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Reviving the Subject of Law

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Abstract

This essay is an advanced draft of work that will be published in On Philosophy and American Law (Francis J. Mootz III ed. forthcoming, Cambridge U.P., 2009). This edited collection includes responses by a wide range of scholars working in legal theory to Mootz's challenge to respond to the current state of American legal philosophy, using Karl Llewellyn's 1934 University of Pennsylvania law review account of the emergence of legal realism as a prompt. Drawing on the author's recent scholarship on the emergence of a distinctive and impoverished model of "common law" judging in the U.S. since the mid- c20th, and taking its lead from Duncan Kennedy's suggestive argument that Realism failed to gain traction in Europe because of the obscene cast that the Third Reich gave to its project, the essay gives a critical account of the contemporary inheritances of the Realists' account of law and their reliance on social science. It argues that interdisciplinary work in studies of law and the linguistic humanities and human sciences might be deployed in reviving the subject of law, generating a thick account of what law is and might be, of how its institutions, discourses, texts and subjects are formed in culture and history, and of how legal subjects reproduce culture and make history in their turn.

Reviving the Subject of Law

Penelope Pether

Legal Realism seems much in the recent (U.S.) news. Constitutional Law scholar Carl Tobias recently wrote that the high level of 5:4 decisions by the Roberts Court signaled that we – or at least they – are all (naïve) Realists now. Appropriating the Realist thesis that judicial decisions are the product of judicial ideology, which in turn informed the CLS perception that "law is politics," to characterize the emergent jurisprudence of the current iteration of the nation's Constitutional Court, he suggested that the following conclusion is unexceptionable: the Justices do not behave as if "law" exists, rather voting their guts or their prejudices, their political or ideological commitments.

If he is right, the nation's Constitutional Court of final jurisdiction presently manifests an attitude to making law which has come to characterize the decisionmaking of the Federal courts in the half century passage from *Brown v Board of Education* to the post 9/11 constitutional "jurisprudence of emergency." Confronted in the very early 1960s by burgeoning appeals from prisoners and civil rights plaintiffs, the United States Court of Appeals for the Fourth Circuit, based in Richmond, Virginia, the heart of "massive resistance" against desegregation, developed a response to appeals it considered peculiarly burdensome. I have called this practice, now institutionalized nationally in federal and state appellate courts and in federal trial courts, "institutionalized unpublication" of judicial opinions.

Institutionalized unpublication enables judges or court staff to identify a small group of opinions as "published" and precedential, and the vast majority "unpublished" and non-precedential, and thus not required to be followed in factually analogous cases. This categorization is made in advance and by fiat, frequently in breach of courts' own guidelines as to what kinds of cases should fall into each category. Next, institutionalized unpublication diverts the processing and thus usually the deciding of appeals from the outset to the non-precedential track, where they are processed, in the absence of oral argument, by court staff. Third, on many courts, this delegated exercising of what at the federal level is Article III judicial power is performed without meaningful judicial oversight, and far too frequently without recourse to practices that would tend to provide safe results: for example, decisionmakers may not read either briefs or transcripts of evidence before passing judgment.

Unsurprisingly, there is substantial evidence that institutionalized unpublication produces inequality effects: powerful litigants manipulate it to stack the precedential deck in their favor; it confers predictive advantages on the information-rich by making records of what the courts do differentially available to them; the comparatively powerless are much more likely to have their *de jure* appeals processed this way than the comparatively powerful, and judges are on record both condemning the quality of staff work on their cases and claiming, against the weight of evidence, that they carefully decide these cases themselves.

Perhaps most troublingly, there is evidence that when staff decide cases brought by the comparatively powerless, they characteristically find against them at rates much higher than even the conservative end of the bench, rates not justified by differential merit. That is, institutionalized

unpublication is the product of a culture that adjudges normative and thus normalizes a profoundly hierarchical status quo with an ingrained tolerance of second class "justice" for the powerless, a profound lack of concern about the values expressed in the material practices of law work, and an evident comfort with legal decisionmaking that does not reflect commitment to any recognizably legal method.

