensurable value sets.

A seventh type of reservation is somewhat similar – the existence of certain historical “problems” that arguably lie outside the ability of the system (here the historical writing profession) to address, treat or otherwise accommodate. The chief

assumption sets behind the ongoing abortion, gun control and affirmative action debates.

¹⁰⁷⁷ Ibid., pp. 161 and 183, respectively (emphasis original). Novick cited favorably to Gallie in stating: “‘Historical objectivity’ is not a single idea, but rather a sprawling collection of assumptions, attitudes, aspirations, and antipathies.” *That Noble Dream*, Introduction, “Nailing Jelly to the Wall,” p. 1.

¹⁰⁷⁸ Kuhn, (1969 Postscript), pp. 198 and 203, respectively.

¹⁰⁷⁹ “All individual passion leads to the suppression of all critical judgment with regard to the object of that passion.” Jules Monnerot, *Sociologie du Communism* (Paris, 1949), as quoted in Jacques Elul, *Propaganda*, Konrad Keller and Jean Lerner, trans. (New York, 1965/1973), p. 170.

example from recent decades is well enough known that a brief mention here suffices to illustrate the overall point:

Auschwitz is a no-man's land of the mind, a black box of explanation; it sucks in all historiographic attempts at interpretation; it is a vacuum taking meaning only from outside history. Only *ex negativo*, only through the constant attempt to understand why it cannot be understood, can we measure what sort of occurrence this breach of civilization really was. As the most extreme of extreme cases, and thus as the absolute measure of history, this event is hardly historicizable.¹⁰⁸⁰

Saul Friedlander's 1992 essay collection *Probing the Limits of Representation: Nazism and the "Final Solution"* treats the historiographical conundrum at length. But what may seem an exception to the present model actually points to yet another parallel – despite the way law ubiquitously saturates society, some important personal, social and even commercial issues are beyond the ability of courts to address, much like the difficulty just noted for historical writing. That stated, my concern here is with what historiographical models *can* address, and how well. Beyond that is Kuhn's instructive and appropriately comforting assertion: "no theory ever solves all the problems with which it is confronted at a given time . . . If any and every failing to fit were ground for theory rejection, all theories ought to be rejected at all times."¹⁰⁸¹

An eighth and final (here at least) potential reservation concerns disciplinary borders and thus attached to *any* historiographical model. In the academy especially, history is a significant element and even tool in practically every argument in practically every discipline. But boiling out "history" from its applications has always been difficult. Is "real" history only that work professional historians produce? If so, what

¹⁰⁸⁰ Dan Diner, "Historical Understanding and Counterrationality: The *Judenrat* as Epistemological Vantage" in Saul Friedlander, ed., *Probing the Limits of Representation: Nazism and the "Final Solution"* (Cambridge, MA, 1992), p. 128.

¹⁰⁸¹ Kuhn, p. 146.

exactly then makes for a professional? Assuming one could draw that line, do all analyses by historians touching on the past equate to historical writing in a way that similar analyses by others do not? Additional boundary issues arise where historians in all admirable diligence strive to lend robust context to the matter studied – the peril there lies in dilution by over-inclusion. Too broad a definition of what activities constitute, for example, “diplomacy” or “education” largely negates the ability to discern patterns of core phenomena from the wall of noise that social workings in their totality generate.¹⁰⁸²

By extension, the history enterprise as a whole is subject to any number of tautological interconnections with its subject matter and even its tools. We have already seen, for example, the tremendous overlap of historical and legal subject matter – again, the importance of many historical events is reflected in new, amended, overturned or reinforced laws, and many legal outcomes constitute or drive new history and new historical writing. Nonetheless, the instant essay does not argue that historical writing is simply lawyering and *vice versa*. Moreover, an interested investigator would find instances of tight cross reference and bi-directional effect between history and a number of other fields, although perhaps not quite as strong as in the history-law overlap.¹⁰⁸³

Historiographers have hoped to evade the redundancy vortex by attempting to parse field-

¹⁰⁸² Sol Cohen offered the example of how education historian Lawrence Cremin’s hugely aspirational work, *The Transformation of the School: Progressivism in American Education, 1876-1956* (New York, 1961), ultimately floundered for such reasons – Cremin’s attempt to reveal how almost everything in education in the period was progressive left little room to assess educative phenomena apart from progressivism. See Cohen, “The Influence of Progressive Education on School Reform in the United States: Redescriptions,” Chapter 5 in his *Challenging Orthodoxies*.

¹⁰⁸³ A growing emphasis on psychological dimensions of historical actors eventually gave rise to, or at least was consistent with, a focus on the psychological dimensions of historical *writing*. Technological shifts are not only intriguing subject matter for historical work, but also alter the possible means of investigation and dissemination. Kuhn’s sociology study of the history of science described paradigm shifts in a manner that arguably created a paradigm shift. The history of propaganda necessarily involves how extensively figures have employed history *in* or *as* propaganda. *Et cetera*.

specific goals and means. Lukacs, for one, cast his understanding of distinctions between law and history in terms of differing primary commitments, i.e., “justice” in one case and “truth” in the other:

The purpose of law is the establishment of justice and the elimination of injustice. The purpose of history is the pursuit of truth through the elimination of untruths.¹⁰⁸⁴

