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David Luban

Georgetown University Law Center, luband@law.georgetown.edu

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TIME-MINDEDNESS AND JURISPRUDENCE

(forthcoming, Virginia Law Review)

David Luban^{*}

Gerald Postema offers a gentle but damning critique of contemporary analytic jurisprudence for being anti-social, anti-philosophical, ahistorical, and, ultimately, mistaken not only about the province of jurisprudence but the nature of law. He also offers an elegant restatement of what jurisprudence with a wider ambition must be like; and it is a jurisprudence in which time and history are central.¹

Postema's basic diagnosis is that analytic jurisprudence accepts a peculiarly narrowing premise of Austin's: that the province of jurisprudence – by which Austin meant the subject-matter it studies – is solely the “core concepts of the professional practice of law—concepts of legal right and duty, possession, ownership, liability, fault, person, thing, status, intention, will, motive, legal sources, legislation, precedent, custom and the like.”² Although Hart and his successors in the Anglo-American tradition mostly reject Austin's definition of law as commands backed by threats, and not all are positivists, Postema believes they retain Austin's narrow understanding of the province of jurisprudence. Jurisprudence is the province of legal concepts used in professional practice, which turn out to be well-suited for the tools and intellectual style of analytic philosophy. A broad understanding of law in its social, economic, cultural, religious,

^{*} University Professor in Law and Philosophy, Georgetown University Law Center; Class of 1984 Distinguished Visitor in Ethics, Stockdale Center for Ethical Leadership, United States Naval Academy.

¹ Gerald J. Postema, *Jurisprudence, the Sociable Science*, __ VA. L. REV. __ (2015). Hereinafter: *Jurisprudence*.

² *Id.*, ms. p. 5.

political, and historical dimensions largely vanishes from jurisprudence so conceived.³ Analytic jurisprudence becomes unsociable, not only to the social sciences, but also to the ambition of genuine philosophy, famously defined by Wilfrid Sellars as the endeavor to understand “how things in the broadest sense of the term hang together in the broadest sense of the term.”⁴ Postema goes so far as to call analytic jurisprudence “philosophy-phobic.”⁵ This is an important point, because it makes it clear that Postema’s complaint is not the familiar realist and law-and-society call for replacing jurisprudence with something more scientific – a view that Postema rejects because it “effaces any ambition of a truly critical theoretical perspective on legal practice.”⁶ The realists wanted *less* philosophy in jurisprudence, where Postema wants more.

Postema levels an additional complaint against analytic jurisprudence, directly related to the theme of this conference. Analytical jurisprudence largely ignores the history of law, and also the history of jurisprudence – two different, if related, points. Its most distinctive intellectual style consists of drawing distinctions, formulating precisely-worded principles, and testing them against linguistic and moral intuitions; but Postema objects that “[p]hilosophy that proceeds primarily by plumbing and pumping intuitions is

³ This complaint is reminiscent of Felix Cohen’s, in *Transcendental Nonsense and the Functional Approach*, 35 COLUMB. L. REV. 809 (1935), which begins by mocking the “heaven of legal concepts,” where “one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life.” *Id.* at 809. Cohen adds: “The boundless opportunities of this heaven of legal concepts were open to all properly qualified jurists, provided only that they drank the Lethean draught which induced forgetfulness of terrestrial human affairs. But for the most accomplished jurists the Lethean draught was entirely superfluous. They had nothing to forget.” *Id.* It is important to see that Postema’s complaint differs importantly from the realist critique of legal concepts as “transcendental nonsense.” The realists were reductionists who wanted to analyze legal propositions functionally, as obliquely-phrased predictions of judicial behavior. Postema is anti-reductionist.

⁴ Wilfrid Sellars, *Philosophy and the Scientific Image of Man*, in SCIENCE, PERCEPTION, AND REALITY 1 (1963).

⁵ Postema, *Jurisprudence*, at ms p. 9.

