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TRUTH AND INTERPRETATION IN LEGAL HISTORY

*G. Edward White**

In the past few years I have published two books¹ that have generated several responses from commentators in scholarly journals. This Essay has been generated by those responses, and by the kind invitation of the editors of this volume. Since the Essay responds to commentary principally through an effort to clarify my views on methodology in legal history, I want briefly to dispose of some less indirect reactions to commentators. Some of the commentary has been principally appreciative,² and I want to acknowledge the pleasure that an author takes in discovering that someone has read, enjoyed, and perhaps even profited from his work. Other commentary has infused appreciative comments with searching criticism;³ it is this set of responses that has provoked me to respond. Yet another set of commentators has criticized my work without, seemingly, making the effort to understand my scholarly purposes or to insure that their criticisms were fairly stated or fully supportable.⁴ I have noted the names of this set of commentators — a Revolution or a Day of Judgment may yet come, and the information may be useful — but this Essay is hardly for them.

The purpose of this Essay is to distinguish my approach toward historical scholarship from two other approaches. One approach rests on the premise that historical scholarship is a search for objective truth; this is most clearly articulated in the work of general his-

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1. G. WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* (1978); G. WHITE, *TORT LAW IN AMERICA* (1980). This essay does not consider reviews prompted by G. WHITE, *THE AMERICAN JUDICIAL TRADITION* (1976).

2. *E.g.*, Corrigan, Book Review, 60 B.U. L. REV. 801 (1980); Fellman, Book Review, 85 AM. HIST. REV. 1253 (1980); Yarbrough, Book Review, 5 VA. B. ASSN. J. 25 (1979).

3. *E.g.*, Feinman, *The Role of Ideas in Legal History*, 78 MICH. L. REV. 722 (1980); O'Connell, Book Review, 1980 DUKE L.J. 1201; Powers, Book Review, 67 J. AM. HIST. 704 (1980); Teachout, Book Review, 67 VA. L. REV. 817 (1981).

4. *E.g.*, Christie, *The Perils of Writing on Intellectual History of Torts*, 79 MICH. L. REV. 947 (1981); Fleming, Book Review, 1980 AM. B. FOUNDATION RESEARCH J. 614. These names do not exhaust the list, but at this point they head it.

torians but shared by some contemporary legal historians.⁵ The other approach rests on the premise that historical scholarship should be informed by the philosophical perspectives of Marxism.⁶ While I shall spend some time criticizing these two approaches, I shall expend the bulk of my efforts in attempting to set forth, in preliminary form, the basis of my own position.

The essay consists of four sections. Section I discusses the nature of historical explanation, devoting some attention to the roles of "truth," interpretation, and detachment in historical scholarship. Section II continues that discussion by exploring the meaning and the purpose of what I call "interpretive detachment" in the writing of history. Section III considers the theoretical assumptions of Marxist legal historians from the point of view developed in preceding sections. Section IV, taking into account some issues that remain problematic or troublesome, restates my approach.

I. THE NATURE OF HISTORICAL EXPLANATION

A work of historical scholarship can communicate at four levels. On a first level of communication, which is commonly taken to be the most significant, the work seeks to contribute to or to recast existing scholarly wisdom through a proposed interpretation of a particular series of events. I call this level the level of historical narrative. At a second level, the work seeks to subsume this proposed interpretation within a particular perspective on the subject of history itself: I call this level the level of historiography. At a third level, the work argues for the general primacy of that historiographical perspective as a way of interpreting reality: I call this level the level of metahistory. And at a fourth level, if the basic assumptions and perspectives of the second and third levels are adopted, the work suggests that certain normative implications for contemporary policy-making follow. I call this level the level of metapolitics.

Not all historical scholarship, of course, explicitly communicates on each of these four levels, and some does not even address the kinds of issues that one associates with the levels of metahistory and

5. See, e.g., O. HANDLIN, *TRUTH IN HISTORY* (1979); Bridwell, *Theme v. Reality in American Legal History*, 53 IND. L.J. 449 (1978). Professor Handlin states the premise succinctly: "[T]he world of the elapsed past has its own reality, independent of who attempts to view and describe it, and is thus objective." O. HANDLIN at 1.

6. See, e.g., Feinman, *supra* note 3, at 730-36; Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSPECTIVES 96 (1978). A less explicit Marxist perspective appears in M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1977).

metapolitics. Increasingly, however, scholarship in legal history has communicated on several of these levels, and the more visible legal history scholarship of the last decade can be read as conveying messages on all four levels of communication. Lawrence Friedman's *A History of American Law*⁷ provides an example.

When I reviewed Friedman's *History* in 1973, I suggested that with its publication the field of American legal history may have "come of age."⁸ By "coming of age" I meant principally that Friedman's work might provoke others to examine source materials in the field and to provide alternative scholarly explanations of past events where they thought Friedman's were deficient, thereby causing scholarship in American legal history to proliferate and mature. I also intended, almost as an afterthought, a second meaning that seems to have been more prophetic: that Friedman had created a new type of work, one that expanded the boundaries of American legal history as a field of scholarly interest. In addition to covering a wide variety of historical themes and topics, Friedman propounded a theory of the relationship between law and society in America. He suggested that, at any point in its history, American law has reflected the "push and pull" of elite groups that seek to fashion it to further their current interests;⁹ he also suggested, less overtly, that such a process has continued into the present; he could also fairly be read as suggesting that this process contains elements of injustice that should be exposed and modified.