And two centuries earlier, Hugh Blair, a Scottish Enlightenment figure and theorist of written discourse: “[T]he primary end of History is to record truth.”¹⁰⁸⁵ But surely those formulae are too simple. Setting aside profound epistemological debates about the ability to achieve or otherwise distill truth (see Chapter 2, Section 7), exercises organized to expose untruths (Lukacs) or record truth (Blair) do not by themselves qualify as historical work – arguably every profession aspires to such goals. Director Jean-Luc Godard partly illustrated the point in a film line: “Photography is truth. And cinema is truth twenty-four times a second.”¹⁰⁸⁶ He no doubt meant a particular cut at truth, thereby showing just how malleable the concept had already become by 1960, i.e., two years before Kuhn.¹⁰⁸⁷

A mere collector of supposed facts is as useful as a collector of matchboxes, intoned founding Annalist Lucien Febvre.¹⁰⁸⁸ No, historians must go further, else accept the label of mere antiquarians. Or concede no real distinction from other *métiers* with

¹⁰⁸⁴ John Lukacs, “Seventy Years Later,” *The American Scholar*, Essays (Winter 2010).

¹⁰⁸⁵ Among the chief works by Blair (1718-1800) are his *Lectures on Rhetoric and Belles Lettres*.

¹⁰⁸⁶ From Godard’s screenplay and film *Le Petit Soldat* (1960). Similarly, Godard praised fellow auteur Robert Bresson’s *Au Hasard Balthazar* (1966): “this film is really the world in an hour and a half.”

¹⁰⁸⁷ The notion that the arts could reveal and convey truth in an arguably purer sense than could other avenues (such as history) has a lengthy pedigree. In this sense, French painter and co-founder of cubism Georges Braque seemed to distinguish between revealing and constructing: “Truth exists; only falsehood has to be invented.” From *Le Jour and la Nuit: Cahiers de Georges Braque 1917-1952* (Paris, 1952).

¹⁰⁸⁸ And: “No problems no history.” For an overview of this historian’s meditations on such themes, see Febvre, *A New Kind of History: and Other Essays*, ed. Peter Burke, trans. K. Folca (New York, 1973).

expertise in matters past: archeology, philology, numismatics, literature, art and architecture studies, folklore/mythology, etc. – one might even include the long stretch back in paleontology to fossil evidence, in astrophysics all the way to the Big Bang, and in theology, back to before even that event – all in some way relevant to humans. Thus, to be a historian must imply some additional analytical, explanatory and interpretive components. Gottschalk’s ruminations on the topic ring true to a third generation now:

[T]he librarian, the archivist, and sometimes the amateur collector are at least as well qualified as the historian to preserve the records of what man has said and done. So are a host of experts in certain aspects of literary study and in philology, archaeology, paleography, and other disciplines that our profession egocentrically thinks of as "sciences auxiliary to history." Systematic preservation, even sparkling reconstruction of the past, are not the preserve of the historian alone. Society must expect of the historian that he do something more or, at least, different . . . a distinctive kind of reflection upon the witnesses' "memory of things said and done."¹⁰⁸⁹

The “value add” historians bring is a series of unifying, explanatory, narrative arguments in the form of interpretations. An analogy to lawyers in civil litigation sheds light on how historians’ techniques and limitations play out in a larger community providing a healthy check on excess. Constant digging will invariably find discontinuities between any analogy and the matter compared,¹⁰⁹⁰ although as shown in the discussions above, the present offering seems remarkably resilient. Still, as Kuhn advised in his study of theory adjustments, “the scientist who pauses to examine every anomaly he notes will seldom get significant work done.”¹⁰⁹¹ Let us then turn to some concluding remarks.

¹⁰⁸⁹ Louis Gottschalk, 1953 *AHA Presidential Address*.

¹⁰⁹⁰ “The thoughtful and honest observer is always learning more and more of his limitations; he sees that the further knowledge spreads, the more numerous are the problems that make their appearance.” Goethe, *Maxims and Reflections*, p. 77.

¹⁰⁹¹ Kuhn, p. 82.

CHAPTER 5 – Conclusion and Extension

We cannot be impartial. We can only be intellectually honest – that is, aware of our own passions, on our guard against them, and prepared to warn our readers of the dangers into which our partial views may lead them. Impartiality is a dream and honesty . . . a duty.

Gaetano Salvemini

The instant dissertation sounds centrally in synthesis – initiated in musings about the potential vitality of an analogy of certain key aspects of historical writing to certain key aspects of civil litigation. Because I could reasonably anticipate a degree of resistance perhaps typical for any new model, it made sense to ensure that the great majority of material examined and synthesized into the analogy was in the form of *commentary by historians and historiographers themselves about their profession.*

Analogies of course do not suggest a perfect match, but rather a set of parallels vital enough to illuminate previously under-recognized aspects of and patterns in the thing or phenomenon compared. They sometimes also can prompt reflection about how to extend the utility of the comparison beyond its initial application. As for the case raised here, because history – like law – so thoroughly permeates the human experience, comparison of training and practice in the two disciplines might edify our contemplation of broader zones of educational and professional activity.

That eventual wider focus first requires, temporarily, a tighter frame. Part of the impetus for the central thesis here was my training in a graduate school of education. My advisor Sol Cohen, who holds double doctorates (Columbia) in history and education, piqued my curiosity about historiography both as to the history profession as a whole and as it concerns what perhaps is the special case of education history. I state “perhaps” because for a long stretch the larger historical community apparently felt no little disdain

for the tendency of education historians to cast their analyses in terms of the “project” of educational progressivism. Whether this sort of bias was/is unusual in the history profession is worth a brief exploration, for the point is instructive.