⁶ *Id.* at 27. See note 3, *supra*.

inevitably and uncritically in thrall to the present.”⁷ More specifically, Postema accuses analytic jurisprudence of confining its attention to time-slice legal systems, that is, legal systems as they exist at a given moment of time, and he argues that this ahistorical procedure “can offer very little illumination of law and legal practice.”⁸

Postema offers two general programmatic suggestions for jurisprudence besides greater historical consciousness: sociability and synechism. Sociability, as suggested above, has two dimensions. First, it means interdisciplinarity – a continual dialogue with the study of legal phenomena by the sciences, humanities, and even theology. Second, it means embedding jurisprudence in general philosophy, which in Sellars’s words encompasses “not only ‘cabbages and kings’, but numbers and duties, possibilities and finger snaps, aesthetic experience and death.”⁹

Synechism is a less familiar idea, drawn from the philosophy of C. S. Peirce. It is the commitment to seek continuity among phenomena. Continuity-seeking may sound like another version of sociability, but as I understand it, synechism is a much more specific and theory-laden requirement. Peirce was metaphysically committed to the existence of actual continua everywhere in nature, history, and human psychology. So synechism will impose a certain demand on all systematic studies, namely discerning those continua. In particular, synechism commits us to a certain kind of historiography: the historian’s job is to unearth continuities between past and present rather than studying ruptures. This, it seems to me, is a contestable commitment that rules out a great deal of important historical work.

⁷ Postema, *Jurisprudence*, ms p. 20.

⁸ *Id.* at 17, n. 48.

⁹ Sellars, *supra* note 4, at 1.

Furthermore, Peirce understood synechism to imply that ideas are intrinsically temporal and historical phenomena. Although Postema does not endorse this general thesis, he does argue for a special case of it, namely that law is “intrinsically temporal.”¹⁰ This conclusion is central to his argument against the possibility of time-slice legal systems. It too is contestable; but, I shall suggest, Postema can reach his conclusion on grounds other than synechism, and I agree with him about law’s intrinsic temporality.

Before discussing law’s temporality and synechism, I offer two more general remarks about Postema’s complaints against analytic jurisprudence.

Unsociability and Analytic Philosophy

The complaint about unsociability rings true. It is apparent in the daily life of law schools, which by and large are sociable places. Legal scholars tackle subjects from a variety of disciplines, and in my own experience they are open to, and even enthusiastic about, good scholarship from other disciplines. Sometimes they don’t fully understand it – to take an obvious example, nobody without advanced training in mathematics can read the technical appendix to a law and economics paper. Sometimes, they lack the background to be critical. And sometimes they cannibalize work from other disciplines into their own in an amateurish way, which carries significant costs when the amateur version oversimplifies and then goes viral in other people’s scholarship. But these are minor complaints compared with the major virtue of sociability that Postema rightly emphasizes. It is on display every week in the faculty workshop.

But then comes the analytic jurisprudence colleague’s turn at the faculty workshop, and, for better or for worse, nobody outside the discipline can figure out what the lessons learned might be or why anyone except another analytic jurist should

¹⁰ Postema, *Jurisprudence*, at 16.

care. When the philosopher explains that she is offering an “account” of the concept under analysis that significantly improves over Professor A’s account and Professor B’s account, it only makes things worse, because nobody knows what an “account” is supposed to be or why having one is desirable.

Arguably, this problem originated in the classical project of analytic philosophy, which from Frege and Russell on was showing how concepts in the special sciences or everyday life could be analyzed as logical constructs of terms within some favored base vocabulary. Can all mathematical objects be defined in terms of sets? Can all observation statements be rewritten (at least in principle) as complex concatenations of sense data? As the name itself suggests, analytic philosophy was supposed to generate analytic truths connecting conceptual targets with a base vocabulary possessing unimpeachable credentials. An analysis of this sort is, more or less, what classical analytic philosophers meant by an “account” of a concept (though they were more likely to use the word “analysis” than “account”), and the purpose of an account is to help us weed out sense from nonsense by recasting arguments in a regimented language where fallacies and equivocations are obvious. But to legal scholars to whom keeping an ontologically kosher kitchen does not matter, the enterprise of devising accounts of concept X in terms of concept Y has no point unless concept Y is convenient to work with, and, furthermore, that translating X-talk into Y-talk can be done effortlessly in practice, rather than merely demonstrated in principle.

