Critical Legal Thought: An American-German Debate

Sonderdruck
(nicht im Buchhandel erhältlich)
A Rotation in Contemporary Legal Scholarship

Cambridge: Mass.
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tendencies and remains unshaken by recent "critical" efforts. My sense is that situating North American legal scholarship in an explicit set of fantasies about ideas and politics will uncover a great deal more common ground across the Atlantic than our conventional images of one another contemplate.

I develop my picture of contemporary legal scholarship in two broad strokes. In the first section, I focus on the relationship between legal scholarship and the traditions of theory, philosophy, and the human sciences, arguing that the interdisciplinary work of contemporary legal scholarship expresses legal culture's uneasiness about intellec tion. In the second section, I focus on the relationship between legal scholarship and political engagement, arguing that the programmatic or exhortatory tone, structure and context of contemporary legal scholarship expresses legal culture's uneasiness about what it thinks of as "politics".

My picture, then, is of a legal academy defined by two broad anxieties. What, we wonder, is our relationship to thought and action? The North American legal scholar seems simultaneously preoccupied with and mistrustful of both thinking and doing. In this essay, I argue that recent changes in North American legal scholarship represent rotations in the legal academic's experience of this problematic, with differences among various scholarly strands marked by contrasting responses to this double uneasiness. In particular, the recent development of critical scholarship on both the left ("CLS") and right ("law and economics") in the United States might be understood as an accomodation of this common difficulty. This suggests a continuity in contemporary legal scholarship stronger than academics of these strands generally assert.

I am particularly concerned with two broad transitions in legal scholarship over the last fifteen years or so: first the development of a harsh challenge to "traditional" or "mainstream" scholarship represented by the self-conscious "schools" of legal scholarship now known as "law and economics" and "critical legal studies" or "CLS". These schools proclaim both their distinctiveness and their critical ambitions more assertively than do the various strands of the mainstream to which they respond, whether these be known by some moniker ("legal process", "law and society", "law and literature", etc.) or simply as "legal scholarship". Legal scholarship which breaks with the mainstream, whether of the right, left or center, marks its departure in part by shifting interdisciplinary associations (importing theories of interpretation, moral philosophy, economics or post-structuralist criticism to legal scholarship) and in part by altering their political program.

Second, I am interested in the developments within left, and, to lesser extent, right and "mainstream" scholarship which have occurred as these challenges matured and began taking account of one another. Both CLS and law and economics - like the mainstream "law and literature" movement - have experienced second or third generation struggles and transitions since first breaking loose from the mainstream. Although the scholarship of each school developed in part through substantive discussions of particular doctrinal or methodological or institutional issues, these struggles were also importantly marked by alterations in participating legal scholars' accommodative strategies to the common anxieties about thinking and doing, by shifts in interdisciplinary strategies and tonal polemics.

In this essay, I have focused most intensely on the development of "CLS" scholarship, in part because I am most familiar with that history and in part because the Bremen Conference was primarily interesting as an exchange between legal scholars of the "left". In looking at left legal scholarship, I am most interested in the relationship between work produced during the first wave of the CLS movement during the 1970s and work produced more recently, in part by an academic generation which studied under both mainstream and CLS scholars, a generation which sees its work as a response to both and often writes in the argot of "post-modernism", "post-structuralism", or "feminism". This transition, like the initiating break with the mainstream, has been marked by a shift in both interdisciplinary associations and political style.

I should say a word about my use of the word "mainstream". In terming "CLS" "left" or "law and economics" "right", I have simply adopted the self-proclaimed positions of scholars producing work in each school. Although these characterisations might well be challenged - and indeed the politics of "left" and "right" scholarship could bear closer scrutiny - they would likely be accepted by those most closely identified with each school. In any case, I feel comfortable dropping the quotation marks.

The term "mainstream" is an entirely different matter. For one thing, mainstreamers' uneasiness about their relationship to intellec tion and politics expresses itself as a distaste for labels of any but the most benign descriptive and depoliticized sort - referring vaguely to method ("law and literature") or doctrinal orientation ("legal process"). They like to reserve political labels like "right" or "left" for private convictions and would resist both applying political labels to legal scholarship and appropriating labels they feel proud to acknowledge outside the context of their scholarly work. Most importantly, moreover, mainstream scholarship is in many ways more diverse than either of the schools which respond to it. Indeed, it constitutes
A Position in Comparative Legal Scholarship

I. Legal Scholarship and the World of Ideas

II. Academic Compact and the World of Ideas

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knowledge of law and life - in their endless respect for the differences between public and private, objective and subjective, substance and process, interpretation and application, law and facts, legislative and judicial, etc.