Friedman, in short, communicated on all of the levels I have previously identified. His *History* first proposed that changes in legal doctrine are principally brought about by changes in the distribution of economic and political power in society: that theme was the organizing principle of his historical narrative. He next argued for the general significance of viewing law in American history as an "instrument" or "tool" of "the people in power,"¹⁰ and thereby communicated his historiographical perspective. He then argued further for the primacy of a general view of the history of American society that attributed great significance to the current self-interest of elite pressure groups, thereby communicating on the level of metahistory. Finally, Friedman argued that, as contemporary Americans, we ought to be concerned about the implications of that general view, and that the methodological perspective he was employing in *A History of*

7. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973).

8. White, Book Review, 59 VA. L. REV. 1130 (1973).

9. L. FRIEDMAN, *supra* note 7, at 25.

10. *Id.* at 10, 25.

American Law had distinctive implications as a contemporary political statement. By making this last argument, Friedman communicated on the level of metapolitics and suggested a close relationship between theories of history and theories of contemporary affairs.

The multileveled communication of works such as Friedman's *History* invites us to reconsider the nature of historical explanation, and to ask what distinguishes historical scholarship from contemporary theorizing. I begin that reconsideration by noting the existence of an enduring professional constraint upon historical writing that I shall call the "canon of detachment." This canon has two distinct aspects. What I call "interpretive detachment" is the suspension of prejudgment toward the historical evidence that one is examining. Interpretive detachment focuses tangentially on the first, but principally on the second and third levels of communication in historical scholarship. Interpretive detachment seeks to insure that the organizing interpretive principle of a historical narrative — the feature that defines the work's historiographical perspective — will be selected solely by reference to the criterion of plausibility, with plausibility determined by the "internal logic," the "contemporary fit," and the "current common sense" of the interpretation.¹¹ Interpretive detachment assumes that while it may well be impossible for a historian to choose an organizing interpretation that ignores his metahistorical and metapolitical perspectives, the plausibility of his chosen interpretation may not rest solely on the purported validity of those perspectives.

The second aspect of the canon is what I call "truth detachment," and its focus is primarily on the levels of historical narrative and historiography. Truth detachment assumes that the organizing interpretive principle on which a historical narrative rests must be capable of being refuted through reference to the evidence on which the interpretative principle rests: that is, the principle must contain the seeds of its own falsification. I shall have more to say about both these aspects of the canon of detachment shortly; here I merely seek to define them.

One of the striking features of the canon of detachment in historical interpretation is that it has endured, albeit represented imprecisely in terms such as "objectivity" or "neutrality," despite significant changes in professional research techniques. Qualitative and quantitative analyses of historical data have gone in and out of

11. "Internal logic," "contemporary fit," and "current common sense" are defined and discussed *infra* at text accompanying notes 16-19.

fashion, and ideas and events have risen and fallen in their stature as causative agents. But a professional judgment has persisted that a historian could produce plausible and falsifiable interpretations of the subject matter that forms the basis of his narrative. An obvious conclusion to be drawn from the persistence of the canon of detachment is that "bias," either at the level of historical narrative or at the levels of historiography and metahistory, is regarded an "unprofessional" quality in an historian.

I want to probe the basis of that apparent judgment about bias in historical scholarship by discussing the canon of detachment in more detail. But at this early stage it is worth noting that adherence to the canon of detachment cannot be said to be the sole prerequisite for "successful" historical scholarship. Another prerequisite seems equally necessary to "success": the criterion of engagement. The engagement criterion, like the canon of detachment, can be seen as containing two distinguishable features. Engagement first refers to the scholar's immersion in his subject. This feature of the criterion, while vital in generating narratives that give a charged meaning to historical subject matter and thereby create a vicarious appeal for readers, is less significant for my purposes. I am principally concerned with the feature of engagement that refers to the professional reader's immersion in the organizing interpretive principle of a historical narrative.

Engagement in this second sense becomes a synonym for the process of stimulating further scholarly inquiry. When a professional reader becomes engaged by an historical explanation, he may be motivated to pursue related inquiries. When a reader is thus engaged, the explanation can be said to be suggestive. It is suggestive in the sense that it gives a vivid meaning to a narrative about the past, and it is suggestive, when the reader is a professional historian, in that it may stimulate ideas for further study. In a professional context, the principal value of an interpretation that satisfies the criterion of engagement is that it provides examples for future work. I shall return to this feature of engagement at a later point.

Historical explanation can thus be seen as a process where two entities — a canon of detachment and a criterion of engagement — interact, sometimes in complementary and sometimes in opposing ways. Such features of historical explanation as the choice of a topic for research, the extraction of meaning from sources, or the juxtaposition of the experiences of the writer and readers against those of another age, can be seen as techniques by which a historian's engagement with his subject is conveyed. In effective historical writing

this quality of engagement is transferred to the reader, who is made to feel that the topic is stimulating and timely, that the sources are rich and fascinating, and that the subject matter merits further exploration. Sometimes the detachment of the scholar adds to this sense of reader engagement by suggesting that all this fascinating "history" is not just the product of a vivid scholarly imagination.

At other times, however, the canon of detachment serves as a reminder that the engagement of a historian may not overwhelm his interpretive stance if his scholarly product is to be deemed "successful." The canon suggests, for example, that if a topic seems chosen for its contemporary attractiveness, and the writer's stance towards the topic reflects a partisan current perspective, readers will become suspicious. It suggests that if a historian habitually extracts one meaning from his sources, or seems to strain their meaning, or seems to use them selectively, readers will begin to reconstruct in their minds a historical "record" that lies beyond the writer's interpretations. It further suggests that if the juxtaposition of past and present experiences seems to lead inexorably to a simplistic "lesson from history," readers will wonder if the lesson is merely a self-fulfilling prophecy. And it suggests, finally, that if all the above reactions on the part of readers produce a sense that a given historian is "biased," that historian's arguments will probably be dismissed, and will not serve as guidelines for future study.