By the mid-1950s, Quine, Sellars, and Wittgenstein had demolished key premises about language and knowledge that motivated the classical analytic project; in this sense, at any rate, the classical project died young, and philosophy went post-analytic six

decades ago.¹¹ But the enterprise of analyzing obscure concepts in terms of concepts supposedly less obscure, along with a style of argument based on precise definitions, fine-grained distinctions, thought-experiments, and suspicion of big unscientific ideas continues to dominate. The aim is to promote clear thinking; but to outsiders, the enterprise can seem more like an obstacle than an aid, the intellectual equivalent of red tape that keeps you from doing business because the Bureau of Warranted Concepts won't issue a permit.

There is an additional and nationally specific reason for the insularity of analytic jurisprudence within U.S. law schools: the prevailing Englishness of a discipline whose writings often seem like planets orbiting a foreign sun named H. L. A. Hart. This is in no way to denigrate the importance and excellence of *The Concept of Law*, or to suggest that it is unworthy of the vast intelligence analytic jurists have expended on it and its theoretical competitors. The problem is simply that Hart's book doesn't touch, to any noticeable degree, the theoretical debates growing out of the specifically American legal experience. Most U.S. legal academics came to their prevailing positivism via another route – a crooked path that runs from legal realism and pragmatism through today's textualism (notwithstanding that textualism and realism disagree about nearly everything except the positivist proposition that there is no law but positive law).¹² Natural law in U.S. legal discourse comes cloaked in the positive-law guise of the U.S. Constitution,

¹¹ W.V.O. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV. 20 (1951), attacked the distinction between analytic and synthetic truths and the reduction of empirical knowledge to logical constructs of immediate experiences. Wilfrid Sellars, *Empiricism and the Philosophy of Mind*, in SCIENCE, PERCEPTION, AND REALITY, supra note 4, further undermined reductionism, and LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953) broadly attacked the representational view of language underlying the classical project.

¹² Postema's comprehensive study of twentieth-century Anglophone jurisprudence concurs: he divides it into two mostly non-intersecting tracks, one deriving from Hart and the other from Holmes. GERALD J. POSTEMA, LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD (2011). On the "Holmesian" track, see especially chapters 2 and 3.

taken as a totem for veneration, not in the guise of “morality.” And whatever residual anti-positivism we find in the mainstream U.S. legal academy likely derives from the legal process theory of the other Hart (Henry not Herbert), from pragmatism of the sort favored by Richard Posner, or even from law and economics, none of which resembles the traditional natural law that was H. L. A. Hart’s target.¹³ In *American Jurisprudence Through English Eyes*, Hart himself seemed to recognize that U.S. legal theory responds to different problems (namely, problems about the judicial role) than his concerns about the rule of recognition, officialdom, and the separation of law and morality.¹⁴ More specifically, U.S. legal theory centers on problems of judicial role in the divided government of an administrative federal state. Indirectly, these are problems growing from the U.S. experiences of race and capitalism – for race and regulation are the contexts in which judicial activism became a public political issue. Tellingly, Ronald Dworkin is the only contemporary analytic jurist with whom U.S. legal scholars outside the discipline regularly engage. Dworkin’s jurisprudence is judge-and-Court-centered,¹⁵ and his topical essays tackle distinctively U.S. debates over liberty versus equality, free speech, and religion.¹⁶ He is, if anything, further proof that our legal solar

¹³ See, e.g., Posner’s dissenting opinion in *U.S. v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1996) (Posner J. dissenting), describing “the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments ... and the natural lawyer’s or legal pragmatist’s view that the practice of interpretation and the general terms of the Constitution (such as ‘equal protection of the laws’) authorize judges to enrich positive law with the moral values and practical concerns of civilized society.” The legal pragmatist, of course, is Posner himself – see Richard A. Posner, *Pragmatic Adjudication*, 18 *Cardozo L. Rev.* 1 (1996). The version of natural law Posner has in mind is probably Dworkin’s version. See Ronald A. Dworkin, “*Natural Law*” *Revisited*, 34 *Fla. L. Rev.* 165 (1982).