In this section, I pursue the traces of this double uneasiness through the scholarly work of the mainstream and the development of a left response. Doing so requires that we recall the stability of mainstream liberalism in legal scholarship - heir to the legal realism of the nineteen twenties and thirties - in both its more complacent fifties and critical sixties manifestations.

1. Mainstream eclecticism

Few in the legal academy would dispute that legal theory has become more sophisticated and the methods of legal scholarship more eclectic since the interwar era of "legal realism". Realism set in motion changes which have defined the post-war generation of legal mainstream academics and which have highlighted the relationships between law and other disciplines. One striking manifestation of this development is that one can hardly peruse a law journal without encountering references to what once seemed the obscure texts of divergent disciplines, for interdisciplinary nourishment has become a staple part of the post-realist mainstream.

Most agree that the realists left legal scholarship in a real quandary. One way to think about realism's legacy for North American legal scholarship is to focus on two scholarly inquiries which have seemed, since realism, increasingly difficult to pursue. First, what makes law special, independent, autonomous? Second, what gives law its force, or bite, or connection to social life? The realists, by demonstrating the mutual implication of law and political or social life, made it more difficult to account for law's autonomy. At the same time, their insights into the extremely flexible relationship between given legal propositions and particular social relations made it more difficult to explain law's normative bite. Thinking about realism in this way, as a simultaneous challenge to the independence and force of law, illuminates the post-realist's difficult relationship to the worlds of both thought and power. In short, the mainstream legal scholar repeats in his uneasy relationship to both other disciplines and to politics his anxiety about the independence and authority of law - and the legal academic.

As the realists' insights have been developed over the past decades, becoming ever more culturally pervasive, legal theory and doctrine have come to seem weaker and less persuasive. Doctrinal argument seems increasingly complex and ever less able to determine outcomes. The normative moorings of the most basic doctrinal discourse by lawyers, scholars and judges seem inform. Legal principles, rules and policy arguments seem to dissolve far too easily into thin disguises for assertions of interest. The more diverse the sphere of an argument's application, the thinner it seems to become until its manipulability becomes more apparent than its persuasive clout. The result has been ever more polarized arguments, ever more sophisticated doctrinal diversity, and ever more narrowly applicable holdings.

At the same time, legal theory seems both bogged down in controversy and increasingly irrelevant to the work of legal practice. Descriptions and analyses of doctrinal developments have been unable to explain the unstructured and diverse nature of contemporary law without either abandoning the idea of a normative law or limiting the ambit of normative claims to a few fairly narrow cases. Theoreticians have been unable to describe what goes on in post-realist legal culture without choosing between a defense of law's normative claims which abandons a great deal of the field occupied by lawyers to politics and a defense of law's scope which abandons claims about its special normative status.

Bluntly put, after realism, there was no generally accepted sense in the American legal academy about what makes law distinctive and how law can be stably linked to social behavior. But these remained the questions. Far from becoming discouraged, legal scholars seemed to become obsessed with figuring out what law is and what gives law normative stability. And there were nearly as many answers as there were legal scholars.

Moreover, faced with the growing fragmentation of legal theory and doctrine, lawyers scavenged in foreign disciplines, rushing to the bookstore to shore up their own edifice. This has worked in a couple of different ways, in part depending upon the question which seemed most pressing. Sometimes, particularly when focusing on the question of law's stable bite, disciplines such as sociology, history, political science and economics have been used to provide a structured (even a legally structured) base for or alternative to the increasing fragmentation of the law. This approach makes it difficult to explain law's distinctiveness. Typically, the scholar tries to account for law's identity by claiming that the things legal people do are, or are structured by, or contribute to, a legal process - for even if everything is political, it is not, after all, just politics. This very practical, practice oriented approach, threatens to be very uncritical. In an extreme form, it tends towards the tautological - law, however like everything else it seems, is the realm of the legal.

On the other hand, particularly when the issue of law's autonomy seemed most pressing, mainstream scholars have relied on disciplines such
Despite these challenges, all level courts clearly recognize the importance of a clear, rational, and comprehensive statement of the issues. This is especially true in the context of professional responsibility, where the determination of the outcome often hinges on a careful analysis of the facts and the application of legal principles. The courts have consistently emphasized the need for a thorough and well-reasoned approach to the resolution of these cases, and have supported the use of clear and concise language in legal writing.
disintegrating insights - in their distinctive management of interdisciplinary roaming.

