

Tel Aviv University Law School
Tel Aviv University Law Faculty Papers

Year 2010

Paper 114

THE CHARACTER OF LEGAL THEORY

Hanoch Dagan*

Roy Kreitner[†]

*Tel Aviv University, daganh@post.tau.ac.il

[†]Tel-Aviv University Faculty of Law, kreitner@post.tau.ac.il

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Abstract

For nearly a century legal scholars have vacillated between two strategies for dealing with the collapse of legal science as an autonomous discipline. One typical response has been to abandon the notion of a legal theory and to borrow a theoretical discipline from the social sciences or from the humanities. Another response has been to discard the idea of legal theory by highlighting the practical wisdom of lawyers and celebrating law as a craft.

Our mission in this Essay is to describe legal theory as an enterprise robust enough to justify separate naming. Legal theory focuses on the work of society's coercive normative institutions. It studies the traditions of these institutions and the craft typifying their members, while at the same time continuously challenging their outputs by demonstrating their contingency and testing their desirability. In performing the latter tasks, legal theory necessarily absorbs lessons from law's neighboring disciplines. But at its best, legal theory is more than a sophisticated synthesis of relevant insights from these friendly neighbors, because of its pointed attention to the persistent jurisprudential questions regarding the nature of law, notably the relationship between law's normativity and its coerciveness and the implications of its institutional and structural characteristics.

Before we turn to elaborate on these features, we begin with an outline of the three other important discourses about law: law and policy; socio-historical analysis of law; and law as craft. Sketching these three genres of legal scholarship is instrumental for our task because analyzing the ways in which legal theory is different from these other modes helps us characterize legal theory.

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INTRODUCTION

Once upon a time – or at least so the conventional story goes – academic lawyers were united by a cohesive methodology. Langdellian legal science envisioned law as an autonomous discipline governed by three characteristic intellectual moves: classification, induction, and deduction. Legal realists discredited this pristine vision of legal theory by demonstrating that the multiplicity of doctrinal sources renders it hopelessly indeterminate.¹ One typical response of legal scholars has been abandoning the notion of a *legal* theory and borrowing a theoretical discipline from the social sciences or from the humanities. Another response has been discarding the idea of legal *theory* by highlighting the practical wisdom of lawyers and celebrating law as a craft.²

Both types of responses contributed immensely to the academic analysis of law. But both – explicitly or implicitly – disparaged too quickly the enterprise of a post-formalist legal theory, which is irreducible to another discipline. Hence, the disciplinary malaise of the legal academy, which is the subject of this conference. In academia, disciplinary malaise can quickly evolve into crisis, and an increasing fragmentation of (American) law schools to "mini-departments" of other disciplines cautions that we would be wise to be mindful. But at the same time, tormented soul-searching seems somewhat awkward given the thriving industry of distinctly legal theories of, for example, property, regulation, international relations, and human rights, to name just a few, at least according to our understanding of the concept of legal theory.³

So our mission in this Essay is to describe legal theory as an enterprise robust enough to justify separate naming. Legal theory focuses on the work of society's coercive normative institutions. It studies the traditions of these institutions and the craft typifying their members, while at the same time continuously challenging their outputs by demonstrating their contingency and testing their desirability. In performing the latter tasks, legal theory necessarily absorbs lessons from law's neighboring disciplines. But at its best, legal theory is more than a sophisticated synthesis of relevant insights from these

¹ See Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 611-17 (2007).

² See Anthony T. Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335 (1988). Richard Posner is particularly clear about the former response where he defines legal theory as "the study of law... 'from the outside,' using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system." Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 779 (1987). Our definition (below) of legal theory is of course very different.

³ See J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949 (1996).



friendly neighbors, because of its pointed attention to the classic jurisprudential questions regarding the nature of law, notably the relationship between law's normativity and its coerciveness and the implications of its institutional and structural characteristics.

Before we turn to elaborate on these features (in Section 2), we begin with an outline of the three other important discourses about law. While the first two – law and policy and socio-historical analysis of law – both represent the three dots after "Law and ...," they are sufficiently distinct to warrant separate treatment; and the third – craft – is obviously different from both. Sketching these three genres of legal scholarship is instrumental for our task because analyzing the ways in which legal theory is different from these other modes helps us characterize legal theory. It is also important because it allows us to offer (in Section 3) some remarks concerning the interrelationship between these four members of the family of legal discourses.