¹⁴ H. L. A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 *Ga. L. Rev.* 969 (1977).

¹⁵ For Dworkin, legal philosophy is “the general part of adjudication, silent prologue to any decision at law.” Ronald Dworkin, *Law’s Empire* 90 (1986).

¹⁶ However, as Postema notes, Dworkin too “seems to share the amnesia of the history of the discipline characteristic of the Hart-sources stream.” Private communication, Dec. 11, 2014 (on file with the Virginia Law Review).

system revolves around native suns, and it is closely keyed to the various revolutions in U.S. history rather than the problems Hart investigated.

Must Philosophy Be Comprehensive?

Notwithstanding my complaints about conceptual analysis, I think an analytic jurisprudent might reasonably reject Postema's requirement on what the subject must look like. Postema writes that "seeking comprehensive explanations is the ambition of philosophical jurisprudence."¹⁷ What if an analytic philosopher denies that "comprehensive explanations" must be the ambition? What if that philosopher prefers to work on discrete bounded problems, for example causation in tort or the theory of criminal defenses? That choice seems like a matter of temperament, not a matter of right and wrong ways to study the law. The same difference in temperament crops up across fields of study. It clearly crops up in history, where a first-rate historian might devote years to a single decade of the English civil war without ever aspiring to the grand synthesis of a Bloch or a Braudel. As another example, a much-discussed essay by the mathematician Timothy Gowers warns that within pure mathematics the gulf between problem solvers and theory builders has become a two-cultures divide as dangerous (for mathematicians) as C. P. Snow's divide between the cultures of science and letters.¹⁸ Gowers observes that contemporary mathematics tilts toward theory building and the sub-specialties that lend themselves to theory building; in the face of this trend, he defends the dignity of problem solving and the worth of the mathematical specialties that problem solvers favor. Gowers insists that the insights that go into tackling a

¹⁷ Postema, *Jurisprudence*, ms. p. 19. Again: "Philosophical jurisprudence, first, seeks fundamental *comprehensive explanations* that propose to understand phenomena of law as an integral aspect of human social life and human experience." Id. at 24.

¹⁸ W. T. Gowers, *The Two Cultures of Mathematics*, in *MATHEMATICS: FRONTIERS AND PERSPECTIVES* 65 (V. I. Arnold, Michael Atiyah, Peter D. Lax, and Barry Mazur eds., 2000), available at <https://www.dpmms.cam.ac.uk/~wtg10/2cultures.pdf> (accessed Sept. 6, 2014).

problem are no less capable of changing the way mathematicians think than a grand theorem uniting two areas of mathematics.¹⁹

My point is not to equate analytic jurisprudence with problem solving rather than theory building. Many analytic philosophers, in law and elsewhere, build systematic theories, some of which are vast in scope. My point is rather to echo Gowers's caution against thinking there is something second-rate about analytic problem solving.

Melody

Postema's argument about law and history is based on an argument about law and time, according to which law is "intrinsically temporal"²⁰ in the way that melody is. In one sense, of course, everything earthly is intrinsically temporal; but Postema is pointing to the special sense in which a melody stopped in time would no longer be a melody at all.²¹ I would put it this way: One of the defining elements of melody is its rhythm, which is a temporal succession of notes and rests of defined relative duration. Take away time and rhythm disappears; the notes collapse into a chord. A time-slice of a melody is in this sense a contradiction in terms, because once you make the time-slice, what you have bears no resemblance to melody.

