

Legal Metahistory

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The Call for Papers asserts: “Apart from some notable exceptions, much of contemporary legal theory is uninformed by history, including legal history”. We are invited to accept this supposed fact and to work through the merits or otherwise of contemporary legal theories being “uninformed by history”. But is the assertion, that “much of contemporary legal theory is uninformed by history”, true? How would one set about determining whether it were true?

Ignoring issues of general epistemology, we ordinarily attend to an assertion’s *content* for this. We determine the truth of an assertion with mathematical content on the basis of mathematics, and we determine the truth of an assertion with moral content in terms of what some moral theory advises us.

By contrast, the Call for Papers seems to be making an *observation* about contemporary legal theory which is akin to that which a historian of contemporary ideas might make. “Contemporary” implies some spread over recent historical time including our extended present.¹ The observation then appears to be a *historically factual* assertion, the answer to which is to be found in the *contemporary history of legal theory*. Hence checking its truth plausibly involves, first, finding appropriate examples of contemporary legal theory and, second, examining how far those examples are “informed by history”. These two steps are indistinct and problematic.

Taking these steps requires some criterion of what is to count as a “legal theory” and, since it is claimed that there are “notable exceptions” to the assertion, one also needs some criterion of “informed by history” to distinguish the “informed” theories from the “uninformed” theories. The content of such criteria is not, at least not obviously, itself to be *recovered* from the contemporary history of legal theory without risking some kind of circularity, while *a priori* justifications of the criteria which ignore contemporary history of legal theory may be *ad hoc* and even perhaps *ad personam*. This problem of the apparent arbitrariness of selection is common in historical research and understanding.

Assuming for a moment that one has nevertheless found some unproblematic criterion of a legal theory “informed by history”, we can proceed. Given that the assertion “much of contemporary legal theory is uninformed by history” is a historically factual one, the answer requires *historical accuracy* and *reference to historical sources*, conceiving these as involving skills in the use of evidence and abilities in analysis and interpretation which are appropriate to the sources involved. Thus the Call for Papers seems to require us, *a priori* as it were, to adopt a *historical stance* in setting about our engagement with the issue, understanding that as requiring in this context historical accuracy and reference to historical sources. Only then might we engage in examining the merits or otherwise of contemporary legal theories supposedly being “uninformed by history”.

¹ How we decide what counts as our extended present is addressed in Jonathan Gorman, “The limits of historiographical choice in temporal distinctions”, in *Breaking up time: negotiating the borders between present, past and future*, eds. Chris Lorenz and Berber Bevernage, Göttingen: Vandenhoeck & Ruprecht, forthcoming 2013.

Moreover, we may work backwards from this point: since the Call for Papers is interpreted as making the *historical assertion* that “much of contemporary legal theory is uninformed by history”, then we might also read that assertion as claiming that “much of contemporary legal theory” is uninformed by the very criterion that we are obliged to adopt in assessing the merits of the assertion, namely, uninformed by *historical accuracy* and *reference to historical sources*. Should legal theories be informed by that? It is not at all obvious that they should.

What is it to adopt what I have called a “historical stance”? This is a *metahistorical* question; hence, although this is only a partial explanation, my use of the word “metahistory” in the title of this paper. There are other ways of interpreting the expression “uninformed by history” and other ways of interpreting the supposed distinction between a theory “informed by history” and a theory not so informed. Before assuming that it is a historically factual matter – a mere contingency – whether or not “much of contemporary legal theory is uninformed by history”, we might wish to consider that, given a supposed distinction between “theory” and “history”, it *might not be possible* for *any* theory to be “informed by history”; alternatively, that it might be *necessary* for *every* theory to be “informed by history”. Different philosophies of theory and different philosophies of history yield different answers here.