1. A TOPOLOGY OF DISCOURSES ABOUT LAW

a. Law and Policy

The familiar approach of law and policy begins with Oliver Wendell Holmes' prescription that legal reasoning be concerned with providing reasons which refer to the social ends of law – to "considerations of social advantage" – and that "those who make and develop the law should have those ends articulately in their minds." This focus, Holmes predicted, is bound to extract legal discourse from its solitude: jurists will have to study "the ends sought to be attained and the reasons for desiring them," and thus to utilize lessons from bordering disciplines, such as criminology and political economy. This prediction explains, of course, his celebrated dictum that "the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."⁴

It is in this spirit that Roscoe Pound called for "'team-work' between jurisprudence and the other social sciences." Pound insisted that jurists must take account of the "social facts" to which various legal institutions apply; evaluate the "the actual social effects of legal institutions and legal doctrines"; and choose among competing alternatives according to the desirability of the actual consequences of their realization. This emphasis on the social effects of law and on the means for producing these effects, Pound argued, needs to be made as the interpretive strategy of courts; as the proper way for

⁴ OLIVER W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 184, 187-189, 195 (1920); ID., *Law in Science and Science in Law*, in ID., at 210, 238-239. Holmes developed his ideas of tying law to social purposes in the wake of von Jhering. See, e.g., RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* 325-47 (Isaac Husik trans., 1913) (1877).

preparing legislation within the legislative branch; and as an important focus of legal history.⁵ The famous “Brandeis brief” provides an early epitome of this vision, as it recruited social science to legal advocacy by incorporating empirical findings of social scientists in a formal legal presentation.⁶

As these early manifestations of law and policy imply, students of these schools view legal rules and other forms of law as “most essentially tools devised to serve practical ends” and thus insist that “rules and other varieties of law, once created, ought to be interpreted, elaborated, and applied in light of the ends they are to serve.”⁷ As Felix Cohen succinctly described it, law and policy shifts legal discourse “away from the attempt to systemize and compare”, or “from concern with the genesis and evolution”, and towards “a study of consequences in terms of human motivation and social structure”; away from the lawyer-craftsman “standards of beauty or finesse”, and towards “the concrete values of human life and the effects of law upon human desires and feelings.”⁸

For many legal scholars this shift is a matter of degree. But at its extreme version, policy swallows law. Thus, as early as 1934, Edward Robinson described law as “an unscientific science” and urged lawyers to become scientific. Robinson claimed that “legal science has imposed a constant drag upon the adventurous spirit of the times.” He described the practice of precedent – “the principle that the concurrence of a judge with his predecessors is a direct test of the validity of his decision” – as “a habit of mind in which a stupidity may be perpetuated on the grounds that it is well-established.” He vigorously criticized this “conservative logic” and argued that the only way of “attaining an improved set of values as to what courts ought to do,” is by “going through a period during which we thoroughly discredit many of the things courts have been thought to do.” In this view, lawyers – especially academic lawyers – should become genuine social

⁵ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 510, 512-16 (1912). *See also, e.g.*, KARL L. LLEWELLYN, *Some Realism about Realism*, in JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE 42, 70-73 (1962).

⁶ *See* AMERICAN LEGAL REALISM 237 (William W. Fisher III et al. eds. 1993); N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 29 (1997). *See also, e.g.*, Phoebe Ellsworth & Julius Jentum, *Social Science in Legal Decision-Making*, in LAW AND THE SOCIAL SCIENCES 581 (Leon Lipson & Stanton Wheeler eds, 1986).

⁷ ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20-21 (1982).

⁸ FELIX S. COHEN, *Modern Ethics and the Law*, in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 17, 31 (Lucy Kramer Cohen ed., 1960); *ID.*, *Transcendental Nonsense and the Functional Approach*, in *ID.*, at 33, 56.



engineers; in order for such engineering to be successful, legal scholarship should apply social scientific methods for the practical solution of socio-legal problems.⁹