In "On Philosophy and American Law" Llewellyn focused some of his sweeping and yet cluttered survey of American law on precedent. Significantly for my purposes here, that survey was taken a year into the burgeoning "state of exception" that did away with a meaningful – which is to say not merely positivistic or authoritarian – rule of law in Germany in the period 1933-1945. To the extent that Llewellyn's account of precedent reaches a conclusion, it characterizes it as both positivist and available for unprincipled manipulation by those with economic and thus political power. Thus far, then, Llewellyn and I see the (judge-made) American law of our respective eras in similar ways.

There is a difference, however, in our conclusions about what might or ought to be done in response. For Llewellyn, Legal Realism provided a totalizing philosophy of law that could account for interpretive practices lacking coherent or conventionally principled grounds. Social science in the hands of what have come to be euphemized as "progressive" skeptics provided a method of predicting and providing reasons for judgment superior to any distinctively legal method. As Tobias suggests of the Roberts Court, for Llewellyn there was no "law" there, and this troubled the philosopher as little as it apparently does the Justices.

As Llewellyn signally fails to register, yet as is implicit in Professor Tobias's account of the workings of the Roberts Court and my own account of the law-making practices that have come to characterize the nations' courts more generally, Legal Realism might be complicit with ends that do not advance the liberal or "progressive" "social needs" (Llewellyn 1934: 212) political agenda the Realists laid claim to. This should not surprise us: the sociologist of the professions Pierre Bourdieu has identified the juridical field as a site of permanent interpretive struggle for control of the meaning of law's texts.

On the other hand, the implications of Tobias's insight, contextualized, might provide at once a shock of recognition, and an estrangement of the normal. In "American Constitutionalism as Civil Religion: Notes of an Atheist," Duncan Kennedy suggests that Legal Realism took root as powerfully and flourished as vigorously as it did America because the high stakes created by both U.S. constitutionalist "civil religion" and the conservative Supreme Court doctrine on property rights of the late 19th Century "created a vested interest for... progressives in demystifying legal reason." He concludes with an allusive and perceptive insight about legal realist thought's comparative lack of influence during the decade after Llewellyn's essay in Europe, from whence, sourcing itself in the German "Free Law" movement, it had been borrowed. "[F]ascism and Stalinism," he writes, made "the realist impulse look positively obscene in Europe" (Kennedy 1995: 921).

My reprise of Llewellyn's essay does not rest with diagnosis, and in its project of restoring the subject of American law to the "possibility of Justice," it departs not only from his conclusions but also from his method in three critical ways. First, it focuses on theory, specifically critical theory, rather than a totalizing philosophy of law, and interests itself in what David Kairys called the politics

of law, rather than law reduced to politics. Second, it is substantially more suspicious than Llewellyn about the uses of social science for law. Third, its candidates for interdisciplinary knowledges that might unsettle or supplement, rather than substitute for legal knowledge, and thus enable a thick understanding – a philosophy, if you like – of what law is and how it does its work, lie largely in the humanities rather than in the social sciences, specifically in the disciplines of history, and of literature and other linguistic humanities: rhetoric, cultural studies, critical linguistics, and so on. So much for the subject of law as discipline. Redressing the impoverishment of the philosophy of the nation's law depends not merely on reimagining the law as discipline, discourse, epistemology and hermeneutics, however; it depends equally on enabling the formation of different kinds of legal subjects.

How would I reimagine Llewellyn's account of philosophy, and of philosophy's relationship with law, in this project of reviving the subject of law? First, privileging "theory" over philosophy draws on a scholarly tradition which does not seek to totalize, to give "a general account of interpreting that provides guidelines for guaranteeing correct interpretation" (Mailloux 2002: 40-41). Rather, it enables the familiar to be seen with estranged eyes, enabling "change in the currently prevailing discourse of authority and power" (Norris 1988: 41).

Next, I would make a move left unmade in Llewellyn's frozen jurisprudential moment and hold philosophers of law – which for my purposes means the members of the legal academy in their role as scholars and teachers of law – responsible for making law, just like judges, legislators, and regulators. On his account of public and private lawmaking in the U.S. from the Declaration of Independence to the end of the first third of the Twentieth Century, Llewellyn suggests that the law is to be found not only – or perhaps not at all – in the texts of those whose positivistic charge it is to "lay down the law": judges, legislators, those authorized to issue regulations. Rather, it is to be found in the interpretive, predictive, analytical work that lawyers – or at least those to whom Llewellyn referred when he invoked "the actual behavior of the better bar" (Llewellyn 1934: 212) – do.