It is easy to slip into characterising academic jurists as to some extent distinguished into theorists and historians. An elementary theory/history contrast was particularly apparent in the second half of the twentieth century in moral and political theories, which strongly overlap with legal theory on at least some interpretations of “legal theory”. Prior to John Rawls writing his 1972 *A Theory of Justice*, it was standard to address political theory by working only in the history of political thought: Machiavelli, Locke and Marx, say; similarly, it was standard to address substantive moral issues by recovering, from the history of moral thought, the view of (for example) Aristotle, Kant or the Utilitarians. Post-war moral and political philosophers before Rawls often took the view that they were not “expert” on substantive ethical or political matters. At that period there was not even an obvious theory/history contrast, for it seemed that all substantive theory *was* history. Indeed, political philosophy was “dead”, Peter Laslett had said.² But Rawls revitalised political theory in an analytical yet *substantive* way.

After Rawls a contrast thus came into being between those working in substantive analytical political theory and those working in the history of political thought, but to think this a simple contrast is misleading. Was Rawls’s a theory “uninformed” by history? Rawls’s analytical work certainly was, in one narrow sense, “informed” by the history of political thought: an explicit main opponent for him was Mill’s Utilitarianism, while his first major analytical responder, Robert Nozick, famously drew on Locke. Analytical theorising, even at its most abstract, does not take place in a historical vacuum. Indeed, it is arguably *impossible* for theory to avoid being “informed” by history in this sense. All theorists unavoidably live in ongoing historical contexts and are validated in terms of their teachers, readers and

² Peter Laslett, “Introduction”, in *Philosophy, Politics and Society*, ed. Peter Laslett, vii-xv at vii. Oxford: Basil Blackwell, 1956.

audiences to address their matters of theoretical concern. They have to take due account of existing published work and without some form of validation their work would not count as a theoretical contribution at all. But this connection with their historical context may be trivial. Crucially and essentially, the analytical *methods* used by Rawls and Nozick did not involve *historical accuracy* and *reference to historical sources*, and in this sense history played no part whatever in the test of their theoretical success.

The same easily made theory/history contrast was also apparent in philosophy at the beginning of the second half of the twentieth century. Drawing on a tradition informed by an inheritance of logical empiricism, analytical philosophers often took little notice of past philosophers, while historians of philosophy often felt excluded from live philosophical debates. Yet unlike most analytical philosophers who took the irrelevance of history for granted, Peter Strawson, writing on Leibniz, went out of his way explicitly to distance himself from historians' concerns and possible criticisms by adding the following qualification: "that when I refer to the system of Leibniz, I shall not be much concerned if the views I discuss are not identical at all points with the views held by the historical philosopher of that name. I shall use the name 'Leibniz' to refer to a possible philosopher at least very similar to Leibniz in certain doctrinal respects; whether or not they are indiscernible in these respects matters little".³ Indeed, within analytical theorising historical reference or accuracy became irrelevant to the point where thinkers *invented* their opponents: every undergraduate in analytical political or legal philosophy, as in analytical philosophy more generally, was taught to recognise the genetic fallacy, and if one was going to argue with Mill or Locke then one had better argue with "Mill" and "Locke" the analytically improved constructs rather than the original straw men, historically real though they were.

Hence, as I have already suggested, it *might not be possible* for any theory to be "informed by history" in any non-trivial way, for a major element that then defined the tradition of analytical theorising in philosophy was its principled disciplinary *separation* from history.⁴ Of course, one could, as a philosopher, have history or law as one's subject matter, but one would be standing outside that subject matter and using the tools of one's own, separate, discipline. One might well seek to adopt a standpoint which, in Thomas Nagel's words, offered a "view from nowhere",⁵ standing outside any historical context just as mathematics is supposed to do. Understanding analytical theorising in mathematical terms is an idea that goes back to Frege.⁶

Given this, philosophy, understood as *essentially* a universalising discipline like all "theorising", could not be grounded in contingent historical occurrences. What, theorists would once have asked, could any historical work or source tell us about the nature of truth in law or objectivity in history,

³ P.F. Strawson, *Individuals*, London: Methuen, 1959, 117. I have presented arguments relating to this quotation in Jonathan Gorman, *Historical Judgement: The Limits of Historiographical Choice*, Stocksfield: Acumen, 2007 and Montreal: McGill-Queen's University Press, 2008, chapter 3.