At times it seems that some contemporary branches of law and policy faithfully fulfill Robinson's legacy. In its extreme manifestation law and policy takes the methodology of another discipline (typically economics) in order to explain legal doctrine or to call for its reform with no reference, explicit or implicit, to the concept of law or to the possible constraints of law's constitutive characteristics. It was from this perspective that George Priest claimed that "legal scholarship has become specialized according to the separate social sciences" so that a law school should be structured as "a set of miniature graduate departments in the various disciplines." Given this dominance of such other disciplines, Priest claimed that it is difficult to justify "why law is a subject worthy of study at all" and furthermore denied even the utility in "extensive knowledge of the intricacies of legal doctrine and legal argument."¹⁰

b. *Socio-historical Analyses of Law*

We call the second grouping in our map of legal discourses socio-historical analyses of law. If law and policy points preliminarily to legal scholarship in the *law and...* tradition (law and economics; law and psychology), socio-historical analyses would point to a different blank phrase: ... *of law* (sociology of law; critical theory of law; cultural analysis of law, and so on).¹¹ The label is consciously unfamiliar, as no one uses the phrase to describe their own work. The point for us is that this is a group of approaches to analyzing law with distinctly different characteristics from legal science and from the law and policy approaches discussed above. And despite the wide range of methodologies involved, we believe there are certain common features that justify grouping these types of analyses together.

The first feature of socio-historical analyses is that they see law as a subject matter or a field of inquiry distinct from scholarship about law. This may seem, to the 21st century American reader, like an obvious point, but we should remember how starkly this

⁹ Edward S. Robinson, *Law – An Unscientific Science*, 44 YALE L.J. 235, 238, 256, 258, 264 (1934).

¹⁰ George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 437-39, 441 (1983). Later on, Priest added that interdisciplinarity does not imply the neglect of legal doctrine, but even his later writing testify that by "interdisciplinary research" Priest in fact means research which uses a methodology of another discipline. See George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of Legal Ideas*, 91 MICH. L. REV. 1929, 1936 (1993).

¹¹ The distinction between "law and" and "of law" is only suggestive. Many of the socio-historical analyses we have in mind also go under other, less cumbersome labels: legal history; critical legal studies; legal sociology. And of course, law and economics is also known as economic analysis *of law*.



distinguishes such analyses from traditional legal science. Recall that at its height, legal science (especially in its most developed, i.e., German version) viewed scholarly production as a crucial aspect of the law itself, whether as formal source or as binding guide to interpretation of posited norms. As John Merryman famously described this vision, “The teacher-scholar is the real protagonist of the civil law tradition. The civil law is a law of the professors.”¹² While law and policy approaches do not go so far, they are often framed in terms that blur the boundaries between scholarship and legal practice, leading to what Ed Rubin described warily as a “unity of discourse.”¹³ Socio-historical analyses, in contrast, constantly (some might say obsessively) draw attention to a sharp distinction between their own academic discourse, including its language, method, audience, and goals, and the instrumental orientation they associate with practical legal discourse.¹⁴

A second, related feature of socio-historical analyses is that they typically eschew any normative or reformist impulse, and thus bracket the typical perspective of much legal scholarship that concentrates on solving concrete legal problems or existing social problems through law. For some scholars doing what we are calling socio-historical analyses, this distance from a normative perspective requires an apologetic posture;¹⁵ for others it is a point of pride.¹⁶ The distance from the normative perspective is a matter of degree (and dispute). Thus, some scholars see a total divorce from the normative

¹² JOHN MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 56 (3d ed. 2007). *See also* GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT* 36 (2005).

¹³ Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1859 (1988).

¹⁴ *See* Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and its Audience*, 63 U. COLO. L. REV. 569, 579-89 (1992) (contrasting instrumental practical discourse and non-instrumental theoretical or scholarly discourse). *See also* Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, in *CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM* 1, 3-6 (Austin Sarat & Jonathan Simon eds., 2003). The distinction also has an institutional face: while it is easy, indeed intuitive, to imagine a smooth movement from doing law and policy (think of Richard Posner or Cass Sunstein) to judging or other practical law jobs, it is much more difficult to imagine such a transition from socio-historical analysis (think of Gunther Teubner or Austin Sarat) to judging.

¹⁵ One thinks of any number of legal history articles that conclude with normative speculations that seem to have precious little grounding in the work that preceded them; we have had private conversations with more than one historian who said s/he really didn't have any normative stakes, but felt a need to at least mention the perspective that would exercise so many readers.

¹⁶ At the extreme, the normative perspective may be held up to ridicule. Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).



perspective as a precondition for quality scholarship,¹⁷ while others suggest that bracketing direct normative questions will eventually lead back to normative inquiry with new perspectives.¹⁸ But almost all socio-historical analyses suspend direct normative inquiry in large measure.