It is not obvious that law is like this. A rule of contract law – for example, the mailbox rule – does not on the face of it share the property that its components succeed each other in time. If you begin to play a melody at 3 p.m. and ask what it sounds like 3.4 seconds later, the answer will be either a tone or a rest, C# or silence. If you ask what the mailbox rule is at 3.4 seconds past 3 p.m., the answer is that it is the mailbox rule.

¹⁹ Id. at 6-8 (of the on-line version). Gowers's example is a proof by the legendary problem solver Paul Erdős, who with great ingenuity showed how to introduce probabilistic arguments in unexpected ways into new fields of mathematics. Id. at 6. On Erdős, see PAUL HOFFMAN, *THE MAN WHO KNEW ONLY NUMBERS: THE STORY OF PAUL ERDÖS AND THE SEARCH FOR MATHEMATICAL TRUTH* (1999).

²⁰ Postema, *Jurisprudence*, at 16.

²¹ In Postema's words, time is an existence condition of everything, but it is of the essence of melody. Id. at 15.

Indeed, laws can seem *less* temporal than extra-legal human affairs. A statute comes into force abruptly at a specified time and date, and remains in force in the same form until it is amended, repealed, replaced, or rejected as unconstitutional. We can search official records to find out what the original version of the statute said, exactly when it was amended, exactly when the amended version was next amended, and so on. The data base will say something like “2006—Subsec. (c)(3). Pub. L. 109-366, §6(b)(1)(A), added par. (3) and struck out former par. (3) which reads as follows: ...”²² Black letter law seems chopped into discrete temporal bits. They succeed each other, but each bit remains constant until the next bit comes along. If human affairs may be represented as a system in continual motion, like the Earth’s winds, black letter law seems more like stop-frame animation or even like beads on a string. This difference raises the question of what Postema has in mind by his analogy of law with melody.

In an earlier paper on which he draws, Postema elaborates the metaphor. “Music, melody in particular, is an *ordering of time*.”²³ To hear a melody as melody is to hear its parts in relation to a temporally extended whole, and this awareness itself takes place in time (and not, Postema explains, “from some point outside the temporal process”²⁴). It involves the listener projecting what she has just heard into what is to come—and, if the melody takes an unexpected twist, re-integrating what has already been heard into a different totality. Listening to music is, in this sense, holistic. Postema next argues that individual intentions, which he understands as partial and indeterminate plans, share this

²² I have chosen, more or less randomly, the note to 18 U.S.C. §2441, the federal war crimes statute.

²³ Gerald J. Postema, *Melody and Law’s Mindfulness of Time*, 17 *RATIO JURIS* 203, 207 (2004)[hereinafter: *Melody*]. Cf. Stravinsky’s dictum, “Music is the best means we have of digesting time.” IGOR STRAVINSKY & ROBERT CRAFT, *RETROSPECTIVES AND CONCLUSIONS* 149 (1969).

²⁴ Postema, *Melody*, at 208. These two standpoints correspond roughly with what philosophers of time call the “A-series” (past, present, future), which is indexed to some temporal being’s *now*, and the “B-series” (September 18, September 19, September 20), which orders events temporally without indexing them to a privileged *now*. Postema’s point is that human awareness of time is ineluctably A-series awareness.

same holistic mindfulness of time: plans project both forward and backward into time.²⁵ And so does law, understood as a method of normatively guiding social interaction.²⁶ Normativity requires both citizens and officials to incorporate law into intentions and plans, and as we have just seen, these require coherence over time. Thus, Postema concludes, “the normative coherence of momentary legal systems is derivative, depending entirely on their coherence over time.”²⁷ He therefore rejects the beads-on-a-string view of law, or, as he puts it, the view that “the identity of a legal system over time is a function of identity-maintaining links among momentary segments of the legal system.”²⁸ Momentary segments taken by themselves have no normative authority – a powerful argument, in my opinion.