⁴ I address this matter further in Jonathan Gorman, "Hayden White as analytical philosopher of mind", *Rethinking History*, forthcoming 2013.

⁵ Thomas Nagel, *The View from Nowhere*, Oxford: Oxford University Press, 1986.

⁶ Gottlob Frege, whose *Begriffsschrift: A formalized language of pure thought modelled upon the language of arithmetic* was first published in 1879.

when that was a matter of the general relationship between language and the world? How could any historiographical exercise provide justification sufficient to meet the demands of the epistemological sceptic? History – inevitably grounded in particular contingencies – could not conceivably answer the problems of theoretical understanding – inevitably grounded in universalities, necessities and possibilities; it was inherently irrelevant. Theorists understood with principled clarity that analytical thinking was fundamentally a different discipline from history and that theory could not, in any way other than the supposedly trivial one already mentioned, be “informed by history”.

An easily made theory/history contrast was also apparent in philosophy of science in the second half of the twentieth century. Here philosophers of science with an inheritance of logical empiricism sought to avoid reference to the history of science because it was seen as relativising science to its social or cultural background, so committing its practitioners to a partisan philosophical position in epistemology. In a parallel way, historians of science resented and rejected calls from philosophers of science for them to keep abreast of the latest analytical thinking about science, involving as it often did issues in mathematical logic and probability theory which were for them matters of historical irrelevance. For philosophers of science there was and still is a permanent example which sets the pro-theory and anti-history standard: all physicists know their “Newton” and “Einstein”, but these are to be unhistorically understood in terms of the received scientific tradition as it is now. Like Rawls’s Mill or Nozick’s Locke, “Newton” and “Einstein” are in important part constructs for the sake of contemporary theorising.

And yet, the arguments of Kuhn’s 1962 *Structure of Scientific Revolutions* suggested that the history of science was *necessary* to philosophy of science. Further discussion suggested that one could not engage in the history of science without some prior understanding of science which only theory could provide. There was a complex interplay between philosophy and history such that *both* were necessary to understanding science and *neither* discipline had justificational authority or priority.

Whatever the importance of history to legal theory, no philosopher could accept that understanding law could involve a simple appeal to the “facts” of actual practice. The facts of legal practice are not independent of the theories about it. Kuhn’s position itself did not and could not involve an appeal to “facts” from the history of science, but involved the development of a model for understanding the history of science itself.⁷ So, for our present concerns, theorising about or modelling law or legal systems, if that involves some appeal to “history”, must involve an appeal to history as theorised, that is, it must involve an appeal to a philosophy of that history. Notice that, while that history may be *legal* history, it would not *have* to be; that would depend on the content of the legal theory. Nor is there only one historical self-understanding within the legal profession.⁸

⁷ Material in this paragraph comes from Jonathan Gorman, *Rights and Reason*, Chesham: Acumen, 2003, 112-3.

⁸ See Simon Lee, *Judging Judges*, London: Faber and Faber, 1988, for the view that each judge brings his or her own philosophy of law to decision-making.

I have said that all theorists unavoidably live in ongoing historical contexts and are validated in terms of their teachers, readers and audiences in addressing their matters of theoretical concern. I have remarked that theorising does not take place in a historical vacuum and that it is arguably *impossible* for theory to avoid being “informed” by history in this sense. I have suggested that this sense may be trivial. But it is better not to see it so. The “principled clarity” which led theorists to hold that philosophy was fundamentally a different discipline from history was a clarity which has faded as theorising left behind its heritage of logical empiricism and concentrated on the newer legacies of the later Wittgenstein and American pragmatism. It could then be held that it was *necessary* for *any* theory to be “informed by history”, understanding that in a non-trivial sense as the ongoing linguistic context in which people lived and thought. We can now draw on the contemporary history of legal theory, illustrating with, at last, a paradigmatic legal theorist, H.L.A. Hart, who drew on the linguistic context of his time to develop his understanding of the law. Were Hart’s *Causation in the Law* and *Concept of Law* “informed by history”? Nicola Lacey in her superb *Life of Hart* observes that it has been “pointed out that Herbert’s argument is sometimes expressed in terms which invite confusion between analytic and historical claims”.⁹