In 1960 Bernard Bailyn, a highly respected specialist in early American history (but not education history *per se*), issued a piece ostensibly addressing “needs and opportunities” in that specialty. His *Education in the Forming of American Society* indeed noted a number of areas ripe for investigation, but is better known for its scathing rebuke to education historians for how their zeal in evangelizing the blessings of progressive public education had clouded their historical analyses: “The development of this historical field took place . . . in a special atmosphere of professional purpose.”¹⁰⁹² That agenda, according to Bailyn, et al.,¹⁰⁹³ led subfield practitioners to commit the (not always conscious) sin of presentist distortion – “condescension toward the past”¹⁰⁹⁴ – i.e., casting historical events and circumstances as simply the superior present writ small, essentially, the very sort of self-celebratory “whig” history Butterfield had so thoroughly critiqued in 1931 (see Chapter 2, Section 4, *supra*). As a result of that tendency, within a few decades of the rise of American education history in the 1890s, what had become the “leading characteristic” of that specialty was “its separateness as a branch of history, its detachment from the main stream of historical research, writing, and teaching.”¹⁰⁹⁵

¹⁰⁹² Bernard Bailyn, *Education in the Forming of American Society: Needs and Opportunities for Study* (New York, 1972 [1960]), p. 8.

¹⁰⁹³ He was far from alone in that assessment. Indeed, in an unmistakable snub, the Committee of the Role of Education in American History, formed for the purpose of generating “needs and opportunities” studies like Bailyn’s, included not a single member of an education faculty. See Sol Cohen, “The History of the History of American Education,” in *Challenging Orthodoxies*, pp. 4-6.

¹⁰⁹⁴ Bailyn, *Education in the Forming of American Society*, p. 11.

Moreover (again, per Bailyn), in time the better scholars altogether avoided the sub-discipline, which increasingly “displayed the exaggeration of weakness of and extravagance of emphasis that are the typical results of sustained inbreeding.”¹⁰⁹⁶

Very strong words. But not unreasonably so, save for a major bout of myopia as to matters closer to home. Education history through that period *had* been an easy target, for several of its practitioners were proverbial “heart on one’s sleeve” instrumentalists. But writing in 1960, two years even before Kuhn, Bailyn could not have known that his comments came on the cusp of an entirely new era of epistemological challenge touching history as deeply as any other discipline (see again, Chapter 2, Sections 6-7, *supra*). One dimension of that set of meta-critiques was complex *internality*, both of the text itself and of the author, whose largely subliminal socio-cultural loading and other biases were now (for some commentators) fair game for deconstruction. In retrospect, then, an intriguing possibility arises as to Bailyn’s diatribe (however deserving) against education historians. Could it have a trace of projection or prescience as to the state of historiography overall? Consider Bailyn’s use of a quotation from what he identified as “the seminal book” for the first wave of education historians, Thomas Davidson’s *A History of Education*:

By placing education in relation to the whole process of evolution, as its highest form, I have hoped to impart to it a *dignity* which it could hardly otherwise receive or claim. From many points of view, the educator’s profession seems mean and profitless enough, compared with those that make more noise in the world; but when it is recognized to be the highest phase of the world-process, and the teacher to be the chief agent in that process, both it and he assume a different aspect. Then teaching is seen to be *the noblest of professions*, and that which ought to call for the highest devotion and enthusiasm.¹⁰⁹⁷

¹⁰⁹⁵ Ibid., p. 5.

¹⁰⁹⁶ Ibid, p. 9.

¹⁰⁹⁷ Ibid. p. 7, quoting Thomas Davidson, *A History of Education* (New York, 1900), Preface.

Effectively damning? Yes. But the terms “dignity” and “the noblest of professions” recall the discussion in Novick’s *That Noble Dream* about a similar conceit in the history profession as a whole, i.e. the pre-1960s inclination to equate historians with judges, or at least with an older image of judges sitting in dignified decorum, above the fray. Indeed, 1900 was a peak period for judicialist historiography and triumphalism in much if not most historical writing (see again, Chapter 1, Section B and Chapter 2, Section 2, *supra*). Might it be that Bailyn was to some extent *projecting*, i.e., using the education history specialty as a whipping boy to express his perhaps sublimated concerns about the profession as a whole, such issues soon thereafter to rage across the profession?

To explore whether this is a fair and plausible read, we turn to Bailyn’s own words two decades later (1981), a speech on “The Challenge of Modern Historiography.” Now he warned: “*to keep the internal separated from the external and to ignore the effects of one upon the other, is to evade the central obligation of history.*”¹⁰⁹⁸

Ultimately, Bailyn proved too fine a scholar not to process and integrate the better lessons of the long period of interrogative ferment in historiography. By the time he issued a late career set of notes on current issues in the profession (1994) he appeared to have abandoned the notion of major distinctions between the historical subfields:

Common problems? Universal concerns of the craft? There seems to be one that *runs through the whole historical enterprise*: the problem of anachronism. *All historians are involved in this question*; namely, whether or not one’s present views are read back into the past and, therefore, whether the past is distorted, foreshortened, and its distinctiveness lost. That seems to be a universal and basic problem of historical writing and teaching.¹⁰⁹⁹

¹⁰⁹⁸ Bailyn, “The Challenge of Modern Historiography,” 1981 *AHA Presidential Address* (italics added).

