

The Will to Ignorance: Modern Legal Theory and the Flight from History

Bruce P Frohnen

From its roots in the thought of British utilitarian Jeremy Bentham to its current proponents (e.g. Richard Posner) and opponents (e.g. critical legal studies) modern “realist” legal theory has sought to discount and undermine the role of history in understanding and applying law. Differing in their views on the nature of justice and the justice of existing institutions, both legal realists and their opponents agree in seeing law as a tool of those in power to be used in establishing order. Moreover, even many professing to work from within the natural law tradition in fact accept the instrumentalist view of law at the heart of the modern project. This paper will examine the ways in which modern legal theorists have rejected the role of history in the formation of law and legal institutions, and the reasons why this rejection is highly damaging to any reasonable approach to law as an institution integrating reason and experience so as to maintain order and the possibility of virtue.

The utilitarian project was explicitly anti-historical. It also was explicitly anti-religious, presuming that religion and political, social, and legal institutions connected with earlier, religious ages, were inherently unjust and irrational. Bentham sought to “rationalize” laws through the utilitarian principle, calculating the utility of laws, like all else, according to their tendency to promote the greatest good of the greatest number of individuals. This calculation is central to the thought of more modern “legal realists” like Richard Posner, and also at the heart of radical movements like critical race theory. In both cases the actual historical development of institutions, including individual rights, local liberties, equal protection, due process, and other practices key to the practice of ordered liberty, is dismissed. Posner dismisses history as simply irrelevant to calculations of immediate material interest, whereas critical race theorists assume the oppressive nature of existing institutions and seek only “practical” action aimed at particular ends deemed good for specific groups. As for the “new natural law” theorists, their work emphasizes the sense in which certain ends or “basic goods” are inherently beneficial and to be pursued through rational conduct, divorced from any direct consideration of the actual roots of existing institutions, or the importance of pre-existing, often unexpressed assumptions in maintaining social and political order.

In all these cases, modern legal thinkers accept the notion that the person and the law both can and ought to be examined strictly according to their current rationality. Persons act rightly only when they make rational calculations regarding costs and benefits. Laws are good only when they can stand up as “useful” according to rational criteria measuring their current utility.

This paper will argue that all these groups ignore the fundamental role played by history in shaping legal institutions, and also in shaping the habits and assumptions that maintain order and justice. Because peoples have become accustomed to conducting their affairs in a given way, they have a rightful expectation that these modes of conduct will continue unmolested. Moreover, critically important practices, such as due process, are themselves historically-rooted artifacts of belief and conduct. Thus current policies undermining human dignity (e.g. abortion) also undermine our more general inheritance of individual rights. Because laws are culturally rooted, because they depend on their

tacit acceptance by the bulk of the people in daily practice, they are dependent on historically-rooted assumptions and habits. To ignore the historical dimension of law is, then, to assert the brute fact of power in its imposition, stripping away the gentle authority of experience and common belief in maintaining public order.