We can put together from Lacey’s *Life* some of the already digested detail we need about Hart. The ongoing historical context of Hart’s thinking about law we might think of, first, as a set of *social practices*: thus Lacey says, “The combination of legal experience and philosophical insight equipped Herbert ... to make an original contribution to a field which was crying out for someone with insight into the social practices within which linguistic usage develops”.¹⁰ Yet, she adds later, although Hart is often thought of “by followers like Neil MacCormick or Joseph Raz as having had an institutional or social theory of law, his exploration of that institutional framework is relatively thin”;¹¹ again, she says, the reader of *Causation in the Law* “is given no systematic analysis of the institutional, practical, professional context in which that legal language was used; in Wittgenstein’s terms, there is no exploration of the social practices or forms of life within which the causal language game is embedded”.¹²

It was J.L. Austin who was the major philosophical influence on Hart in those first theoretical steps of his at Oxford, while Wittgenstein was less helpful. Lacey remarks, “Wittgenstein circled – in the elliptical style which so alienated Austin – around a problem which Herbert himself never quite confronted. This was the precise nature of the relationship not just between language and behaviour, but more specifically between linguistic usage and the context in which it happens...”.¹³ Finally for me here, she observes, “Once the notion of ‘context’ is broadened out, the inexorable conclusion is that illumination of legal practices lies not merely in an analysis of doctrinal language but in a

⁹ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004, 229.

¹⁰ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004, 145.

¹¹ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004, 217.

¹² Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004, 217.

¹³ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004, 218.

historical and social study of the institutions and power relations within which that usage takes place".¹⁴ Plausibly, it is *this* which we should think of as the kind of historical context which ought to, and arguably *must*, inform "theory" even when we understand theory as analytical philosophy of language.

Elsewhere in her *Life*, Lacey describes how Hart found Harvard in 1956-57,¹⁵ where law was already discussed in what might be called historical context, with various views about what counted as "context": thus Rosco Pound had introduced much sociology of law while Lon Fuller ensured depth of discussion of the merits of the natural law tradition. According to Lacey, Hart saw that bringing law and Austin-style linguistic philosophy together was overly narrow and he came to understand that he and Honoré would need to develop their view about causation in the law in terms of economic and policy contexts. She quotes Hart's *Listener* BBC broadcast on Christmas Eve 1957 where he said that, "to many Americans", "We [in Oxford] stand on the brink, wondering about the meanings of words, while they wish to plunge in and get the drift of whole paragraphs, or some large sense of general purpose, without bothering too much about the precise meaning of what is said".¹⁶

Hart differed here from those he called "the Americans" over how "meaning" was to be understood and located in practical contexts, with Oxford narrowness contrasted with the American big picture. But Lacey's Hart did not notice that he was not characterising "America" correctly: "America" here could only mean *Harvard*; by contrast, and again drawing on the contemporary history of legal theory, Wesley Hohfeld of Yale had already offered in 1919¹⁷ a way of theorising about law which grasped and determined meaning in a narrow way like Hart, one that Harvard people indeed found uncongenial to their own broader tradition: Yale man Arthur Corbin, himself committed to the importance of "context" in interpreting law, noted a Harvard-style comment in his Foreword to Hohfeld's book: "Those Yale men say rights-powers-privileges-and-immunities as a single word, the way the rest of us say son-of-a-bitch".¹⁸