This broader account of what "law is" understands law as always and only made in its varying forms of practicing, including that which legal theorists, shadow practitioners of the work of highly skilled practicing lawyers, do. This is or ought not to be all of the stuff of the law we make, however. Its reductiveness brings the legal theorist close to eliding her responsibility for making law; confines her to documenting the work of others; reduces her lawmaking role to whatever little influence she can have on judges; loses sight of her implication in the subject formation of lawyers. The law is also, then, perhaps most importantly, what we teach.

Applied Legal Realism is also discernable in what the nation's news media signally and persistently failed to lose interest in as I wrote this essay: symptoms of the "politicization," or more or less frank adoption of political results-oriented cronyism as personnel policy "in action," in what it has become increasingly ironic to call the "Justice Department." The symptoms of this manifestation of politicization of the making of U.S. public law in its material practicing ranged from the simmering not-quite scandal of the firing of selected U.S. Attorneys and their replacement with what appear to be paradigmatic Executive loyalist hacks, with a view to the selective rigging of election law and thus of national political power, to the egregious yet tragically predictable (to any modestly

introspective U.S. legal educator with an eye for the structural and a grounding in critical sociology) Monica Goodling's apparent infractions of the Hatch Act in shaping career attorney hiring practice.

Ms. Goodling's approach to applied human resources theory was evidently informed by the way things were done at Regent University. This might be predicted from the sociologist of the professions' Pierre Bourdieu's account of the *habitus,* the embodied experience of the world which constitutes subjects and makes them constitute the world in its – and their – image in its turn. An analogous example of the contextually transposable reproduction of aspects of the *habitus* is evoked by another recent symptom of the politicization of U.S. public law: the current administration's adopting Immigration Court appointment practices blending cronyism and a confidence in the appropriateness of a lack of expert qualification to do the job of passing judgment on the most vulnerable of "our" others as a criterion for appointment to this specialized adjudicatory office, yet another advance on the continuum of practices systematically eradicating adjudicatory independence in immigration cases, carefully documented by Stephen Legomsky (Legomsky 2006).

The recent events I have chronicled thus far suggest the appropriation of (opportunistically naïve) Legal Realist thought translated into action in order to reinforce the hegemonic status quo. What other insights into the current state of the relations between law and philosophy in the U.S. might be enabled by thinking them through critically, with estranged eyes? What impetus to transform those relations might this impel?

First, the impoverishment of both the national practices of legal subject formation and legal institutions, as of legal discourse and its theorizing, both likewise evident in the material practices of institutionalized unpublication, has left "American Law" profoundly and critically adrift. Next, my project is to suggest a means to and the utility of using theory to recover the *subject of law*, by which I mean two things. The first involves accounting for law as a set of institutions, discourses and practices distinct from politics, as from theory understood as doctrine or legal science on the one hand or law understood as (social) science *manqué*, on the other. The second suggests a way out of what my recent scholarly work has revealed: both a crisis of the national judicial ontology, evidenced by a massive, institutionalized, national failure in judicial ethics and judicial accountability, and the shoddy, intellectually etiolated or disingenuous ragtag of "business as usual" that stands in for a conscious theory and practice of passing judgment and laying down the law in judgment's texts; and the systematic material institutional practices of production of impoverished and impoverishing legal subjects for which Monica Goodling – the U.S. legal academy's collective Frankenstein's Monster – might serve as an exemplar.

The material results of the current administration's approach to appointing law makers are suggested by Ramji-Nogales's, Schoenholtz's, and Shrag's study of disparities in asylum adjudication at the immigration court level, a study that supplements my recent reinterpretation (Pether 2006) of David Law's study of Ninth Circuit appellate asylum jurisprudence: that there is no better account of how law is made in this area than that provided by the politics of lawmakers. Ramji-Nogales, Schoenholtz, and Schrag conclude that

> in asylum cases, *which can spell the difference between life and death*, [emphasis mine] the outcome apparently depends in large measure on which government

> official decides the claim. In many cases, the most important moment in an asylum cases is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge (Ramji-Nogales, et al. 2007: ms. 1).

