
Postscript

On Rattling Cages: Joel Handler Goes to Philadelphia and Gives a Presidential Address

Stewart Macaulay

Joel Handler is a friend, and I have appreciated his work for almost 30 years.¹ I had dinner with him two nights before he gave his presidential address in Philadelphia. He knew that he was taking a chance by doing something different, and he hoped that he could bring it off. He did. Even if those he challenged raise valid objections to his position—and I'm not the one to judge this—he raised important questions and started us toward important answers.

A presidential address at a professional association is an odd art form.² Beginners and those completely outside of the group's tradition don't get to be president. Nonetheless, if all you do is celebrate the mainstream, you put the audience to sleep. You must give the speech during a lunch. You compete with dessert and waiters removing plates. You talk after awards and other ceremonies have taken more time than planned. Entertainment may be more appropriate than challenging thought.³ Despite all these hazards, Joel Handler flattered his audience by demanding our attention and offering ideas clearly worth it.

The Law and Society Association's members have long been eclectic, if not eccentric, about how we find or create

¹ Joel and I were colleagues together at Wisconsin for about 20 years. Joel is a member of the University of Wisconsin Law Faculty in Exile, West Coast Branch. This distinguished group, of course, has far too many members for my taste.

² Compare Erving Goffman's (1983:1) comments on presidential addresses at the American Sociological Association: "A sociologist you have selected . . . takes to the center of this vasty Hilton field on a hobby horse of his own choosing. . . . Indeed, one might want to argue that the interesting matter for all of us here (as all of us know) is not what I will come to say, but what you are doing here listening to me say it" (emphasis omitted).

³ See, e.g., Macaulay 1987. This was my attempt to make serious points while getting some laughs. I think I was moderately successful—at least, I got the laughs.

knowledge or whatever we call the stuff that we produce. Some of us talk about hard social science, but our field—when we look closely—offers little of it.⁴ The functioning legal system is hard to study in a precise quantitative fashion. The data seldom are good enough to warrant sophisticated methods. As a result, we have long been open to a wide range of approaches. Most recently, colleagues have confronted us with postmodernism and deconstruction. On one hand, this approach questions whether we can learn much from orthodox social science, Marxist analysis, or just about any other familiar method. On the other hand, it offers deconstruction of texts—and just about anything can be called a text—as its preferred method.

Two events at our Philadelphia meeting suggest that not all of us had converted to the postmodernism faith. As we registered, most of us received copies of “Buzzword Bingo.” It was a six-by-six bingo table. Instead of the typical numbers, the boxes contained buzzwords. Some of the buzzwords represented tradition: We found “probit,” “.05 significant level,” and “sample selection bias.” However, we also found “historicity,” “hegemonic,” “deconstruction,” “narrativity,” “encoded,” “voice,” and, my favorite, “text, context, subtext, context, Aztec (any 2 used together).”⁵ Buzzword Bingo proved a powerful example of informal social control. Speaker after speaker apologized for giving members of the audience another entry on their bingo card. People even tried other terms or explained what they meant by the buzzwords.

Handler’s presidential address at the Association luncheon offered another challenge to postmodernism and deconstruction. What gave the talk real power is that most of those who use these literary approaches are, just as is Handler, critics of modern welfare states and Western industrialized societies. The postmoderns are critics of orthodox Marxist approaches as well. Handler has devoted a long career to studying when ordinary people confront the bureaucracies of the modern welfare state. He has offered an elaborate theory for empowering ordinary people who must cope with these bureaucracies. Moreover, he does not view the injustices that he discovers dispassionately. They sicken and anger him. Anyone who would

⁴ Of course, the accuracy of this sentence turns on what we mean by hard social science. There is much excellent empirical work in our field. Nonetheless, little of it would satisfy some scholars with whom I’ve served on committees. These people tend to like brilliant methods applied to answer trivial questions. They have great faith that little bits of solid knowledge will accumulate and explode in a great breakthrough. Moreover, they have contempt for those whose methods exhibit what they see as the slightest flaw, notwithstanding the importance of the questions they attempt to answer.

⁵ I sent a copy of Buzzword Bingo to Professor Julie Brickley, my sister-in-law, who studies and teaches literature at the University of Wisconsin–Green Bay. She responded: “Once I had deconstructed the problematized hegemony of your text, I understood that you were theoretizing, as well as foregrounding, an empowered and gendered social construction.” She used all the buzzwords in her one-page letter.

accuse Joel Handler of being an apologist for the status quo is a fool or a knave. Thus Handler's criticism comes from one who shares most of the same values as those he criticizes.

Handler began by describing the postmodern deconstructionist approach. This was heavy going for those of us in the audience who had eaten lunch and dessert. I found myself in an odd position in discussions after the talk. On one hand, I felt called on to explain and defend postmodernist approaches. I have admired many articles by those taking these approaches, and I admire many of those writing from this point of view. This work cannot be dismissed out of hand. On the other hand, I've often doubted that I have understood an author because what I can make of some of these articles just leaves me baffled. Often the vocabulary is strange and wonderful. I worry that authors announcing the discovery of a suppressed meaning, produced by deconstruction, might themselves have put the rabbit into the hat.⁶ Assertions appear that do not make sense, considering the way that I have constructed my world. What, for example, do these authors mean when they say that law is *constitutive* but then deny that words have any necessary connection with underlying facts? Just how does law constitute anything apart from the total surrounding culture? Why should we assume that law does anything more than reinforce existing cultural patterns? What do these writers mean when they say that lawmakers have the power to create the world by naming it? Of course, lawmakers can try and sometimes it works. But sometimes it doesn't.⁷ Certainly, the position of African-Americans in our society has changed since World War II. We can wonder about the relative influence of the Brooklyn Dodgers hiring Jackie Robinson and the Supreme Court's decision in *Brown v. Board of Education* (1954). Both labeled segregation as wrong, but which had the most influence? Those of us who have looked at popular legal culture find that ordinary people have both an exaggerated respect for law and a cynical awareness of how to beat the system. They also know many things about law that aren't so. And much of life exists subject to institutions only partially responsive to matters legal. Nonetheless, we must concede that under some circumstances, for some people, law might have the impacts claimed. The Internal Revenue Code,