Hohfeld's analysis of rights and duties is familiar enough to legal theorists. "Chameleon-hued words are a peril both to clear thought and to lucid expression", he said,¹⁹ and he disambiguated these notions in a table with a newly exact logical structure of four kinds of rights: right; privilege; power; immunity; and four kinds of duties: duty; no-right; liability; disability. Hohfeld said of this analysis, "...Eight conceptions of the law have been analyzed and compared in some details, the purpose having been to exhibit not only their intrinsic meaning and scope, but also their relations to one another and the methods by which they are applied, in judicial reasoning, to

¹⁴ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004, 219.

¹⁵ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004, chapter 8.

¹⁶ Quoted in Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004, 195-196.

¹⁷ Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. W.W. Cook, New Haven and London: Yale University Press, 1919.

¹⁸ Arthur L. Corbin, "Foreword" to Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. W.W. Cook, New Haven and London: Yale University Press, 1919, x.

¹⁹ Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. W.W. Cook, New Haven and London: Yale University Press, 1919, 35.

the solution of concrete problems of litigation”.²⁰ On the face of it, this is just the kind of linguistic understanding that Hart was engaged in.

Hohfeld’s understanding of the meanings of the terms analysed is that they have an “intrinsic” meaning, and are also those which are actually used in real judicial situations which deal with real legal problems. There is a wealth of references by Hohfeld to actual legal usage in support of his analysis, and yet there are also a “considerable number of judicial opinions” which, as he put it, “afford ample evidence of the inveterate and unfortunate tendency to confuse...”.²¹ Hohfeld, while certainly finding much in the law reports in the way of judicial support for his analysis, also assessed legal usage by reference to independent standards of clarity and consistency.²²

Hohfeld’s theory was an attempt to summarise some features of existing social – in particular linguistic – practices, conjoined with a recommendation that certain further refinements be universally adopted by his profession. While there are descriptive elements in his theory, theoretically these amount to little more than a reminder of how selected past judges or jurists had reasoned. Some of this reasoning was “good” reasoning and some “bad”, by Hohfeld’s lights, with his assessment being made not on the authority of the courts in question with respect to how the relevant meanings were to be understood, nor on what the courts counted as good reasoning in the contexts involved, but on the basis of the need to “think straight” in relation to all legal problems.²³ Much is stipulation.

In this Hohfeld was following a line of philosophy which would have been familiar to logical empiricists in the early twentieth century. It was assumed that ordinary or natural usages are inherently vague, and any claim to exact knowledge which is to be taken seriously needs to be readily translatable into the terms of a rational model, itself best expressed in terms of a formal or mathematically symbolic deductive logical system, preferably classical rather than paraconsistent. Many legal theorists today, of course, work in often Scandinavian or Italian traditions of deontic logic which are theoretically independent of any historical context. Theorists of law might embrace this as the idea that legal meanings – like the interpretations of mathematical symbols – are in their paradigm form not subject to change, not historicisable, and some might hope that the meanings of statutes and contracts and indeed the existence of human rights are like mathematics in that respect.

But the “clarity of meaning” which Hohfeld sought does not have to be understood in this way. Some philosophers of language followed the later Wittgenstein in thinking that natural languages, with all their subtleties and distinctions and the fullest possible range of literal and rhetorical resources, inherently permit exactness, and for a full theoretical understanding we need, as Lacey put it, to understand linguistic usage in “the context in which it

²⁰ Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. W.W. Cook, New Haven and London: Yale University Press, 1919, 63.

²¹ Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. W.W. Cook, New Haven and London: Yale University Press, 1919, 27.

²² I offer an explanation of Hohfeld’s argument in Jonathan Gorman, *Rights and Reason*, Chesham: Acumen, 2003, chapter 7 and analyse it in chapter 8.