Let me pause for a moment on this notion of management, for it seems the secret of much contemporary legal work. My sense is of a scholarly community, perhaps an industry, sustained not by a shared sense of problems to be addressed or criteria for evaluating resolution, but rather by a collective practice of shrewd equivocation, by which every attempt at problem definition or resolution is transformed into a process, perhaps an institution, of evocation, deferral and repetition. Interdisciplinary roaming seems but one example of this practice, an example which institutionalizes the legal academic's unsettled sensibility about ideas.

A typical post-realist work of legal scholarship might refer the reader seeking authority and resolution for thorny problems to the worlds of practice (known by sociology), judicial decision (known by literary interpretation and linguistics), legislative fiat (known by political science), moral judgment (known by philosophy), business practice (known by empirical study) or market efficiency (known by economics). The key to such referrals is their solidity. The realm to which reference is made is projected far more stably than it might appear to scholars tilling its fields. Thus, the insistent call for careful empirical study or philosophical reflection imagines a stable practice known only as a hope - just as nostalgia for a once and future business judgment, market efficiency or procedural imperative invokes a meaningfulness sustainable only as a memory.

For this to work, the imports must be crude - must compensate for the sophistication of the realist's critique of law's independence and authority. It is difficult at first to see how such crude imported references could do the job - especially in the face of shrewd collegial critique. One partial explanation might be provided by the mainstream post-realist's relationship to his own practice, for the typical post-realist legal scholar devotes a significant part of his time to the "practice" of generating imperatives of the sort he can invoke in his scholarly work.

He might work with the profession, codifying, restating and cataloging norms, with the professional, representing the judgments of business, with the poor, experiencing the imperatives of politics, or with the government, developing the necessities of institutional process. Or he might work with the sociologists doing empirical work, with the economists generating and testing models, and so forth. Whatever he does when he is not teaching or writing he remembers in his scholarly more nobly, more insistently, more clearly, more hopefully, than he admits in conversation. Thus we might think of the post realist scholar writing about doctrine this way: suddenly, if repeatedly, he stumbles on difficulties of fragmentation, undecidability and uncertainty, and he invokes another discipline, remembering - himself, on another day, in another mood, steadfast.

In this way, the interdisciplinary practice and scholarship of the typical post-realist reinforce one another. The sophistication of the practice - its imbedded uncertainty - is buttressed by the clarity of the scholarly narrative. If the practice seems crude, the scholarship is tenuous, delicate, finely nuanced and open-ended. When the scholarship seems fragmented, it remembers the practice, and so on. All these references back and forth across the boundary between thinking and doing, between a rejection and a transcendence of intellelction, when things go right, give post-realist work a positive forward spin.

It is important to realize, however, that it is the work, the judgment, which seems authoritative, confident. The mainstream legal scholar himself seems lost. For all the elaborate self-reference of much post-realist legal writing, this delicate textual management is usually marked by a distinctively self-effacing tone and purport. Interdisciplinary travels have eroded the assertiveness of the legal writer - his willingness to speak as the embodiment of a self-confident legal culture. Conflicts about identity and loyalty do that - and in any case some such erosion seems to have sparked the flight to foreign terrain in the first place. As a result, the modern legal voice is strangely flat and disembodied - assertive only about its humility and the difficulty of its enterprise. The unsatisfactory nature of each interdisciplinary movement is deployed to suggest the next. In this, the mainstream eclectic seems to have saved his field only by losing his voice.

2. The mainstream cricte

Before turning to scholars - such as those associated with CLS or law and economics - who situate themselves against the mainstream, it is important to focus on the extent to which the mainstream legal scholar pursues a critical project despite the fact that the eclecticism of modern legal scholarship seems primarily a defense of law against the disintegration set in motion by the realists. Indeed, the post-realist seems as determined to extend realism's critical project as he is to respond to it. His difficulty is that the product of his eclectic construction is extremely difficult to undo. Shrewdly equivocal and passionately disengaged, the mainstream discourse of contemporary law is infuriatingly difficult to criticize. It is hardly surprising that the post-realist would be as rigorous in pillaging the terrain of
-driven by the brain. The brain processes this information to form conscious experience. This process involves the interaction of various brain structures, including the sensory cortex, the thalamus, and the hippocampus.

Furthermore, the conscious experience of a particular event is influenced by the brain's ability to integrate information from different sensory modalities. For example, when we perceive a sound in a noisy environment, the brain must integrate information from the auditory system with information from the visual system to determine the source of the sound.