The interplay of engagement and detachment in historical writing is especially important in historical scholarship that communicates at the four levels previously identified. Such scholarship consciously seeks to increase its audience's engagement, and also to expand the meaning of history, by interweaving historical explanation with contemporary political theory, thereby suggesting that "good" history and "good" politics are not easily separable. How can this genre of historical scholarship avoid being regarded as lacking proper detachment?

To address this question is to reconsider the professional function of the historian. Both interpretive detachment and truth detachment rest on certain assumptions about the unique contributions of history as a profession. I want first to consider some assumptions on which truth detachment could be said to rest. One is that lay persons regard historians' interpretations of the past as truth, or at least as approximations of truth. Another is that "true" interpretations of the past are possible because the historical "record" has some objective reality. A third is that a detached stance in the historian fosters a faithful reproduction of the historical record. Each of these assump-

tions needs qualification. While lay persons may regard history as merely a faithful reproduction of "the record," most historians do not. Most historians view history as the interplay of a "record," which can vary in its content, with scholarly efforts to interpret that record.¹² Indeed, the conception of a historical record as a set of indisputably "true" facts that have a meaning independent of their presence in various historical interpretations is a highly problematic notion. Karl Popper has argued, categorically, that "there can be no history of 'the past as it actually did happen'; there can only be historical interpretations, and none of them final."¹³

If Popper is correct, the value of historians' interpretations of the past lies not so much in their "truth," or faithful reconstruction of an objective record, as in their current suggestiveness and plausibility. If fidelity to truth were the principal goal of historical writing, the concededly continuous process of historical revision would be meaningless: faithful reproductions of history, once found to be true, would be incapable of being revised. Popper thus shifts attention from questions about the objective accuracy of a historical explanation to questions about the success of the explanation as a suggestive and plausible, if temporary, interpretation. For Popper, a successful historical explanation is conscious of its "point of view," thereby avoiding "uncritical bias," is fertile, thereby stimulating others to think about its propositions, and is "topical," thereby helping to "elucidate the problems of the day."¹⁴

Despite Popper's rejection of the idea of history as synonymous with objective truth, he endorses truth detachment as I have defined it. Popper argues that for a scholarly explanation to be professionally successful, it must be capable of being falsified: its propositions must rest on evidence that contains the seeds of their prospective revision.¹⁵ This is the point where I part company with Popper and find the concept of truth detachment precarious. If one accepts, arguing, Popper's claim that "truth" in history cannot be divorced from interpretation, on what basis can an interpretation be falsifiable? Surely not by a testing of it against "truth." Indeed, Popper himself suggests that the tests for "successful" scholarship (self-

12. Handlin, for example, juxtaposes his conception of an "objective" record against "the scholar's vision," which he calls "subjective, at least to the extent that his own point of observation and the complex lenses of prejudice, interest, and preconception shape what he discerns and therefore what he can portray." O. HANDLIN, *supra* note 5, at 1.

13. 2 K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 268 (4th ed. 1962).

14. *Id.*

15. See K. POPPER, *CONJECTURES AND REFUTATIONS* 215-17, 312-14 (1963); K. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 31-50 (1959).

consciousness, fertility, topicality) are tests that presuppose some inarticulate professional "common sense" about scholarly *interpretation*. But interpretations are necessarily different from "what actually happened."

At this point, I believe, one has to choose. One may resurrect the idea of truth in history, and argue that while "what actually happened" is of limited utility until it is interpreted, conformity to the integrity of a finite historical record is a justifiable evaluative criterion for "successful" historical scholarship. Or one may reject both truth in history and Popper's notion of falsification, and argue that all the evaluative criteria for successful historical scholarship are *interpretive* criteria, and that therefore the canon of detachment in historical writing is meaningful only in its interpretive aspect.

In the following section I want to develop a justification for the latter choice, and to explore more fully the relationship of my views to those of Popper and to those of Thomas Kuhn. Before so doing, let me summarize the presentation to this point. I have argued that visible and prominent contemporary scholarship, as evidenced by recent work in the field of legal history, communicates on levels — the levels of historiography, metahistory, and metapolitics — that go far beyond the narrow definition of history as "what actually happened in the past," and implicitly cast serious doubts on the intelligibility of that definition. The communication levels that I find striking in contemporary historical scholarship are levels of interpretation, such as the levels of metahistory and metapolitics, that convey distinctly normative contemporary messages. These levels of communication, which are intended, among other things, to increase reader engagement, confront a canon of detachment in historical scholarship. The process of historical explanation can be seen as an interplay between a search for engagement and this canon whose meaning, I have begun to argue, lies not at the level of fidelity to truth, but at the level of interpretation. I now turn to a further extrapolation of that last argument.

II. THE SIGNIFICANCE OF INTERPRETIVE DETACHMENT

An example based on one of the hypotheses I advanced in *Tort Law In America* may serve as a useful introduction to some of the distinctions I intend to make in this portion of the Essay. In that book I argued that the "modern" negligence standard in American tort law, which conditioned liability on legal fault and defined fault to include "unreasonable" misfeasance as well as nonfeasance, was not solely or even principally a response to industrialization. Let us

suppose that my support for this argument rests on two kinds of evidence: evidence of the absence of "modern" negligence cases at a time when industrialization has become a feature of American society, and evidence of the appearance of a distinctive mode of American legal thought — a mode that placed great emphasis on the derivation, articulation, and application of generalized standards for legal conduct — precisely at the time when "modern" negligence cases began to appear in striking numbers.

Now assume that a legal historian, in evaluating the "success" of my argument, discovers numerous "modern" negligence cases decided before the time when I assert that the new mode of thought came into being. The historian claims that these cases suggest that my argument is flawed. What assumptions have been made by my argument and by that claim, and how do those assumptions relate to the roles of truth and interpretation in history?