²³ Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. W.W. Cook, New Haven and London: Yale University Press, 1919, 25.

happens”.²⁴ While Austin and indeed Hart did not go very far in developing the notion of linguistic context, it was clear to them that mere “textual” meaning, as we would recognise that for example in Hohfeld’s work, was not enough. Meaningful intention was central, and this arises in a way explained by Strawson in referring to J.L. Austin: “Given that we know ... the meaning of an utterance, there may still be a further question as to *how what was said was meant* by the speaker, or as to *how the words spoken were used*, or as to *how the utterance was to be taken or ought to have been taken*”.²⁵

And certainly, in the fullest sense of understanding the “speech act” in question, all these matters are relevant, with “authorial intention” being primarily a matter of what the author *intended to be understood* by using the words in question in the context they were used. But “context” is ambiguous: first, there is what one might think of as the *non-verbal* context in which the words were used. With respect to the traditional understanding of history, this might be assumed to be the “religious, political, and economic factors” involved.²⁶ However, in our common law system, even the most ancient of statutes has to be interpreted according to rules of statutory interpretation which prioritise what the text means rather than what the author of the text meant. Only when the literal meaning is completely indeterminate might the author’s (Parliament’s) intentions or beliefs be sought, and even then the wider justificatory context might well be eschewed: “It was a public mischief, [Gladstone] said, to look beyond the walls of Parliament for the influences that were to determine legislation”.²⁷ Nevertheless, in speech-act theory we are thinking about practical situations having primarily to do with authorial intention rather than such background factors, and where the meaning of the words alone is well short of enabling us to understand the intended meaning of the utterance or indeed its likely uptake by the hearer. It is here, in speech-act theory, that we find authorial intention crucial to interpretation. Quentin Skinner and others have demonstrated the importance of this for history.²⁸

There remains a further meaning of “context”, the *verbal* context of an utterance, and here we should think not of alternative contributions to a conversation (which is nevertheless an important part of speech-act theory) but a return to the *text* in which the utterance appears. Accepting the importance of authorial intention indeed means that the text is not “autonomous”, but in many cases the text may still be taken as the primary bearer of meaning; indeed, the pen would never have been mightier than the sword unless this were so. Here we are to think of utterances as being

²⁴ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004, 218.

²⁵ P.F. Strawson, “Intention and convention in speech acts”, in J.R. Searle (ed.), *The Philosophy of Language*, London: Oxford University Press, 1971, 23-38 at 24.

²⁶ Quentin Skinner, “Meaning and understanding in the history of ideas”, *History and Theory* 8, 1969, 3-53 at 3.

²⁷ John Vincent, *The Formation of the British Liberal Party 1857-68*, Harmondsworth: Penguin, 1966, 260 (letter from Gladstone to Russell). There is a contrast between statutory interpretation and contract law. For the latter the intentions of the parties are crucial, although the text is nevertheless regarded as the best evidence for what those intentions were. Richard A. Posner, thinking about the United States Constitution, says “people who are sophisticated about interpretation know that text does not come first in any illuminating sense”. Richard A. Posner, *Overcoming Law*, Cambridge, Mass.: Harvard University Press, 1995, 175. [Most of the present footnote and the assertions to which it relates appear also in Jonathan Gorman, *Historical Judgement: The Limits of Historiographical Choice*, Stocksfield: Acumen, 2007 and Montreal: McGill-Queen’s University Press, 2008, 85.]

²⁸ Quentin Skinner, “Meaning and understanding in the history of ideas”, *History and Theory* 8, 1969, 3-53.

interpreted, not as free-standing sentences, but in the light of *the surrounding sentences in which they appear*.²⁹

I have space only for a concluding suggestion. If there is merit in legal theory being informed by history, then it needs to be informed by history as theorised, by philosophy of history. And this brings me to a point derived from a central claim in much current theory of history: it is *narrative* which structures our historical context and narrative structure which we need to understand. The title of my paper will perhaps now become apparent to some, for it is Hayden White's 1973 book *Metahistory* and his associated writings which offers us some further understanding. To think historically is to think contextually and central to that is narrative plot structure. If we follow Hayden White, it is *consciousness* that is being expressed by narrative texts,³⁰ and we all of us *share* that consciousness. Moreover, it is a *temporally stretched* social context which we share, covering even the future.³¹