Law concluded that a small number of Democratic appointees to the Ninth Circuit bench decided asylum cases "strategically"; that is, they "demonstrated a heightened tendency to vote in favor of the asylum seeker" in published, formally precedential, judicial decisions, for the purposes of "mak[ing] 'good law,' and to avoid making 'bad law' by casting 'good' (ideologically preferred) votes in published cases, while restricting 'bad' (ideologically disfavored) votes to unpublished[, non-precedential] cases" (Law 2005: 861).

Read against information revealing that while judges formally made these decisions, in practice a sizeable majority of unpublished asylum decisions were made by court staff, particularly staff attorneys, my own reinterpretation of Law's data shows that junior court staff, usually new law graduates, characteristically decide these cases against asylum seekers and for the government, at rates much more marked than Republican-appointed judges, evidencing a pro-government bias not accounted for by the merit of the cases involved. I conclude that these de facto Article III judicial officers have learned very well, from their law school teachers as from the judges whose work they do, the apparently compelling logic of hierarchy, as of an unreflective approach to the work of making the law; their work bears the imprint of an impoverished philosophy of law as indistinguishable from politics.

These two examples of social scientific work on asylum jurisprudence have much to teach about the uses of social science for post-Realist legal theory. Legal Realist thought had a paradoxical faith – given its debunking of Langdellian legal science – in sociology's ability to supply truth to – rather than merely knowledge about – law. To the extent that theory work generally, and work in the humanities and human sciences understood as such rather than as pseudo-scientific, is of use in reviving the subject of law, it might be deployed to generate a thick account of what law is and might be, of how its institutions, discourses, texts and subjects are formed in culture and history, and of how legal subjects reproduce culture and make history in their turn.

The study by Ramji-Nogales, et al is useful in accounting for law precisely because it generates knowledge about legal subjects and their practices; other useful social scientific work might likewise give us information about legal institutions or discourses. The Law study manifests symptoms of the dangers posed by over-reliance on Legal Realist social science when it seeks to theorize the "real" reasons for legal decisions in politics, both party-line and professional, rather than interrogating its data for knowledge about legal subjects and the work that they do, knowledge capable of informing legal theory.

To the extent that interdisciplinary work in the human sciences might be employed in reviving the subject of law it is most useful not as a substitute for legal knowledge that can unveil the "truth" that law's methods cannot; nor yet in seeking in other "social sciences" substitutes for the contingency of legal knowledge; nor in seeking to rehabilitate law from, or alternatively to substantiate, the claim that its "real practitioners," the judges, are unprincipled because practicing politics rather than law. Rather, interdisciplinary (rather than alternative disciplinary) work in social

science and law is most usefully deployed in illuminating our own institutions, discourses, and modes of subject formation, generating ways of seeing what the law cannot see about itself or that which it occludes from vision. It does this in order to better understand the way that legal institutions, discourses, and subjects do their work, how they produce disciplinary truths, and how supplementary knowledges brought into intertextual relationships with law's texts and their modes of production, consumption, interpretation and use in law work might unsettle "business as usual."

Modes of interdisciplinary law and social science scholarship that are particularly apt to revive the subject of law include sociology of legal education or cultural psychology of the kind practiced by Guinier at al, or Susan Daicoff; Pierre Bourdieu's theoretical sociology of the professions in general or the juridical field more specifically; and Elizabeth Mertz's linguistic anthropology. Mertz's study makes a powerful case why careful interdisciplinary recourse should be had to the linguistic humanities in the project of reviving the subject of law. She understands law as made in significant part in its discourses, language as much more thoroughly constitutive of what law is as well as what it ought to be than did Llewellyn, who saw it merely as a means to get at truth, which he called "the real" (Llewellyn 1934: 212). A strong strategic argument for the utility of the linguistic humanities – including rhetoric, literary theory, critical linguistics, poetics, extending to cultural studies and semiotics, if we think of language broadly – in reviving the subject of law might be to suggest law's identity as an humanity, a discipline producing knowledge about the institutions, discourses, subjects, practices and texts of the law rather than truth, or totalizing systems of knowledge, which for Foucault were the self-same thing.