In resting my argument about modern negligence on "evidence" from the past, and especially in attaching some significance to time demarcations of the past, I seem to be deriving a hypothesis from some finite, discoverable, temporally divisible historical record. But a moment's reflection suggests that this is not quite what I am doing. Instead, I am assuming the established salience of industrialization as a causal factor in the growth of negligence law, and then attempting to show that the salience of that factor can be undermined through the use of currently acceptable research techniques, such as analysis of common-law cases. The critical steps in my argument are not what I "find" in the record about industrialization and a modern negligence standard, but what I assume to be the appropriate frame of reference for pursuing scholarly inquiries.

In discovering the modern negligence cases that I ignored, the critic seems also to be bringing evidence from a finite historical record "to light" and then claiming that my argument is not faithful to the "record." Again, the critic is not quite doing that: the critic is assuming that my "counter-hypothesis" (changed ideas about law) is also a salient causal factor, and then employing a currently acceptable research technique (the discovery and analysis of cases and their correlation with time segments) to question that hypothesis. The critic and I, in short, share an assumed technique of scholarly inquiry.

Where do these assumptions about the saliency of hypotheses and the acceptability of research techniques come from? One thing seems clear: they do not come simply from observations of the record of the past. Given the multifaceted quality of American society

and the diverse products of the legal profession, mere observation of the past would not seem to compel the assumptions that industrialization invariably helps to explain changes in American law, or that common-law cases are significant manifestations of how American law changes, or that the dates of particular types of cases have any generalizable significance. It appears that assumptions such as these are produced in a much more complex way. I referred earlier to the notion of plausibility in historical scholarship, which I said was determined by the "internal logic," the "contemporary fit," and the "current common sense" of a proposed hypothesis. The factors determining plausibility can also be taken as rough descriptions of the factors that go into determining saliency in a scholarly hypothesis or acceptability in a scholarly research technique.

"Internal logic" is a dangerous phrase to use in this context, because it may connote some finite sense of rationality or truth and thereby resurrect conceptions this essay has sought to place to one side. I am using the phrase in what might be called a "weak" sense. Thomas Kuhn, while agreeing with Karl Popper that history cannot properly be equated with "what actually happened," has argued that Popper's work, taken as a whole, presses one to the conclusion that hypotheses can be "tested" and found "false," that they can thus be labeled "mistakes," and that scholars "learn from [their] mistakes."¹⁶ Kuhn rejects these views, arguing that the "success" or "failure" of scholarly hypotheses is not determined by "exclusively logical criteria" but by the "professionally shared imperatives" of a scholarly community.¹⁷

I agree with Popper and Kuhn that history is best understood as tentative interpretations of the past, and with Kuhn that no exclusively logical criteria can be supplied to determine whether a given interpretation "rings true." But that is not to say that no interpretation could ever be deemed "unsuccessful" because it offended some variety of internal professional logic. An interpretation, for example, that "industrialization" caused the development of an Old English dialect in remote regions of Appalachia, even though such regions were devoid of any of the characteristics conventionally associated with an industrial environment, could, I believe, be rejected on "logical" grounds. The "internal logic" would, however, be "weak" in that it rested on a professional assumption that "industrial characteristics" could be defined and understood. If "logic" is used

16. T. KUHN, *THE ESSENTIAL TENSION* 270-78 (1977).

17. *Id.* at 288, 292.

in this weakened sense, I find it to have some effect not only on the plausibility of historical interpretations but on the saliency of hypotheses and the acceptability of research techniques.

The "internal logic" criterion, however, is less central than the remaining two criteria. The Appalachian dialect example shows how closely "contemporary fit" and internal logic are linked. If a profession takes for granted a working definition of "industrial characteristics," and no such characteristics appear during a time segment in the past, an interpretation of that period that emphasizes the "industrialization" hypothesis has no "contemporary fit." But few hypotheses are as clearly flawed as the Appalachia dialect example; the process of evaluating a hypothesis in light of "contemporary fit" is usually far subtler. In fleshing out the "contemporary fit" criterion one reaches such issues as the relevancy of temporal demarcations, the intelligibility of a "period gestalt" and of "social change," and other familiar puzzles for philosophers of history. I shall merely note here that "contemporary fit" analysis seems to be a central feature of historical criticism.

The Appalachian dialect example also illustrates a link between the criterion of internal logic and the criterion I have called "current common sense." This is the most mysterious, and perhaps most central, of the criteria being discussed. The Appalachian dialect hypothesis would be likely to offend this criterion because the hypothesis seems nonsensical not only when applied to the time period it seeks to illuminate, but also as a general piece of wisdom. A hypothesis focusing on a causal factor that is not present at the time that it is supposed to be "causing" things to happen offends our notions of the meaning of causation. Although it is perhaps possible to redefine some terms so as to avoid this difficulty, that enterprise, in the Appalachian dialect example, does not seem particularly promising.¹⁸ Its lack of promise, however, is not just a function of the absence of evidence about "industrial characteristics." Its lack of promise is also a function of current understandings about how scholars use and reason from evidence.