⁶ The key text here is David Macaulay (1979). I've drawn on this Macaulay (as far as I know, we are not related) in Macaulay 1984:172–73: "Decoding texts may tell us more about the politics and consciousness of the translator than about the materials themselves. One would be a poor lawyer if he or she could not fashion a plausible argument supporting some link between broad cultural assumptions and appellate cases, or, say, between these assumptions and episodes of *Mork and Mindy* . . . , professional sports . . . , or the structure of elite law schools."

⁷ In act 3, scene 1 of Shakespeare's *Henry IV*, Glendower claims to be able to "call spirits from the vasty deep." Hotspur responds: "Why, so can I, or so can any man; But will they come when you do call for them?" I tried to reinterpret Bourdieu's statement "law creates the social world by naming it" in Macaulay 1989:1555 n.46.

for example, has named concepts and made them real for many who must cope with its provisions. In short, while there is overstatement, the postmoderns have a point.

Finally, Handler tests the new approach by asking about its politics. Handler, and most of these writers, all want to focus on those without great power—ordinary and even oppressed people—those who must cope with the welfare state. He asks us to think about the consequences of our work.

All of us who study the functioning legal system benefit when we ask who might or should care about our work. We can seek to amuse ourselves, and the effort may keep a group of academics off the streets and out of the way. Most of us, however, want to think that our work might matter—at least a little bit. Events of the past 20 years have humbled us. The War on Poverty, for example, was lost or abandoned. Moreover, empirical approaches have fallen out of fashion. Many of us have doubts about creating a totally objective and neutral science of law or fashioning apolitical social engineering (see Trubek & Esser 1989). Sarat and Silbey (1988) warn us to reject the pull of the policy audience. We cannot assume, they correctly warn us, that well-meaning lawmakers will correct their mistakes when we point out their errors. While some lawmakers may be saintly, we know that many are seeking to rationalize doing what will serve their interests.

Perhaps we can look at law and society seeking only the best understanding we can get. Maybe it is enough to try to take a good picture of the law in action. But many of us are skeptical about whether we can produce accurate snapshots. Insofar as we can, we worry that the photos will be accurate but misleading. Nonetheless, most of us want to do more than *take* random snapshots. At a minimum, we try to see that those with power do not use our work to harm people. Work done with one intention can be used for very different purposes by those willing to quote us out of context or misrepresent our research. Moreover, our debunking urge can help those who argue that nothing works, reform is futile, and we must be satisfied with things as they are. This, obviously, is not a politically neutral statement.

Handler points to postmodern articles that emphasize the point of view of the powerless. He concedes that we should celebrate moments of individual resistance and even the small victories of lawyers as they work to give some meaning to rights. Handler, however, objects to those who are content with no more. Joel thinks that we must do more. He has offered his own strategy, a theory of public action (see, e.g., Handler 1986). He focuses on situations in which ordinary people face administrative agencies whose officials must make a continuous series of discretionary decisions. He seeks a sharing of power about im-

portant decisions affecting the individual. Ideally, individuals give informed consent and do not succumb to domination by power. Handler argues for procedures that repair relationships and foster cooperation. Local discretion is inevitable, necessary, and desirable. There must be social movement groups that are autonomous and not adversarial. They must use the power offered to them. Perhaps this is utopian; perhaps it can work only in the instances that Handler uses as examples. Yet maybe it isn't so limited.

I've used the title of a Duke Ellington song—"What Am I Here for?"—in several talks (see, e.g., Macaulay 1985) as I wondered why I had been asked to speak. Well, what are we here for? Once we have tenure, why are we still doing research? Who do we expect will read our books and articles? What, if anything, will our readers do when they finish reading them? Can our work limit injustice, even a little? If we hope that it might, what is the process by which it might matter to those with power and make things happen? When Sarat and Silbey (1988), for example, demand that we reject the pull of the policy audience, are they counseling us to write for a handful of right-thinking academics totally lacking political influence? If so, why bother? If this isn't what they are saying (and I doubt that it is), how does the work they advocate affect the world? Do writers such as Trubek and Esser (1989) really advocate making up, fantasizing, or hallucinating facts helpful in advocating the interests of those we would champion?⁸ Is there any meaningful difference between our work and science fiction—other than that science fiction has a lot more influence? Could any report of a regression analysis pack the rhetorical power, or teach us as much, as some of the writing of the Critical Race Theorists such as Pat Williams (1991)? Joel Handler pushed many of us in Philadelphia to debate such things. This publication should keep the arguments going. This is the mark of a highly successful and very important presidential address.

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⁸ They say they don't (see their note 77), and I don't think they do. But many of my students in Sociology of Law last spring had trouble imagining what in Trubek and Esser's (1989) approach would stop scholars from creating a world that pleased them as long as they could sell their vision to others. I was unable to offer an answer that satisfied them. However, it was clear that my students wanted more certainty and hard answers than Trubek and Esser, or I, think are possible.

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