¹⁰⁹⁹ Bernard Bailyn, *On the Teaching and Writing of History: Responses to a Series of Questions* (Hanover, NH, 1994), p. 50 (italics added).

And here the focus of the present discussion begins to rebroaden, for in like fashion, a beginning recognition of the type of “common problems” and “universal concerns” of the craft Bailyn mentioned led to a deep review of the various critiques of field practice and influenced my eventual exploration of other possible commonalities throughout historical writing. In particular, a review of earlier versions of judicialist historiography led me to consider the merits of more recent and more finely nuanced readings of some of the similarities between the crafting of historical and legal interpretations, a set of assessments I have characterized throughout as “neo-judicialist.” This school, which Ginzburg’s work typifies, has attempted to reconcile some protracted impasses in field thought and practice, partly by suggesting that a proper understanding of rhetoric in historical writing acknowledges central roles for *both* proof *and* narrativity.

But that same allowance for story-telling as part of evidence-driven interpretation in turn compels, in my view, the overt recognition of *argument* and *contestation* – the historian, as shown in Chapter 3, Section 1, *supra*, always proposes an argument of some type against some work or condition, either that prior good treatments (or their absence) nonetheless leave an important vacuum of understanding, or that errors or interpretations in existing works are substantial enough to merit the new treatment – again, with so many other possible topics to explore, why else bother? A fuller reconciliation of divergent views in historiography, thus, requires a reorientation of the neo-judicialist eyepiece, a shift of primary gaze away from the judge, to settle instead on the *lawyer* as the key analog. And more specifically on the civil litigator, who regularly deals with the range of likelihood gradations (rather than near absolute proof) seen in historical work.

Why has this model not been previously articulated at any length? Because historiographers have not yet fully accepted quitting their judicial robes to speak from the other side of the bar. Once that conceptual and psycho-cognitive leap occurs, the other elements key to the analogy rather neatly align, with commentary from historians themselves providing material crucial to the synthesis. As covered in detail in Chapter 3, *supra*, like lawyers in Anglo-American systems, historians drive the inquiry, discovery, verification, causal analysis and interpretation, and then the rhetorical presentation of arguments. The limited resources of time and attention span for both writers and readers of historical works require the writer's prudent selection of helpful evidence from overwhelming loads of potentially relevant data. Good historians and lawyers make careful, cohesive, multi-step arguments via a rational weave of theory, antecedents, common knowledge, documents, other artifacts, circumstantial evidence, expert testimony, credibility testing, anticipatory rebuttal or explanation – and of course analogy – all toward enhancing the proof likelihood and probative weight attaching to the facts and fact clusters key to the given interpretative argument. Some of the evidence (including lacunae, silences – facts in their own right) might be at least as helpful to competing views. In such cases, and where the matter debated is important enough to attract significant resources, the near certainty of critical if not adversarial review compels good historians and good lawyers to avoid excess in either their positive or negative handling of it. For the whole point of the exercise (which includes the strategic use of paratext and socio-political appeals) is to build confidence, with an end goal of *persuading* reviewers – i.e., readers or jurors – of the reasonably high likelihood of interpretative correctness. That is a much easier quest where the advocate generates trust

by honest and fair treatment of the evidence and the aversion of tortured logic, better yet all that within an elegantly resonating narrative. Skilled practitioners in either field therefore leverage good “judgment” throughout the cycle, but it is more a sense of “discernment” as calibrated toward the end goal of authentic persuasion; they are not themselves judges or neutrals – any verdict is left to the reviewing audience.

Once acknowledging but then putting aside the vestigial attractions of identifying with judges, historians and historiographers might recognize how nearly all historical works share the elements proposed in this essay. Indeed, the historian-litigator analogy is consistent with and accommodates many of the key elements within and tensions between prior historiographical offerings: those pointing to metaphysical or other teleological purpose; those claiming positivist aggrandizement; those agitating for or against presentism and instrumentalism; those centering on evolutionary determinism; those suggesting ideology trumps all; those relying on “the constructive imagination” or the like; those asserting or denying historical inevitability and thus against or for moral judgment in history; those analyzing psycho-autobiographic determinants; those pointing to language and discourse itself a historical and ongoing force; those aiming to deconstruct any number of these aspects; those alluding to how narrative tropes place content in the form; those reaffirming the role of rhetoric in historical writing, provided it is interwoven with and aims at demonstrations of proof.

Moreover, the model well accommodates and suggests commonalities for what are otherwise profound distinctions between subfields as to subject matter, period, region, perspective, methodology, and levels of analysis (some cross-over exists with the paragraph above): traditional political, diplomatic or military examinations; traditional

era divisions into Classical, Medieval and Modern, the last with the familiar peaks of the Renaissance, the Enlightenment and the French Revolution (the cataclysmic events of the last century now included); a separate body of “contemporary” history; ongoing use of geographical categories (e.g., by continent, nation or region); emphases on art, literature, architecture and other elements of “high” and “low” culture; studies of religious belief, scholarship and movements; geologic and, separately, environmental or nature-centered perspectives; statistics-driven cliometrics; economic and even business history; the full range of class, feminist/gender, race/ethnicity, colonial/post-colonial standpoint analyses; broad movements or forces such as urbanization, globalization and multiculturalism; biographies; “total” or “universal” history; microhistory; legal history; education history; historiography itself (the history of history); *et cetera*.