Here "current common sense" takes on another level of meaning. It does not mean simply the "common sense" of an ordinary rational

18. The Appalachian dialect hypothesis could be made more credible by a redefinition of "dialect." One could argue that industrialization "caused" Appalachian language patterns to take the form of a "dialect" by facilitating greater social intercourse in areas other than Appalachia, and thereby deprovincializing American language patterns. A "dialect" would then be an original provincial language pattern that, given deprovincialization, appeared to be unique. This restatement of the hypothesis would not be patently illogical, although its working definition of historical causation would seem to strain that concept.

person in the 1980s; it means in addition the "common sense" of the professional community that is evaluating a work of scholarship. At this point I find the insights of Kuhn most useful. Kuhn has argued that "rhetorically induced and professionally shared imperatives" are the central factors that affect the direction of scholarly research and criticism. These imperatives become "institutionalized," and emerge as "maxims and values" that "explain the outcome of choices that could not have been dictated by logic and experiment alone."¹⁹

"Current common sense" in a professional community can be said to be a crude encapsulation of this insight of Kuhn's. The concept of current common sense, I have said, is both mysterious and central. It is mysterious because the process by which "professionally shared imperatives" emerge and disappear is not one that seems capable of precise or rigorous analysis. One senses that in one scholarly generation the formulation of "grand theory" is taken to be a serious or even an essential task of scholarship, whereas in another the same task is regarded as counterproductive. One senses that scholarship in given disciplines or professions is conducted within what Kuhn used to call "paradigms" and now calls "disciplinary matrices":²⁰ contexts based on shared professional assumptions about the scope, direction, and design of research. But one cannot seem to articulate, in any precise fashion, how such "professionally shared imperatives" are created. When one tries, as I have on occasion, one's critics are sometimes provided with a reason for keeping their teeth sharpened.

Although the common-sense criterion may be mysterious, it is also central to an understanding of the nature of historical explanation and of the significance of interpretive detachment in the writing of history. Interpretive detachment, I have suggested, has as its principal purpose the neutralization of bias. Taking interpretive detachment seriously assumes that one also takes bias as a given. Historical explanations are assumed to be personal interpretations of the past that gain legitimacy by persuading other persons that they are provisionally acceptable as a form of professional wisdom. I think that we might agree, as a preliminary matter, that an interpretation that does not sufficiently divest itself of its "personal" or "individualized" features is an interpretation that appears as "biased." But why is bias stigmatized, and what is the relationship between this stigmatization and the current common sense criterion?

19. T. KUHN, *supra* note 16, at 292.

20. Compare T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 38-42 (2d ed. 1970) with T. KUHN, *supra* note 16, at 297-319.

If we believe, with Kuhn, that current common sense is a mysterious but powerful force in the legitimation of scholarly hypotheses, it seems that current common sense bears a close and potentially treacherous relationship to plausibility in scholarly discourse. Plausibility seems to contain, on initial reflection, a component of "rationality," "inner logic," or some such "neutral" or "objective" standard for evaluating scholarship. I have included such a component in my definition of plausibility. But suppose one seeks to build on the insights of Kuhn, and argues that mysterious imperatives control the direction of scholarly research, and that such imperatives are neither irrational or rational, neither logical nor illogical; they merely exist. Then why could current common sense not be rephrased as "current collective bias"? Why could not the "success" of a work of scholarship be equated with its "fashionability," using that term in its most whimsical sense?

This troublesome logic suggests that communities of scholars may well be receptive to works whose methodology implicitly denies that collective bias and fashionability are the basic determinants of successful scholarship. Put another way, a work whose methodology minimizes the importance of its own individualized origins, a work that appeals to others through arguments other than nakedly biased ones, is also seeking to reassure a professional community of readers that current common sense ultimately means something more than fashionability. Interpretive detachment can perform part of this professional function.

I have earlier argued that the "success" of a work of historical scholarship is not determined solely by its plausibility, but also by its suggestiveness. I have argued further that currently "successful" scholarship in legal history communicates not only on interpretive levels that are analytically descriptive, but on levels that are analytically normative. Finally, I have argued that the suggestiveness of a historical explanation is ultimately linked to its capacity to engage the reader: to succeed in convincing the reader of its promise as a guideline for future study and as a normative message. How can one reconcile these observations with the idea of interpretive detachment?

At this point I want to return to the levels of communication that were set forth earlier. Recall that arguments at the level of historiography make claims for the primacy of a particular interpretation of historical evidence, while arguments at the level of metahistory make claims for the primacy of a theoretical organization of reality. To the extent that historiographic interpretations are overwhelmed by a

metahistorical perspective, the biases of the presentation have not been adequately neutralized. An apparent consequence of unneutralized bias is that arguments at the level of metapolitics, which call for taking stock of the contemporary implications of the presentation, may be perceived as unprofessional or even as lacking in "current common sense," and may therefore not sufficiently engage the reader.

One could say at this point that the solution is to exorcise communication at the levels of metahistory and metapolitics from historical writing, and to return to a "truth in history" stance, where a scholar's interpretations are based on their fidelity to an "objective" historical record. But I have sought to show that such a stance misconceives the historian's function and is almost impossible to implement. Historians cannot avoid interpretation, and "successful" interpretations become, through the process of provisional acceptance of their explanations by a professional community, surrogates for truth.

Therefore it is too simple to believe that "truth in history" is a way out of the dilemma. It is also too simple to believe that an historian can seriously advance historiographic arguments that lead to metahistorical arguments without identifying himself with his metahistorical perspective. Writers of fiction regularly respond to scholarly criticism of their work by categorical statements that they did not "intend" the meaning a critic "found" in their writing. But if their writing can fairly be said to have supported such a meaning, they can hardly cut off inquiry by a denial that it was intended.