In conclusion, consciousness is a complex and multifaceted phenomenon that arises from the interaction of various brain structures and processes. While our understanding of consciousness is still limited, research in this field continues to shed light on the mechanisms that underlie this fundamental aspect of the human experience.
mally, by contrast, the post-realist undertakes his constructive theoretical work with the tools of intuition and aesthetics.

Of course, this association of methods and realms of work is not fixed in the constructive work of mainstream scholars. One finds also constructive doctrinal work which is inspired by elegance or idealism and scholars whose theoretical work is rigorously analytical. Yet, although the associations of the two methodologies with theory and doctrine might be reversed, these distinctions mark the difference between theory and doctrine in the constructive work.

Post-realist criticism, on the other hand, often achieves its bite by reversing these associations. Doctrinal formulations which had been formally elaborated are criticized for their moral bankruptcy. Theoretical elaborations which were idealistic are criticized as logically or empirically or analytically unsound. A thoroughgoing reform-minded mainstream will exploit both of these aspects of constructive scholarship to develop his criticism. Just as constructive scholarship uses analytic methods to develop theory and aesthetic methods to elaborate doctrine, so reformers often reverse their methodology in response.

So long as the fundamental division between analytics and aesthetics is maintained, scholarship can be both constructive and critical. Yet as long as analytics and aesthetics remain distinct, legal scholarship cannot be constructive and critical at the same time or in the same voice. Only a shifting identity can sustain the omnibus project of critique and construction. And a shifting identity only seems sustainable so long as aesthetics and analytics remain compatible - with each other as much as with law. But this does not seem possible for long. Indeed, the post-realist's basic experience of empiricism is its contentless generality, its obliteration of meaning, just as his basic experience of morality is its groundless individuality.

We might summarize the mechanism by which the post-realist elides this dilemma by saying that mainstream scholarship works by displacing into the difference between alternative disciplines (science and morality) a distinction which it seeks to blur within the law itself (doctrine and theory). The movement occurs through the juxtaposition of constructive and critical voices in the post-realist text.

As a result, mainstream scholarship, although inspired by realist insights into the inseparability of law and life or of theory and doctrine and often inspired by literatures from other disciplines which criticize these distinctions, repeat them in their own work. It is a repetition they develop as a relation among interdisciplinary alternatives. They might use history to attack law's idealist claims and logic to demonstrate that law's purported scope is unsustainable and then turn to functional sociology to elaborate law's actual terrain and analytic philosophy to sustain law's normative claims. And so on. No less a figure than Justice Benjamin Cardozo put it this way: "History or custom or social utility or some compelling sense of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge and tell him where to go".

The result is an interminable discussion in flight from the closure it seeks. In repeating this distinction, while embracing the very ground from which it might be rendered visible, the mainstream avoids direct inquiry into either their knowledge or their activity, recreating each by reference to the absent other. The play of references which results might seem either incoherent, alienating and generally unpleasant, or inescapable, necessary and desirable. However one feels about it, the most significant accomplishment of mainstream scholarship is precisely this uneasy interminability.

As a result, mainstream work places law and its intellectual other as well as the enterprises of criticism and reconstruction in complicated relationships of interdependence. This embrace - even dependence upon - the intellelction and criticism which threatens the law they would defend is their shrewdest achievement and a bold expression of their complex relationship to the realist scholarship which they seem to have displaced by simultaneous affirmation and denial.

3. The critical legal scholar

Let me turn now to the CLS movement, like "law and economics", a self-conscious scholarly opposition to mainstream post-realism which emerged slowly during the seventies. In this description of CLS, I am less concerned with the nuance of their arguments, with their historical specificity, with the substantive claims they have advanced in particular areas, or with their methodological claims than I am with their relationship to the mainstream problematic of law and intellectation. It is here, more than in any specific insight or advance, that CLS shows both its opposition to the mainstream and its situation within mainstream American legal culture.

The CLS movement seems to have been initiated at least partly by scholars working within the mainstream who wanted to emphasize the various critical strands of post-realist work. CLS scholarship became distinctive when it began to tackle more directly the complacency of eclectic mainstream liberalism in both its constructive and critical phases. To do so, critical legal scholars, like their eclectic target, turned to intellectual traditions
The partial exception of CTS choreship is expressed by the adjustment of CTS choreship, which arises under the same circumstances as those under which the CTS choreship is expressed. This is the case where the CTS choreship is expressed by the adjustment of CTS choreship, which arises under the same circumstances as those under which the CTS choreship is expressed.