The third feature of socio-historical analyses we will call attention to is a sense of reflexivity. Analyses of this sort are constantly folding back onto themselves, pouring attention on categories like legal consciousness and on the role of the scholar in shaping consciousness. This type of reflexivity may have been born of the jurisprudential conflicts between legal realists and their predecessors – conflicts that forced the actors into self-conscious positions on legal scholarship itself. Generations later, such analyses were part of what gave critical legal studies much of its energy,¹⁹ but the reflexive mode has spread well beyond CLS. Paul Kahn's voice is indicative: "The only way out of the limitless claims of the hermeneutic circle is self-reflexive. That is, we must be able to take the categories of experience as a subject of reflection even as we deploy them."²⁰

These three features – distinguishing scholarship from practice; suspending normative inquiry; and reflexivity – are not necessarily present in every socio-historical analysis.²¹ Taken together however, they roughly mark out a style of legal scholarship readily identifiable in today's academy, and when taken to their logical endpoint they raise serious doubts about the very possibility of legal theory:

¹⁷ PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 18 (1999).

¹⁸ MEIR DAN-COHEN, *RIGHTS PERSONS AND ORGANIZATIONS: A LEGAL THEORY FOR A BUREAUCRATIC SOCIETY* 1-4 (1986).

¹⁹ For mature versions of CLS analyses that concentrate on what it means for legal academics to develop their particular styles of scholarship and argumentation, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION – FIN DE SIECLE* (1997), and ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996).

²⁰ Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, in *CULTURAL ANALYSIS*, *supra* note 14, at 154, 177.

²¹ An additional feature of socio-historical analyses is that they often concentrate heavily on the ways that law, broadly conceived, impacts on subjectivity or identity. A recurrent theme in socio-historical analyses is the belief that "law is constitutive of group and individual identities and values... Scholars of law and culture focus on the materiality of law, the way in which law simultaneously embodies the interests of particular groups and shapes those interests – and even shapes the identities of those who understand themselves as members of such groups." *Id.* at 162. There is nothing logically necessary about a focus on the constitution of subjectivity, but the focus is prevalent and figures as a major aspect of what socio-historical analysis is about today (possibly varying from such analyses early in the twentieth century).



[L]egal study unavoidably becomes a program for the reform of law. With this, the line separating the scholar from the object of his or her study disappears. The study of law turns out not to be an intellectual discipline at all; it is a part of the practice that was to be the very object of study. From the very beginning, the study of law is co-opted by legal practice. The independence of the discipline will never be possible unless the understanding deployed in theoretical inquiry can be distinguished from the reason deployed in legal practice. Such a distinction in the forms of reason is neither readily available nor easily achieved.²²

c. Law as Craft

Alongside policy and socio-historical studies, a third genre of legal discourse identifies law as neither art nor science, but craft.²³ Aristotelian in its inspiration, this group of studies focuses attention on law's shared professional norms and on what Karl Llewellyn referred to as lawyers' "ways of doing," "working knowhow," "operating techniques," or "craft-conscience."²⁴

Two strands of legal scholarship seek to explore and give meaning to this inward-looking focus. (We will address the third strand, dealing with normative coherence, in section 2.b. because it integrates craft with policy.²⁵) One such strand is procedural, studying the institutional structure of (common law) adjudication as the epitome of virtuous legal dispositions and as the core of law's legitimacy. Thus, Llewellyn claims that the legal ethos – which is epitomized in the adversary process and the judicial opinion and is reinforced by "[t]ime, place, architecture and interior arrangements, supporting officials, garb, [and] ritual – directs judges to be "open, truly open, to listen, to get informed, to be persuaded, to respond to good reason."²⁶ More recently Owen Fiss

²² KAHN, *supra* note 17, at 18.

²³ For an extended elaboration, see Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245 (2001).

²⁴ KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 77 (Paul Gewirtz ed. Michael Alsandini trans. 1933, 1989); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 49, 214, 216-17 (1960); KARL N. LLEWELLYN, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW* 183, 183 (1941). For a differently inflected set of references to Llewellyn's view of the craft of law (and particularly judging), see Scharffs, *supra* note 23, at 2248-49.

²⁵ Coherence of the doctrinal type is not included in our topology, because excepting regarding the more technical aspects of the law, a reference to coherence – like other formalist strategies – is question begging. See Hanoch Dagan, *Codification, Coherence, and Priority Conflicts*, in *THE DRAFT CIVIL CODE FOR ISRAEL IN COMPARATIVE PERSPECTIVE* 149, 151-52 (Kurt Siehr & Reinhard Zimmermann eds. 2008).