There is another option possible. Those who welcome the presence of metahistorical arguments in historical writing but also believe in the value of interpretive detachment can pay sharper attention to the precise relationship in their writing between theories of historical interpretation and theories of metahistory and metapolitics. That relationship can be seen, using the terms of this essay, as a process of engagement, detachment, and reengagement. The writer engages the reader with the suggestiveness of an interpretation, but presents that interpretation in a manner that emphasizes its internal logic, its contemporary fit, and its current common sense. In so doing the writer is seeking, as a preliminary strategy, to detach his interpretation from any grand theory of reality that the interpretation conveys. Then, after the reader has digested and assessed the plausibility of the interpretation, he is led, by the power of the interpretation itself, to consider its suggestiveness — to assess the theoretical perspective on which it implicitly rests and the guidelines it

provides for future research. In the schema of this Essay, metahistorical perspectives must not be permitted to overwhelm historiographic interpretations; historiographic interpretations must be consistent with a number of plausible metahistorical perspectives and must provide suggestive examples for professionals. An interpretation of this kind can be said to be consistent with, but not dependent upon, a view of reality. A reader can reject that view of reality but still consider the interpretation plausible. But if the reader finds the interpretation plausible, and suggestive as well, he will be exposed anew to its theoretical implications, including its normative messages as a current political statement. Once an interpretation conforms to the canon of interpretive detachment at the level of historiography, it qualifies as an interpretation that can yield suggestive and plausible theories of metahistory and metapolitics.

I now want to consider whether Marxist legal historiography attempts historical explanations that can be said to attempt to neutralize bias and thereby take into account the canon of interpretive detachment. That inquiry, of course, places Marxist historical explanations within the general analytic framework of this Essay, which offers a theory of historical explanation. A Marxist legal historian could assert that my theory is flawed and therefore my analysis of Marxism is not germane. But at that point the common ground of discussion would be lost. My analysis assumes an inquiry of common concern to historians, regardless of their ideological persuasion, that can be stated as follows: If the professional standing of a historical narrative cannot be based on its fidelity to truth, but must be based on the plausibility and suggestiveness of its organizing interpretations, can a historian advance an interpretation of stature that violates the canon of interpretive detachment?

III. MARXIST LEGAL HISTORY AND THE PROCESS OF HISTORICAL EXPLANATION

Marxism takes a distinctive view of history that is normally labeled "materialist." The materialist view of history can be said to be composed of two elements, a theory of the principal locus of thought and a theory of change. Marxism asserts that thought emanates from "the mode of production of material life." In Karl Marx's words, the mode of production "conditions the social, political, and intellectual life process in general," so that "definite forms of social consciousness," including "a legal . . . superstructure," emanate

from "the economic structure of society."²¹ Ideas are thus "anchored in . . . the material setting of history";²² they do not exist independent of it.

The concept of a mode of production, however, refers to "economic activity" in an expansive sense of that term. "Modes of production" are intended to include the means by which participants in the economic structure of society establish, and justify, their relations in society and their relations with one another. Here Marxism makes the assumption that within any mode of production there will be disharmonies among participants, and that these disharmonies will take the form of class antagonisms arising from "the unequal relations between the superior and inferior class within any mode."²³ The principal unequal relationship is that between the "ruling class" and the "under class," and the chief manifestation of inequality is "the vastly disproportionate access to, or ownership of wealth that is the prerogative of the ruling class."²⁴

Marxists believe that class antagonisms arising from inequalities within a mode of production are the chief source of historical change. The underclasses protest such inequalities and the ruling classes seek to justify them. The result is a complex of responses: "false" ideologies created by the ruling classes to deemphasize their power or to emphasize the common values that they share with the underclasses; shifts in the composition of ruling and underclasses as new means of production come into being; open attempts on the part of the ruling classes to oppress the underclasses. This complex of responses to class antagonisms produces change. History is the progressive record of such change.

The use of the adjective "progressive" in Marxist theories of history is necessary because for Marxists the class struggle, and the consequent changes that it produces, is only a stage of history that will ultimately lead to sharpened class antagonisms, a "dictatorship of the proletariat," and ultimately a classless society. This predictive feature of Marxism has caused its adherents acute practical problems, but my concern here is with Marxist approaches to history, not Marxist prognostications of the future. More specifically, my concern centers upon the materialist treatment of ideas and the motivation of those who articulate them.

21. Marx, *Preface to a Contribution to the Critique of Political Economy*, reprinted in THE MARX-ENGELS READER 3, 4 (R. Tucker ed. 1978).

22. R. HEILBRONER, MARXISM FOR AND AGAINST 63 (1980).

23. *Id.* at 68.

24. *Id.*

Marx once said that "it is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness."²⁵ His collaborator Friedrich Engels added that "the ultimate causes of all social changes . . . are to be sought, not in the minds of men . . . but in changes in the mode of production and exchange."²⁶ Engels noted, on another occasion, that "constitutions established by the victorious class after a successful battle," "judicial forms," and "juristic [and] philosophical theories" were "various elements of the superstructure" whose "basis" was "the economic situation."²⁷ The clear import of these comments for legal history is that the presence of ratified constitutions, or of established legal doctrines, or of commonly accepted theories of law, is explained by their connection to the existing class struggle within the existing mode of production.

When this theory of the ultimate explanatory source of legal history is combined with the notion of "false" ideology in the ruling class, the legal historian who approaches history from a Marxist perspective seems to adhere to a theory of the causes of legal change whose metahistorical and metapolitical components overwhelm its historiographic component. If the ruling classes invariably seek to further their interests at the expense of the underclasses, but may do so in a variety of "apparent" or "false" ways, any justification that legal institutions advance for their decisions becomes fodder for a Marxist interpretation. If a judge, for example, states that the purpose of a decision barring workers from suing their employers for injuries caused by the negligence of co-workers is to promote the interests of owners of the means of production rather than the interests of workers, his decision can be taken as overt evidence of a ruling class perspective held by courts. If, however, the judge states that the basis of his decision is to encourage workers in an occupation to be more mindful of their safety, his reasoning can be interpreted as a "false" ideology designed to disguise the true purpose of putting the costs of such injuries on workers.²⁸

25. Marx, *supra* note 21, at 4.

26. Engels, *Herr Eugen Dühring's Revolution in Science (Anti-Dühring)*, reprinted in *A HANDBOOK OF MARXISM* 279 (E. Burns ed. 1935).