Why is the list so long? Because, as asserted herein a few times already, history, like law, is elemental to how humans view themselves within society and is thus key to one’s reservations, resentments, aspirations, and even strategies. Moreover, because “history is a medium of education,”¹¹⁰⁰ i.e., because some version of history is foundational to virtually every academic subject, and is quite often also an argumentative device in academic teaching and writing, the character of historical inquiry and interpretation has major pedagogical implications. Accordingly, I now broaden further yet the discussion of interlinks between education, history and historiography, with continued reference to certain norms in legal advocacy.

¹¹⁰⁰ Geoffroy Barraclough, “Universal History” in H.P.R. Finberg, ed, *Approaches to History: A Symposium* (London, 1962), p. 109. F. Smith Fussner added: “Every man has opinions about the past, and there is hardly a field of inquiry which does not make some use of ‘historical’ evidence.” Fussner, *The Historical Revolution*, Introduction, p. xiv.

*Historians have powerful imaginations, which are essential and dangerous.*¹¹⁰¹

Professor Robert Stinson was speaking to the promise and peril of historical argumentation. At the heart of the analogical model threading through this essay is the idea of historical writing as an exercise in persuasion, rooted in trust, in turn rooted in honest and fair treatment of the material. Educator Carlos Torres seemed to understand how that dynamic extends naturally to educational ventures writ large, although his phrasing also hints at a potentially troubling side to the equation:

The art of *persuasion is a pedagogical art*. Not by chance Lacan insisted that a good teacher is a great *seducer*.¹¹⁰²

The context of this comment was the need for healthy skepticism as to State rhetoric, even where, or especially where, elegantly and winsomely articulated. However, for Torres, “the same applies, from a critical theory perspective, to every level of social exchange and narrative in the public sphere and civil society.”¹¹⁰³ Certainly. And it should emphatically include narratives delivered in the classroom. But the conundrum there is that the check of informed skepticism so critical in litigation and in community review of professional historical writing is simply not as readily found in the lecture hall.

Much of that reality is the understandable result of multiple demands on students in particular, and the tremendous gap between professor and students in topic knowledge. Education is not easy by several measures, one of which concerns the selection of themes and materials to cover. Historian of religion Sidney E. Mead acknowledged the matter

¹¹⁰¹ Robert Stinson raised this and other salient points in his *The Faces of Clio: An Anthology of Classics in Historical Writing from Ancient Times to the Present* (Chicago, 1987).

¹¹⁰² Torres, *Democracy, Education and Multiculturalism*, p. 93 (italics added for emphasis).

¹¹⁰³ *Ibid.*, pp. 93-94.

with impressive candor: “Half the job of teaching history is getting the students interested in the questions the Professor deems important.”¹¹⁰⁴ That set of choices goes largely unquestioned, again understandably, but not without some cost to critical inquiry. As Gottschalk reflected after three decades of teaching history:

By necessity the professor was not only the historian whose class presentation was the common core of knowledge that the students were required to appraise but also the sole judge of the merit of their appraisals. Allowance had therefore to be made for some students' quite intelligible tendency to mollify the judge by tempering their critical spirit.¹¹⁰⁵

Whether in a course on history *per se* or in one of the legion other courses employing history, the lectures and reading are often the first and sometimes the only time students encounter the materials, or rather the slice of them the professor opts to include. Aside from those few pursuing a profession in the exact field, students are highly unlikely ever to become steeped in specialty journals, where essential debates are raised and countered. Otherwise, the professor must decide what is important and why. And the very selection of what to emphasize or omit, and how to organize, interpret and present it, recalls the observation in Chapter 3, Section 1, namely, that *there is always an argument and an effort to persuade*. That unavoidable reality in academic work (in history and elsewhere) is in itself not nearly as problematic as are ideological pretenses of “discourse.”

In the course of obtaining now my fifth university degree I have enjoyed far more than the average number of occasions to observe how professors handle materials and interpretations. Some of my professors over the years proved stellar in this regard – even where at times I ultimately disagreed with their conclusions, I came to admire their grace

¹¹⁰⁴ Sidney E. Mead, *History and Identity* (Missoula, MT, 1979), pp. 22-23.

¹¹⁰⁵ Gottschalk, 1953 *AHA Presidential Address*.

and fairness in honestly describing and encouraging the exploration of other perspectives. Sadly, a significant number of others – but none of them historians¹¹⁰⁶ – seemed to prioritize their personal agendas, with much selective use of history to buttress central points. One cannot always discern whether such one-sidedness is simply unwitting or rather is a mode of ideological warfare, or which is worse,¹¹⁰⁷ but in either case it too rarely comes with a caveat to students, at least in my experience. An interesting irony touching ideologues comes with the likelihood that some of the more perceptive of their students will recognize the shortcomings. Failure to present the evidence and debate issues honestly may well result in the eventual rejection – once students learn differing views – of the entirety of the professor’s teaching and preferred stance as hopelessly biased and unfair, even those portions that were not. Even so, we should not conclude the existence of a self-regulating system in that respect, not where perhaps most students are unable to or uninterested in interrogating the professor, who separately and additionally often enjoys the cover tenure provides.¹¹⁰⁸

¹¹⁰⁶ Despite intervals of delusion, historians have long been among the most honest thinkers in critically assessing the possibility of excess and thus the need for humility and check. Polybius (c.200-c.118 BC), for example, reflected: "[T]here are plenty of mistakes made by writers out of ignorance, and which any man finds it difficult to avoid. But if we knowingly write what is false, whether for the sake of our country or our friends or just to be pleasant, what difference is there between us and hack writers? Readers should be very attentive to and critical of historians, and they in turn should be constantly on their guard."