Although Postema is talking about entire legal systems, a similar argument might be made about individual rules. Returning to my example of black letter law, notice that even written statutes and constitutional provisions are continually being interpreted by both citizens and officials, and therefore the beads on a string are not quite as internally changeless as the model suggests. Consider, for example, the Equal Protection Clause (EPC) of the U.S. Constitution. Under its original meaning, it was a guarantee that government would protect everyone, not solely white people, against illegal violence, private or public.²⁹ After *U.S. v. Cruikshank*, the EPC protected only against state action,

²⁵ Id. Here he adopts the analysis of intention offered by Bratman, citing MICHAEL BRATMAN, *FACES OF INTENTION* (1999). Postema wrote the paper I am discussing before the publication of Shapiro’s *Legality*, which also understands law in terms of Bratman’s linkage of intentions and plans, although Shapiro does not emphasize law’s temporality. SCOTT J. SHAPIRO, *LEGALITY* (2013).

²⁶ Postema, *Melody*, at 223.

²⁷ Id.

²⁸ Id., at 221.

²⁹ JACOBUS TEN BROEK, *EQUAL UNDER LAW* 116-34 (1965).

not private action, although nothing in its wording had changed.³⁰ In *Brown v. Board of Education*, the Supreme Court found that the EPC forbids race segregation in public schools; half a century later, the Court found that the EPC forbids race *desegregation* in public schools.³¹ The language of the EPC remains constant but its interpretation does not, and the normative guidance that the EPC offers is in flux.

Postema generalizes this point beyond judicial interpretation when he claims that law is recursive, meaning that how citizens and officials understand law's directives – call this their “uptake” – shapes legal rules themselves.³² It is easy to misunderstand his point. Postema does not mean that current understandings of the law will influence future rule changes and interpretations. That is true but trivial. He means something bigger: that citizen and official uptake determine what the rules are now. On his view there is no Archimedean point like original intent or meaning that fixes the rules.³³ That is because law is a recursive normative practice.

Postema seems to adhere to a “meaning as use” theory of legal linguistic meaning, in which the normative practice of the relevant community determines the semantics of legal rules. As Robert Brandom, the leading contemporary exponent of this view of language, puts it, “the process of *applying* concepts in judgment, and their rational integration with one another ... [is also] the process of *determining* the content of those concepts.”³⁴ Brandom explicitly models his view of language on judicial decision-making according to precedent, in which “the judge is extracting material inferential consequences from [prior adjudicators’]

³⁰ “The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another.” U.S. v. Cruikshank, 92 U.S. 542, 554 (1876).

³¹ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 747 (2007)(basing the rejection of race-conscious remedies on *Brown*).

³² Postema, *Jurisprudence*, ms. at 16-17.

³³ Postema, *Melody*, at 218 (rejecting originalism).

³⁴ ROBERT B. BRANDOM, *REASON IN PHILOSOPHY* 84 (2009)(emphases in original).

commitments ..., but ... *also ... developing and determining* the conceptual contents ... that in turn constrain the process going forward.”³⁵

This pragmatist and Hegelian view of linguistic meaning is by no means uncontroversial. It offers itself as a rival to mainstream theories holding that the meaning of a sentence is given by the conditions under which it is true. Brandom and Quine argue that the mainstream theories err by modeling natural language on formal languages. In the latter, symbols are assigned meaning in advance of their use in theory-building and belief-formation, and only by stipulating concepts in advance are we able to state truth conditions. In natural language, by contrast, we fix meaning *in medias res* by using concepts in making claims and drawing inferences.³⁶ Language and belief arise together with no in-principle demarcation between change in language and change in belief, and they evolve together in a process that – as Postema argues – is essentially historical and time-minded. Contestable as this theory of meaning may be, I agree with it, and I believe it is implicit in Postema’s arguments and conclusions.

Synechism

I am less confident about synechism, “a methodological inclination favoring explanations that focus on continuities.”³⁷ As mentioned above, the term originates in the writing of Peirce, who defined it as “the tendency to regard everything as continuous.”³⁸ Peirce believed that all ideas have fuzzy edges, that is, real continuities with their neighbors

³⁵ Id., at 85 (emphases in original).