27. Letter from Friedrich Engels to Joseph Bloch (Sept. 21-22, 1890), reprinted in *THE MARX-ENGELS READER*, *supra* note 21, at 760.

28. Morton Horwitz, in *The Transformation of American Law*, seems aware of this difficulty and attempts to avoid it. He demonstrates that courts made use of a "contractarian" doctrinal framework to "transform" a conception of fellow-servant cases as raising issues of "substantive justice" into a conception of those cases as raising issues of the economic marketplace. M. HORWITZ, *supra* note 6, at 209. One reading of Horwitz's interpretation, then, is that the courts merely adopted a different set of "intellectual premises" on which their doctri-

If a judge decides to change an existing rule of law for "the public good" or because "public policy demands" it, a Marxist can treat such rhetoric as "false" and can initiate a search for the "true" impact of the change on the various classes within the mode of production. Alternatively, if a judge decides to follow an existing rule on the grounds of its longstanding acceptance or because settled expectations would be upset if it were changed, a Marxist can equate "settled expectations" with the expectations of the ruling class, and "acceptance" of the rule with furthering the interests of the ruling class or disadvantaging the interests of the underclasses.²⁹ As the logic of this methodology is played out, any evidence of change in legal history — the establishment or modification of a constitution, the rise and fall of legal doctrines, the shifting theories used to justify one outcome or another — can be seen as emanating from tensions within the mode of production.

In the works of leading Marxist legal historians, law serves as an instrument for establishing or ratifying the hegemony of the ruling class. But is it not even necessary to a materialist interpretation of legal history that law be so designated. An occasional judicial decision, piece of legislation, or constitutional provision may be directed at curbing the power of the ruling class, reducing the inequalities between actors in the means of production, or even sharpening awareness of the class struggle. Indeed, given Marxism's progressive view of history, one might expect such instances to occur. Scholarly interpretations of a given legal rule as promoting the interests of one or another set of actors within the class struggle, however, need not depend on the justifications articulated on behalf of the rule. Those justifications may be taken as "true" or discarded as "false" because

nal framework rested. *Id.* at 210. For Horwitz, however, "intellectual premises" have a central purpose: he argues that through "contract ideology" the "law had come simply to ratify those forms of inequality that the market system produced." How, then, would Horwitz interpret fellow-servant cases that, during the period of "contractarian" analysis was dominant, grounded their decisions in the "substantive justice" of safety for workers? It seems that either those decisions do not support Horwitz's interpretation or the decisions are engaging in "false" rhetoric.

29. One might note here that Horwitz parallels his demonstration of the emerging formalism of American private law in the nineteenth century with a characterization of formalism as representing "the successful culmination of efforts by mercantile and entrepreneurial interests during the preceding half century to transform the law to serve their interests, *leaving them to wish for the first time to 'freeze' legal doctrine. . . .*" *Id.* at 259 (emphasis added). In the conclusion of *The Transformation of American Law*, Horwitz argues explicitly at the levels of metahistory and metapolitics: "[T]he paramount social condition that is necessary for legal formalism to flourish in a society is for the powerful groups in that society to have a great interest in disguising and suppressing the inevitably political and redistributive functions of law." *Id.* at 266.

of assumptions made about the way antagonistic actors within the mode of production behave.

The writing of legal history from a Marxist theoretical perspective therefore appears to face two related problems: the problem of not being able to neutralize its biases, and the problem of not convincing other scholars that its contributions can serve as fruitful examples for further work. Such scholarship seems to violate the canon of interpretive detachment, and because it has violated that canon, to fail to satisfy the criterion of engagement as well. Perhaps a saving distinction can be made. A Marxist legal historian could argue for the primacy of the model that he advances but concede that there will be instances when the model breaks down. The model is extremely useful, one could say, in providing a hypothetical set of motivations for participants in the class struggle who make use of law. One can presume that actors will want to use law to ratify or to change their position in the class struggle, or perhaps to make others aware of the internally contradictory nature of ostensibly cooperative social efforts, such as the production of goods and services for the marketplace. But that presumption is not conclusive: sometimes the language reveals that actors do not see themselves as motivated by their position in the class struggle or do not even seem aware that it is taking place. At that point the purpose of a Marxist approach to legal history is to supply "secret" or "unconscious" motivations for actors who cannot avoid participation in the class struggle even though they fail to recognize it.

If this distinction is to be truly saving, it would seem that Marxist interpretations of legal history should acknowledge the potential plausibility of interpretations that deny the primary assumptions of Marxist theory. Marxist interpretations would then pose a different question: Given several historiographical interpretations that satisfy the criteria of internal logic and contemporary fit, does a Marxist interpretation better accord with current common sense?

To pose such a question is to treat interpretations of legal actors' motivations that rely on factors other than the actors' place in the economic structure of society as competitive with the interpretations of Marxism. If several interpretations achieved reader engagement, current common sense could then determine whether, in the main, a Marxist approach to the motivation of legal actors or some equally suggestive alternative approach would be deemed more plausible, and hence "successful," or whether a Marxist approach could be regarded as more plausible in some situations but not in others.

I suspect that some Marxist historians might be inclined to accept

this compromise. But when the issue is one of causation in history, the very universality of Marxist theory makes such a compromise precarious. Take the role of ideas as a causative agent in history as an example. If, according to Marxist metahistory, ideas have no independent meaning apart from their material context, how can one take seriously "competitive" historical interpretations that suggest that ideas can be unrelated to their material contexts or can even shape the contexts themselves? Seemingly, these interpretations must be treated as misguided because they do not account for the difference between "false" and "true" justifications; their arguments are accordingly based on the "wrong" historical evidence. No compromise seems possible here: the theory of ideas as causative agents violates the initial assumptions of Marxist theory.