¹¹⁰⁷ Two extremely well-known cautions any professor might reflect upon are from Plato ("The unexamined life is not worth living") and Nietzsche ("Convictions are more dangerous enemies of truth than lies").

¹¹⁰⁸ One might additionally wonder whether in certain entire academic subfields the critical review function professional journals normally provide offers only limited checks against excess. In such cases – and it is beyond the scope of this essay to explore how many and which – one could speculate about varying degrees of naked instrumentalism correlating to varying degrees of "local" dominance or hegemony (in the Foucauldian sense) in the guiding philosophies and methodologies of subfield inquiry and publication. At some point, these currents might become strong enough to dictate or otherwise guide self-perpetuation at the hiring level. My own suspicion is that the more such specialties reveal themselves to be dominated by particular theoretical frameworks impervious to outside critique, the less seriously the academic community (much less the society at large) as a whole views the work product.

It is not a question of discourse critical of established social institutions and practices. Tenure, of course, is meant to insulate professors from the fear of engaging in deep social critique, one important function of the university, which at least for a long stretch represented something akin to a “marketplace of ideas.”¹¹⁰⁹ That comparative exchange of critiques should work hand-in-hand with another chief goal of the university, delivering the highest quality instruction reasonably possible.¹¹¹⁰ That in turns suggests the professor’s *duty* to present a fairly representative range of materials and perspectives, i.e., to be interested in the student’s fundamental and broad edification at least as much as a particular critique agenda. In this sense, and turning back to the operative analogy of this dissertation, while in historical *writing* the author adopts the lawyer’s role, in most classroom circumstances the professor either teaching history or using it as a significant component in another subject has to be able to shift, where appropriate and at least temporarily, a little more to the mediator’s role – guiding the exchange to ensure the airing of other perspectives, where practicable.

But by no means must professors, by periodically donning the mediator’s hat, abandon their own well considered conclusions. After all, even in historical writing earnestly advocating a particular interpretation I have shown the optimality of raising and treating competing perspectives as a vital part of persuasively stating one’s own view, at times strongly held. Poet and author John Betjeman, writing on historical town architecture, and though he spoke ruefully, came close to my position: “History must not

¹¹⁰⁹ One hears that phrase less often in recent years; perhaps it is a question of incessant critiques aimed at capitalist exploitation of market imperfections.

¹¹¹⁰ An influential discussion of the tension between engagement and reflection in education, and especially in higher education is Clark Kerr, *The Uses of the University* (Cambridge, MA, 1963). Among the chief obligations Kerr listed for university professors were teaching, scholarship, service and social critique.

be written with bias, and both sides must be given, even if there is only one side.”¹¹¹¹

Thus, it is a mistake to believe that multiperspectivalism is the first stumble in a freefall into the maw of total relativism. First, overbounded thinking is a serious pitfall for the serious scholar, such that education professor Douglas Kellner’s prescription makes sense: “To avoid one-sidedness and partial vision one should learn ‘how to employ a *variety* of perspectives and interpretations *in the service of knowledge*.’”¹¹¹² And even should the result of such an approach be, as Donna Haraway urged, a linguistic community of situated, partial knowledges in which no one is “innocent,”¹¹¹³ it does not follow that the varying interpretations are all equally cogent, proof-demonstrating, fair and thorough, i.e., that they are all equally persuasive. Yet another critical theorist, Immanuel Wallerstein, acknowledged this sort of gradation in credibility:

The role of the scholars is not to construct reality but to figure out how it has been constructed and *to test the multiple social constructions of reality against each other . . . to discover the reality on the basis of which we have constructed reality. And when we find this, we seek to understand how this underlying reality has in turn been socially constructed. In this navigation amidst the mirrors, there are however more correct and less correct scholarly analyses.*¹¹¹⁴

Whether such exercises render the “more correct” analyses somehow “true” is another

¹¹¹¹ John Betjeman, *First and Last Loves: Essays on Town and Architecture* (London, 1952), p. 5. Betjeman’s complaint here was part of a broader lamentation as to the insidious and inexorable dismantling of traditional architecture in favor of suburban sprawl and its attendant material efficiency and ease. Hence his conservatism in matters epistemologic (e.g., his resistance to multiple reads of history) paralleled his conservatism in matters aesthetic, the latter instinct now, three generations later, in strong favor despite its essential nostalgia, otherwise disdained in intellectual circles – an intriguing paradox.

¹¹¹² Douglas Kellner, *Media Culture: Cultural Studies, Identity and Politics Between the Modern and the Postmodern* (London, 1995), p.98, quoting Nietzsche, *The Genealogy of Morals* (New York, 1969), p. 119 (the first use of italics as found in Kellner’s book, second set added here for emphasis).