³⁶ Id., at 83.

³⁷ Postema, *Jurisprudence*, ms. at 22.

³⁸ C. S. Peirce, *Immortality in the Light of Synechism* [hereinafter: *Immortality*], in 2 *The Essential Peirce: Selected Philosophical Writings (1893-1913)* 1 (Nathan Houser & Christian Kloesel eds. 1998). Peirce did not restrict synechism to a single domain: “Surely no reader will suppose that this principle is intended to apply only to some phenomena and not to others – only, for instance, to the little province of matter and not to the rest of the great empire of ideas.” Id. at 2.

that, by definition, are different ideas.³⁹ In his philosophy of mathematics, Peirce believed in the existence of actual infinitesimals and maintained that reasoning with infinitesimals is mathematically preferable to reasoning with limits (a view that few contemporary mathematicians share).⁴⁰ That allowed him to conclude that the sum of the angles of a triangle is not 180° “but only that it equals that quantity plus or minus some quantity which is excessively small for all the triangles we can measure.”⁴¹ Similarly, rather than saying that space has three dimensions, we should say only that any movements out of three dimensions are excessively small.⁴² Proceeding from these mathematical speculations, Peirce next argued that the boundary between a red surface and an adjacent blue surface is infinitesimal in width and is half red and half blue; analogously, “what is present to the mind at any ordinary instant, is what is present during a moment in which that instant occurs. Thus, the present is half past and half to come.”⁴³ Finally, “[t]hat ideas can nowise be connected without continuity is sufficiently evident to one who reflects upon the matter.”⁴⁴

These final two propositions – that the present is half past and half to come and that ideas cannot be connected without continuity – are the ones Postema endorses. I don’t attribute the rest of Peirce’s metaphysical baggage to Postema, for he explicitly distances himself from it.⁴⁵ For my part, I find it too much to swallow, at once confusing and confused.⁴⁶ The existence of actual infinitesimals seems like a conjecture that can neither be

³⁹ See generally C. S. Peirce, *The Law of Mind*, in 1 *The Essential Peirce: Selected Philosophical Writings (1867-1893)* 312 (Nathan Houser & Christian Kloesel eds. 1992).

⁴⁰ *Id.* at 322. A handful of mathematicians, beginning with Abraham Robinson, developed systems using infinitesimals, but the approach has not caught on. ABRAHAM ROBINSON, *NON-STANDARD ANALYSIS* (1966).

⁴¹ Peirce, *Immortality*, *supra* note 33, at 2.

⁴² *Id.*

⁴³ Peirce, *The Law of the Mind*, *supra* note 34, at 322.

⁴⁴ *Id.*, at 327.

⁴⁵ Postema, *Jurisprudence*, at 23 n. 62.

⁴⁶ For example, Peirce seems to ignore that we can *prove* that the angles of a triangle sum to 180° . Perhaps this is because Peirce denigrates deductive proof as “the lowest form of psychological manifestation” – but that

verified nor falsified; as Peirce understands them, after all, infinitesimals are by definition too small to detect!

Furthermore, they aren't as much help to the historian or philosopher as Peirce seemed to suppose. Consider once again Peirce's example of a red surface adjacent to a blue surface. Peirce finds continuity between them, mediated through their infinitesimally narrow boundary. Couldn't we equally well conclude that they are a perfect example of a sharp break? An infinitesimally small band of continuity is, for all practical purposes, a line of discontinuity.

My biggest problem is that synechism needlessly takes sides in a historiographical controversy. Some historians emphasize continuities between eras that seem quite different, for example the middle ages and the early modern age. Others emphasize rupture and discontinuity. For example, Thomas Kuhn's historiography of science contrasts periods of normal science with relatively abrupt paradigm changes – the discontinuities.⁴⁷ Michel Foucault describes an “archaeological” style of history that has as its consequence that “the notion of discontinuity assumes a major role in the historical disciplines.”⁴⁸ Foucault rightly dates this turn toward discontinuity back to Marx.⁴⁹ It may go back further – it was Hegel who first emphasized that gradual changes in quantity can pass a threshold into changes of quality.⁵⁰ Where synechism emphasizes the gradual quantitative changes, Hegel would respond that this overlooks the qualitative breaks.