In sum, when one subjects an internally coherent and self-reinforcing system of belief, such as Marxism, to the tests of effective historical interpretation advanced in this essay, the very qualities that give that system its internal consistency cause it to yield historical interpretations that may "fail" in two respects. The comprehensiveness of Marxism as a system of metapolitics is based on the fidelity of its practitioners to assumptions whose primacy is not challenged; since that primacy is never questioned, the interpretations supplied by Marxist historians seemingly provide suggestive guidelines for future research only to those who adopt Marxist metapolitics. Uncompromised Marxist interpretations thus fail to achieve interpretive detachment and to engage non-Marxist professionals.³⁰

IV. CONCLUSION: SOME ISSUES FOR FURTHER EXPLORATION

In attempting to find a middle ground between theories of historical interpretation that rest on the idea of "truth in history" and theories, such as Marxism, that rest on metahistorical and metapolitical assumptions, I have, as is doubtless apparent by now, exhibited a logical vulnerability to both of the approaches I have been criticizing. How can I argue for "detachment" in historical interpretation, an apostle of "truth in history" might ask, and yet deny the intelli-

30. The difference between "uncompromised" and "compromised" Marxist historiography is largely a question of how universal one takes the metahistory of Marxism to be. If the metahistory is taken to be so universal that counter examples must be incorporated within it, as in the fellow-servant example, then, in the terms of this Essay, metapolitics and metahistory have overwhelmed historiography and interpretive detachment has been lost. If counter examples are taken, however, as fodder for the competitive interpretations that Marxism seeks to dispute, then to some extent a Marxist interpretation seems to recognize that its success depends not exclusively on its "correctness," but also on the "current common sense" of historians.

bility of an objective historical record? Where does "detachment" come from if not from phenomena external to the interpreter? And how can I concede that ultimately "current common sense" determines the success of historical interpretations, a Marxist might ask, and yet claim that a Marxist interpretation would offend current common sense? What if the great bulk of historians were Marxists?

These hypothetical queries lead me to stress again the complex relationship between interpretive detachment and the unintelligibility of "truth in history." Once one denies that historical interpretations can be tested by recourse to some objective record, the dragon is out of its cave. One can no longer, as an interpreter of the past, claim that one is merely recording the past: it is the act of interpretation that counts, and, as Popper says, interpretations are never final.

What does a member of a professional community whose perceived function is to make the past intelligible and meaningful to persons living in the present *do* with this insight? One response, of course, is that of the Marxists: since interpretation *is* history, and since interpretations are necessarily personal and to some extent ideological, Marxists refine their ideological beliefs, make them explicit, and argue for their interpretations. There is a kind of courage in this position, in addition to its apparent logic. Such a response, however, strikes me as quixotic because it misconceives the nature of professional communities in contemporary society. Professional communities, I believe, are united not by ideology, but by tacitly accepted definitions of their professional functions. However one defines the function of an historian, it is not synonymous with the function of an ideologue. Even if one rejects the criteria for "successful" historical scholarship that I have set forth in this Essay, I suspect that one would have to substitute criteria that sharply distinguish between the art of historical interpretation and the art of ideological oratory. The principal reason this substitution would be necessary is the collapse of the idea of truth in history. That idea, or some version of it, has been sufficiently powerful and sufficiently long-lived to associate the role of being a historian with the act of suspending intuitive contemporary judgment when examining the past. The reflex of judgment suspension — the avoidance of anachronistic reasoning — is sufficiently ingrained in historians, I believe, to constitute what Kuhn would call a shared professional imperative.

What is the future of this professional imperative, however, if we reject the idea of truth in history and the corresponding idea that the historian can be "objective?" What if a version of Kuhnian logic that ends up with the proposition that one cannot say how or why

professional imperatives come and go, that the process is essentially mysterious, is correct? My sense is that Kuhn's logic may be terrifying for historians who have abandoned the idea of truth in history. The "objective" criteria for testing the worth of historical interpretations have been discarded, but no one can say where the remaining "subjective" criteria come from, how long they will last, or even, when pressed, what they are. How does one then know "good" history from "bad" history; where does one find the basis of one's professional judgments?

It is the sense of crisis that this logic engenders that, I suggest, has stimulated the production of historical scholarship that communicates on the four levels I have previously identified. I do not see this "crisis" negatively; such crises are common in, and generally beneficial to, the creative life of a profession, and this crisis has already contributed to the appearance of a number of significant works in American legal history. I also doubt that this crisis will resolve itself through a dramatic change in the roles and functions of members of a profession; I doubt that historians will abandon their strictures against anachronistic reasoning and become ideologues.

Having said all this, I confess that I would like to see whether, on closer inquiry, the criterion of "current common sense," and indeed all of the criteria I have identified with plausible, suggestive, and "successful" historical scholarship, are as mysterious as they seem to be. Their very mysteriousness introduces a fascinating ambiguity to the concept of professionalization. If one is defining oneself as a professional and training others to act as such, but one can only say that the criteria for success in the profession are mysterious in nature and in origin, what is the difference between a profession and a secret society? I have been down this path before in considering what, if anything, it means to "think like a lawyer"; it is a little disconcerting to find the same snarls in the phrase "writing like a historian."

Thus this Essay is a prolegomenon in the sense that the criteria that I advance to support my approach are neither precisely stated nor rigorously applied. I have sought only to sketch out the general framework of my position, to identify its philosophical assumptions, and to contrast it with other general views. I have not filled in many of the details. Maybe all one can say about successful historical scholarship is that one "knows it when one sees it." But that despairing suggestion ought not to excuse historians from attempting a fuller understanding of the relationship between truth and interpretation in history. The dragon may be out of its cave, but it may not be a dragon after all.