What is striking about much legal theorising is that it involves philosophising about the meanings – senses, references, intentions and the like – of those short examples with which analytical philosophers and speech-act theorists most characteristically deal. Here it is as if our central legal concepts take so little time to think that they are allowably analysable as if they take no time at all to think, so that, once we have got our theory right, their meaning is completely and instantaneously manifest. By contrast *it takes time to think the concept or concepts only expressible in narratives*. We may have to allow that what Hohfeld called “fundamental legal conceptions” are only analysable in this way and are not briefly summarisable.³²

²⁹ Jonathan Gorman, “Objectivity and truth in history”, *Inquiry* 17, 1974, 373-397; Jonathan Gorman, *The expression of historical knowledge*, Edinburgh: University of Edinburgh Press, 1982.

³⁰ Hayden V. White, “The historical text as literary artifact”, in *The History and Narrative Reader*, ed. Geoffrey Roberts, London and New York: Routledge, 2001, 221-236 at 221.

³¹ Mark Day defines “an open narrative sentence”, which “is about a past event, but which refers to it in terms of later events, *including events that have not taken place by the time of the speaker*. Such sentences are open to the utterer's future” [Day's stress]; Day, thinking of sentences as in part properly capable of being future-referring, rightly stresses that “what is required is an act of will: the will to make that sentence true by your future action”. Mark Day, *The Philosophy of History*, London and New York: Continuum, 2008, 227. I give further analysis in Jonathan Gorman, “The limits of historiographical choice in temporal distinctions”, in *Breaking up time: negotiating the borders between present, past and future*, eds. Chris Lorenz and Berber Bevernage, Göttingen: Vandenhoeck & Ruprecht, forthcoming 2013.

³² After giving this paper I came across an essay by Bernard Williams (“Liberalism and loss”, in Ronald Dworkin, Mark Lilla and Robert B. Silvers (eds.), *The Legacy of Isaiah Berlin*, New York: New York Review of Books, 2001, 91-103, lent to me by my friend Dr Max Wright). Here Williams, writing about Isaiah Berlin's moral pluralism, says “I start from what seems to me a very important remark of Nietzsche's (a thinker for whom Isaiah himself was not a great enthusiast), who said, ‘The only things that are definable are those that have no history’ [Williams gives no reference]. This seems to me profoundly true. The values that we are concerned with here – values such as liberty, equality, and justice – all have a very significant history, and that history stands in the way of their simply having a definition. (This, incidentally, is why, when Isaiah used to say that in studying such concepts he had turned from philosophy to the history of ideas, he did not state his own position quite accurately [end of page 91]. Rather, he turned from a form of philosophy which ignored history to a form of philosophy which did not ignore history. ... my own view is that the question of how we should think about the identity and the structure of such concepts is one that philosophy has scarcely even addressed” (92). Again, “The schema or matrix attached to a given value concept is not going to achieve much by itself: it is too bare, indeed too schematic. It needs, and will have indeed received, an associated social, historical, and cultural elaboration. ... how they determinately work out in different contexts, in different cultures, in different societies, is something that will require a historical story” (93). “Let us call these two things together – the basic schema of concern, and a given historical elaboration or application of it – the *contour* of the value in a given society or historical situation. When we consider what is involved in there being such a thing, we reach a conclusion which (it seems to me) is very important, that the concerns which basically go with these various values cannot be redirected simply nominalistically, by redefining a word.” (94). And, in favour of Berlin's view but against Dworkin's (Ronald Dworkin, “Do liberal values conflict?”, *idem.*, 73-90), “It is obvious that there is no particular reason why the respective contours of two such concepts ... should not conflict and lead to a sense of loss” (95).