If Legal Realist thought is identifiable by its commitment to "concrete data" and "facts" (Llewellyn 1934: 212) and its limited understanding of law's relation to language, the humanities' cultural texts provide supplementary narratives to those of the texts of judgment and other legal textual genres. They deny law's claims to completeness in accounting for society, and enable insights into how the law legitimates particular ways of understanding and thus of ordering the world. The humanities disciplines of rhetoric and poetics have special claims to unsettle law's claims to totalizing knowledge, as Peter Goodrich has suggested: rhetoric because of its history as law's uncanny disciplinary double; poetics because it tells tales out of school about what legal texts, method, epistemology, and hermeneutics seek to forget about themselves.

Llewellyn laid claim to the strength and promise of Realist school of legal theorists in part because their ways of thinking about the law were closer to the practices of "the better bar," (Llewellyn 1934: 212) genuinely sophisticated practicing lawyers, than those of positivist legal philosophers or natural law theorists. Humanities scholars in the critical theoretical traditions share methods with those sophisticated lawyers: critical close reading of law's texts and of law's equivalent of interpretive literary biography, applied in this discursive context in the service of prediction; and also rhetorical expertise in deploying law's genres, discourses, figures, and tropes. Like scholars of literary theory in their work with that discipline's canonical texts, skilled practicing lawyers are also viscerally aware of law's instability, its contingency and indeterminacy, of what Peter Goodrich has identified as its rhetorical insistence that it is science, not a hybrid of literature and poetics. They are constitutionally skeptical of law's insistence that it does Justice, never violence or, even less admissibly, systematic injustice. They recognize their own agency in the production of the one, or the other.

Such lawyers understand, too, what adherents of critical historiography know about history: that the discipline makes stories out of the discipline of history's evidentiary material. Critical attentiveness to history can inoculate against complicity with what Judith Resnik has called law's "McCleskey problem": legal culture's "self-regard and self-celebration," which make it "difficult to convince the unconvinced in law of a relationship between an individual instance and a larger social phenomenon, when both the individual instance and the larger phenomenon are claimed to betray liberal legal democracy's commitments to fairness and inclusion" (Resnik 1999: 692). It might counsel such legal professional practices as maintaining an abiding attentiveness to the nation's defining historical moments, involving as they do structural subordination on the basis of race, paradigm of otherness, as of exceptionalism.

Similarly, as the reference to *McCleskey v. Kemp* suggests, attentiveness to the lessons and methods of history might advocate acute awareness of the contexts in which legal issues arise. Just as it is in the litigation over the institutionalizing of the paradigmatic jurisdiction of exception, Guantánamo Bay, and in recent immigration and asylum jurisprudence (Morawetz 2006/7), the prerogative writ of habeas corpus was especially politically charged in the 1950s and 60s. Like desegregation, this aspect of the Warren Court's criminal procedural revolution caused widespread anger among conservatives, especially in the South, including those who originated institutionalized unpublication, making the jurisprudence of hierarchy characteristic of Jim Crow revivify and spread silently to create a characteristic national jurisprudence of exception which is today most starkly evident in asylum adjudication in the federal courts. If one product of the aftermath of the Holocaust, *telos* of the paradigmatic state of exception, is the origin of modern comparative constitutional law, then even U.S. constitutional law might be reminded that to the extent that it is constitutionalist, rather than merely constitutive, it cannot regard itself as a manifestation of American exceptionalism.

Comparative legal studies drive the subject *qua* discipline of law to engender knowledge of itself, legal subjects to a disciplined practice of self-searching. The most important lesson that a theorist of law seeking to engender a "thick" account of the subject of law, its institutions and discourses, might take from both the governance of Germany as a "state of exception" in the years from 1933 to 1945, and the pall of obscenity it cast on Realism, is that legal subjects enabled the locating of "law" beyond the purview of distinctively legal institutions, that is, the courts. Which is to say that the ontology of legal subjects, as much as if not more than a coherent and principled account of legal epistemology and hermeneutics, is, at present, the most critical project for those of us who profess the philosophy of American Law.

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