Postema advocates synechism solely as a corrective to the “separatist” orientation

is because he wrongly conflates deducing *B* from *A* with the idea of *A* causing the idea of *B* in one's mind, which Peirce likens to a reflex, similar to the way a frog's severed leg responds to a pinch. Id.

⁴⁷ THOMAS S KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS: 50TH ANNIVERSARY EDITION* (2012).

⁴⁸ MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 8 (A. M. Sheridan Smith trans., 1972).

⁴⁹ Id. at 11-12.

⁵⁰ 1 GEORG WILHELM FRIEDRICH HEGEL, *SCIENCE OF LOGIC* 389 (W. H. Johnston & L. G. Struthers trans., 1929).

of jurisprudence he is criticizing, not as a critique of the historiography of discontinuity.⁵¹ Rightly so: it is a mistake to identify a historiography of discontinuity with separatism. Whatever else Kuhn, Foucault, and Marx are, they are not philosophy-phobic analysts of professional concepts. Nevertheless, Postema also adds that “the initial tentative response to encountering new phenomena should be synechist, which, however, can be silenced in the face of strong evidence of genuine discontinuity.”⁵² Here, it seems, he does take sides in the historiographical debate.

My example of the red and blue regions suggests that synechism need not be a choice as substantive as Postema and Peirce suggest. Indeed, we can see this in Postema’s earlier paper where he introduced the melody metaphor. Describing how agents integrate intentions into plans, Postema writes:

The intention-plan need not be (and typically should not be) rigidly fixed. Present circumstances may force her to adjust, or even abandon, the plan. ... It may also force adjustment if past actions were ill-considered or ineptly executed and so may fail to fit with the agent’s original sense of her plan. When it comes to intentional action, we might say, continuity with the past is not a duty, but it is a necessity.⁵³

Postema is right that plans may be abandoned as well as pursued, but he seems to regard abandonment as “continuity with the past.” On this view continuity includes not only persisting in a course of action, but also abandoning it, or backtracking and starting over. Ordinarily, we might think of these as cases of discontinuity, not continuity. Abandoning a plan is continuous with the plan only in the minimum sense of temporal succession. I

⁵¹ Postema, *Jurisprudence*, at 23 n. 62.

⁵² *Id.*

⁵³ Postema, *Melody*, at 210.

don't deny that this is a coherent sense of continuity: in mathematics, a hockey-stick-shaped function with a kink in it is continuous even at the inflection point (the kink). But at the inflection point the function goes off in a different direction, and that matters. To emphasize the function's continuity is not false, but it is not sufficient. It is certainly not sufficient in legal history. Suppose, for example, we accept Maine's famous thesis of a shift from status to contract within the law. A synechist might show that the change was gradual, and that even in the age of status there were always elements of contract and vice-versa. No doubt these are important corrections to the record – but they don't bear on whether, when the smoke clears, status-based law has changed qualitatively to contract-based law. Synechism tells only half the story.

Conclusion

Let me conclude by recapitulating my main points. Overall, I agree with Postema's critique of contemporary Anglophone jurisprudence, and I greatly admire the elegance of his argument. Postema's melody metaphor makes the most sense, I have suggested, as a thesis about conceptual change associated with a "meaning as use" theory of language. This seems to me a more secure and defensible anchor for his argument than Peirce's metaphysical speculations about infinitesimals and the "law of mind." As for the plea for synechism in the form of continuity-based explanations of legal phenomena, I think it is innocuous but nearly empty if "continuity" includes major qualitative changes like sharp kinks in history. If it means something stronger, I fear it imposes an unjustifiable constraint on how we write and understand history.