¹¹¹³ Donna Haraway, “Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective,” Chapter 9 in *Simians, Cyborgs, and Women* (New York, 1991), pp. 183-201.

¹¹¹⁴ Immanuel Wallerstein, “Social Science and the Quest for a Just Society” in *American Journal of Sociology* 102, No. 5 (March, 1997), p. 1254 (italics added).

matter, although in the civil litigation analogy, one can at least deem them more likely so. We thus can contemplate whether and how a historian-as-lawyer model has applications in education more broadly. A further Torres statement lends to just that suggestion:

[T]he overarching purpose in education is to *persuade* by using the *best argument*, *theoretical reasoning*, and available *data*¹¹¹⁵

That the pursuit of such truth approximations has a shade of neo-positivism is probably less objectionable than a generation ago. Growing impatience in several fields of inquiry with the chaotic fallout of relativist deconstruction has understandably bred a yearning for *some* degree of order, although most scholars are far from urging a naïve and reactionary return to full-blown scientific positivism. Here again, the profession of historical writing illustrates the healthy tension between seeking to establish a growing body of generally accepted facts and continuing to issue insightful new interpretations.

For with further time and reflection and in response to new stimuli comes a shift of what historians deem important questions. In this respect, a fitting response to Tolstoy's sarcastic swipe – "Historians are like deaf people who go on answering questions that no one has asked them" – would be the emphatic counter-question: Would we even want universal accord? It would likely toll the end of the type of discourse essential to the entire world of inquiry. Robert King Merton defended the regular occurrence of internal disputes among sociologists (and by extension other social scientists): "It would be a curious reading of the history of thought to suggest that the absence of disagreement testifies to a developing discipline."¹¹¹⁶ Likewise, historian

¹¹¹⁵ Torres, *Democracy, Education and Multiculturalism*, p. 189 (emphasis added). Here Torres was contrasting the goals and means of politics and education, but the point extends well elsewhere.

¹¹¹⁶ Robert King Merton, "Now the Case for Sociology: The Canons of the Anti-Sociologist," *New York*

Hughes-Warrington argued that such provocation has an ongoing vital role: “With Joan Wallace Scott, I endorse the idea that conflicts and disagreements about the content, meanings and uses of knowledge are an important part of ‘history.’”¹¹¹⁷ Extending that insight by inversion, this thesis endorses the idea that conflicts and disagreements about the contents, meanings and uses of *history* are an important part of *knowledge*.

And not just a “small but important” part of knowledge. It is not only that the history-law analogy has some application to other thought fields employing arguments based on strategically presented evidence. Something more yet, as Carlyle reminded us: “What is all Knowledge too, except recorded Experience, and a product of History?” Huizinga added: “No other discipline has its portals so wide open to the general public as history.” Historian of culture Karl J. Weintraub, building on Huizinga, summarized the matter neatly: “History is the discipline closest to life”¹¹¹⁸

We see the truth in those pronouncements, as mentioned now a number of times, when we consider how utterly intertwined history is with formal instruction. It follows that the theory and practice of history – historiography – should be a major concern for professional studies of pedagogy. Most schools of education offer survey-type coursework in education history. As discussed in the early pages of this chapter, the returns on the first several generations of education history were not kind. There have since been spots of brightness in some of the major programs (my own training was very helpful), but should offerings in historiography recede, one must expect regression into

Times Magazine, July 16, 1961.

¹¹¹⁷ Marnie Hughes-Warrington, *Fifty Key Thinkers on History*, p. xxvi.

¹¹¹⁸ Carlyle, “On History” in *The Modern British Essayists: Thomas Carlyle*, Vol. 5 (Philadelphia, 1852), p. 220; Huizinga *Men and Ideas*, p. 39; Karl J. Weintraub, *Visions of Culture* (Chicago, 1966), p. 210.

prior patterns of presentism and instrumentalism in their more parochial, self-celebratory and ultimately self-defeating forms. *Therein the patient must minister to himself.*¹¹¹⁹

Historiography is and of course should remain a core course in graduate History studies. My suggestion is that it is perhaps just as critical for graduate Education studies: History *and* Education greatly aiding the understanding of the History of Education.¹¹²⁰

I am not suggesting a hard binary choice between reflection and engagement, but rather the embrace of what should be a healthy tension between the two.¹¹²¹ Much if not most of education, after all, is geared toward utilitarian purposes – the maintenance of certain goods (via, for just one example, the transmission of traditions and values and the desire and means for good citizenship) and the enhancement of others (including career skills and creative expression), each such sphere rightly subject to ongoing critique. As for the role of history in all this, it is natural that while educators are inherently drawn to provocative questions in their own right,¹¹²² they also retain some essential attraction to the mix of Truth, Story and Utility as raised in the first lines of this essay. For the stakes have always been very high. “Human history becomes more and more a race between education and catastrophe” averred H.G. Wells in one of the more dramatic linkages of the themes. “History may be servitude, History may be freedom” rejoined T.S. Eliot.

¹¹¹⁹ Shakespeare, *Macbeth*, Act V, Scene III (uttered by Lady Macbeth’s doctor).

¹¹²⁰ Trevelyan captured the essence: “History is the open Bible: we historians are not priests to expound it infallibly; our function is to teach people to read it and to reflect upon it for themselves.” For any number of such musings, see G.M. Trevelyan, *An Autobiography and Other Essays* (London, 1949).