Furthermore, the adjustment of CTS choreship is expressed by the adjustment of CTS choreship, which arises under the same circumstances as those under which the CTS choreship is expressed. This is the case where the CTS choreship is expressed by the adjustment of CTS choreship, which arises under the same circumstances as those under which the CTS choreship is expressed.
ean intellectual traditions which have been particularly influential in CLS work as examples: critical theory and structuralism. Although most recent interdisciplinary foraging has continued rather than questioned the tendency to oscillate between complementary forms of theoretical and doctrinal work, critical legal scholars who have become convinced that the problem is a failure to relinquish the distinction between theory and practice have turned to literatures which take as their starting point a rejection of this disjuncture. Like those in the mainstream who have begun deploying notions gleaned from literatures which recognize these difficulties (most notably the traditions of hermeneutics and literary criticism), this interdisciplinary maneuver has more often repeated than resolved or rejected the difficulties which motivated it.

The first wave of CLS scholars hoping to escape the mutual embrace of mainstream criticism and apology often relied on what they took to be the continental traditions of critical theory and structuralism. The invocation of these particular traditions signalled an ambition to refuse post-realist modesty and eclecticism - at least to the extent it seemed anti-intellectual. That signal was sent partly by the obscurity and novelty of relying upon such remote high cultural texts - by seizing the intellectual high ground. Partly it was sent through the vaguely received sense that these two traditions were "about" getting out of the theory/practice circle. These messages seem much more important than any "application" of these traditions in critical legal scholarship. Indeed, the very offhand quality of their invocation (often reduced to a self-effacing string-cite in a first footnote) mocked the idea of methodological application or interdisciplinary importation even as it seized the intellectual high ground. If atypical of scholars importing any particular non-legal intellectual tradition, this mockery was quite consistent with the mainstream's general uneasefulness about association with the complexities of "fancy theory". These two traditions, however, were associated with rather specific methodological projects - projects which restated in an odd way the difficulties of post-realist scholarship. Critical theory was understood to proceed from the relationship between attempts by Hegel and Marx to locate the source of the dichotomy between object and subject in history or to locate the identical subject/object of history which would transcend the antinomies of traditional philosophy and the alienation of bourgeois life. As one after another proposed historical subject failed to fulfill this role, critical theory developed a rich literature of explanation, critiquing the social mechanisms which are thought to reproduce alienation. Each critique was supplemented by a relocation of the aspiration for liberation. Brought into law, this theoretical enterprise became associated with a dialectical historical revisionism and a series of increasingly formulaic ex-

cases for continued injustice - supplemented by a heroic invocation of practice.

Structuralism, on the other hand, was understood to have begun by suspending the question of historical origin, separating the fluid present moment from the text of its past and future. This suspension of the search for historical transcendence permitted an elaborate series of explorations into the relational nature of meaning. But these analyses were always supplemented by shadow theories of the origin of the social relations or structures which they analyzed. Brought into law by CLS scholars, this foreign method was often stripped of these supplemental assumptions, leading to dessicated analyses of form - supplemented by a heroic invocation of theory.

At least in this crude tendential form, the difference between these two European imports seems to repeat the difference within the mainstream between practice and theory. Critical theory is to practice as structuralism is to theory. As so often in mainstream work we find a difficulty handled by projection onto a difference among imported intellectual traditions - even if that projection demands a reduction in the sophistication of the trends it imports. The overall impression is more important than the particulars - all the bases are covered. Indeed, individual works of critical legal scholarship often surround a dense structural analysis of doctrine with an introduction and conclusion in the style of critical theory - suggesting that "legitimation" or "false consciousness" or whatever provides a link between the limits of form and the impossibility of history.

For all this repetition, however, these traditions seem shrewd choices, for each is more complicated than that. If challenged on the reductions necessary for the project as a whole, the CLS scholar can easily beef up his imported literature. Critical theory seems to worry about nothing so much as its reliance on a historical subject, and structuralism seems preoccupied precisely with avoiding the mechanics of form.

Moreover, both disciplines sought to dislodge the complacent everyday perception of reality. They shared the conviction that the paradigmatic interpretation which underlies the most prosaic of observations has an anesthetising and alienating effect upon those who hold it, which can be overcome only through a traumatic reinterpretation of reality which changes the world for the observer. This common dimension fit nicely with the CLS demand for extra-legal assistance in the project of refusing mainstream legal scholarship.

My sense is of an import trade which worked at two levels. First, a rather crude use: of structuralism to complete, pursue or radicalize the