¹¹²¹ “The test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.” F. Scott Fitzgerald, “The Crack-Up,” first appearing in *Esquire Magazine* (February 1936).

¹¹²² “It is history’s purpose to preserve things that prompt questions as much as to supply answers that inspire action.” Henry Glassie, “The Practice and Purpose of History,” *The Journal of American History*, Vol. 81, No. 3 (Dec. 1994), p. 963.

Echoing that duality of potential were two statements by James Baldwin: “People are trapped in history, and history is trapped in them” [but] “To accept one’s past – one’s history – is not the same thing as drowning in it; it is learning to use it.”¹¹²³

The effective use and writing of history, I have argued throughout, gives a central role to proof-based *persuasion*. My model, born in analogy and synthesis, describes how most historians behave most of the time in arguing fact-driven interpretations, some of which explore new areas and themes, some of which overtly revise.¹¹²⁴ To the extent the model is also normative, it holds that the best historians, and the best scholars in any field,¹¹²⁵ understand persuasion as a function of *trust*, which in turn ripens where the given proponent treats the material with *fairness*, of which one measure is *modesty*.¹¹²⁶ That last grace begins with acknowledging one’s own imperfect knowledge.¹¹²⁷ An

¹¹²³ H.G. Wells, *The Outline of History: Being a Plain History of Life and Mankind* (Garden City, NY, 1920), p. 504; T.S. Eliot, “Little Gidding” (part 3) in *Four Quartets* (New York, 1943); James Baldwin, “Stranger in the Village,” from *Notes of a Native Son* (Boston, 1984 [1955]), p. 162; Baldwin, *The Fire Next Time* (New York, 1963), p. 95. Baldwin’s exhortation recalls John Acton’s: “If the past has been an obstacle and a burden, knowledge of the past is the safest and the surest emancipation.” Acton, “Inaugural Lecture on the Study of History” (June 1895) in *Lectures on Modern History* (New York, 1906), p. 4.

¹¹²⁴ “Revisionism is a healthy historiographic process, and no one, not even revisionists, should be exempt from it.” John Lewis Gaddis, *We Now Know: Rethinking Cold War History* (Oxford, 1997), p. 294.

¹¹²⁵ Scholars should exhibit “a willingness to challenge orthodoxies, mystification, and obfuscation not just in histories of education but in educational discourses wherever we find them.” Sol Cohen, *Challenging Orthodoxies*, p. 58.

¹¹²⁶ Some historians have instead used the term *humility*: “For in describing past behavior the historian educates in humility.” Martin Duberman, *The Uncompleted Past* (New York, 1969). “If we are to understand anything of the human mind we must approach the people of the past with humility rather than an overconfident superiority.” A.T.Q. Stewart, *The Shape of Irish History* (Belfast, 2001), p. 19.

¹¹²⁷ The point obviously extends to all scholars. As Voltaire, in the double role of historian and philosopher, expanded: “Doubt is not a pleasant condition, but certainty is an absurd one.” Letter to Frederick William, Prince of Prussia (28 November 1770), in S.G. Tallentyre, ed., *Voltaire in His Letters* (New York, 1919), p. 232. Or as he put it elsewhere: “The more I read, the more I meditate; and the more I acquire the more certain I am that I know nothing” More recently, mathematician and philosopher Alfred North Whitehead counseled academic colleagues: “It should be the chief aim of a university professor to exhibit himself in his own true character – that is, as an ignorant man thinking, actively utilizing his small store of knowledge.” Whitehead, *The Aim of Education and Other Essays* (New York, 1929), p. 58.

important corollary is conceding some shared acceptance of certain fact clusters and their proofs as more likely true than not. Together, these points of recognition enable *more generous terms of discourse*. Here we might look back to Mary Wollstonecraft's words:

Perhaps, there is not a virtue that mixes so kindly with every other as modesty. It is the pale moon-beam that renders more interesting every virtue it softens, giving mild grandeur to the contracted horizon.¹¹²⁸

If it seems ironic or otherwise odd to speak of modesty and generosity of discourse in the context of an analogy to lawyers, let us recall and consider that the norms and mechanics of litigation advocacy, perhaps more than those operating in academe, influence parties to adopt common nomenclatures of exchange, toward achieving zones of at least tentative mutual understanding. The point is less to seek lock-step accord on the universe of facts and interpretations than to encourage the sort of real exchange that commentators have claimed has been nearly impossible for some time now in too many knowledge fields.

This dissertation demonstrates some striking similarities in certain key aspects of the history and law professions, and how they share persuasion as the central organizing principle. The core analogy – which features and synthesizes historians' own revealed thinking – fits several aspects of historical writing well enough to satisfy the same “more likely than not” standard articulated. Beyond that, with Southgate, I believe the issue is “*above all about self-consciousness, and that can be seen both as a desirable quality for individuals, and also as a potentially positive stimulus for historical study.*”¹¹²⁹ As such, the inquiry merely introduced here beckons further research, one hopes fruitful, as to deeper and broader applications in historiography and education. Such is my intent.

¹¹²⁸ Mary Wollstonecraft, *A Vindication of the Rights of Women*, p. 129.

¹¹²⁹ Southgate, *History: What and Why?*, p. 4 (italics added for emphasis).

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