²⁶ LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 24, at 46-47.



highlighted in this regard a number of significant institutional features, namely: the requirement of judicial independence, the concept of a non-discretionary jurisdiction, the obligation to listen to all affected parties, the tradition of the signed opinion, and the neutral principles requirement.²⁷

The structural characteristics of the judicial office, Llewellyn and Cohen argued, have a “majestic power” to channel judges into “service of the whole.” They make the legal arena into a forum in which the participants’ normative and empirical horizons are constantly challenged by conflicting perspectives. They thus encourage lawyers – notably judges – to develop a “synoptic vision” that is “a distinguishing mark of liberal civilization.” Hence, at its best, legal professionalism, and thus (in this view) also legal theory at its best, makes lawyers “experts in that necessary but difficult task of forming judgment without single-phased expertness, but in terms of the Whole, *seen whole*.”²⁸

The second inward-looking strand focuses on the skill of lawyers – judges, practitioners, and legal academics – to capture the factual subtleties of different types of cases and to adjust the legal treatment to the specific characteristics of each of these categories. Herman Oliphant, for example, celebrated the traditional common law strategy of employing narrow legal categories which help to produce “the discrimination necessary for intimacy of treatment,” holding lawyers close to “the actual transactions before them” and thus encouraging them to shape law “close and contemporary” to the human problems they deal with. This strategy facilitates one distinct comparative advantage of lawyers (as opposed to, say, both economists and political philosophers) in producing legal norms: their unmediated access to actual human situations and problems in contemporary life. When law’s categories are in tune with those of life so that an “alert sense of actuality checks our reveries in theory,” lawyers enjoy “the illumination which only immediacy affords and the judiciousness which reality alone can induce.”²⁹

Anthony Kronman argues, along these lines, that instilling attentiveness to context into legal discourse helps to nourish some of the legal profession’s most significant

²⁷ OWEN FISS, *THE LAW AS IT COULD BE* 163 (2003). *See also id.*, at 11-12, 14, 54-55, 68; JOHN RAWLS, *POLITICAL LIBERALISM* 235-36 (1993); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

²⁸ LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 24, at 48; LLEWELLYN, *American Common Law Tradition and American Democracy*, in *JURISPRUDENCE*, *supra* note 5, at 282, 309-10; Felix S. Cohen, *Field Theory and Judicial Logic*, in *THE LEGAL CONSCIENCE*, *supra* note 8, at 121, 125-26. *See also, e.g.*, Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880-87 (1990).

²⁹ Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 73-74, 159 (1928). Joseph Raz’s analysis of the phenomenon of distinguishing cases brings home a similar point. *See* JOSEPH RAZ, *THE AUTHORITY OF LAW* 183-97 (1979).



qualities. Kronman conceptualizes these qualities in terms of sympathy and detachment: the uneasy combination between, on the one hand, a compassion enabling lawyers to imagine themselves in their clients' position (or, for judges, in that of the litigants) so as to understand their experience from within and, on the other hand, independence, coolness, and reserve that are prerequisites for the ability to pass judgment on the situation's merits. This combination of sympathy and detachment is, for Kronman, the professional toolkit of lawyers, and the crux of law's authority and legitimacy.³⁰

At times, writers in this mode of discourse seem to argue that their accounts exhaust what law, properly speaking, is all about. It follows, they claim, that legal scholarship should focus on studying the structures (including substantive doctrine and procedure) of law as well as the traits of character that are most conducive to practical wisdom. Scholars like Ernest Weinrib, James Boyd White, Brett Scharffs, and Fiss among others, have developed a perspective that recognizes the content of law as immanent in practical legal materials, while at the same time according legal scholarship an important role.³¹ Kronman goes even further than that. He contrasts the qualities of sympathy and detachment with "theoretical extravagance." He argues that the professional ideal he articulates is one of practical wisdom – "wisdom about human beings and their tangled affairs" – which is a human excellence, a disposition associated with certain temperamental qualities, rather than any form of technical expertise. Therefore, Kronman insists that law's professional ideal should be divorced from any instrumental approach to law, and not "be tempted by the false ideal of a legal science."³²

2. CHARACTERIZING LEGAL THEORY

As we indicated at the outset, we have no quarrel with the investigation of law from the three perspectives outlined above. Quite the contrary: we think that each of these broad camps has produced valuable insights on law. Moreover, many of these insights are also – as we explain below – part and parcel of what we conceptualize as legal theory. Furthermore, as we claim in the next section, there are good reasons why from a legal

³⁰ ANTHONY T. KRONMAN, *THE LOST LAWYER* 224 (1993). *See also id.*, at 72-73, 113-21, 223, 225, 360, 362, 375.

³¹ *See, e.g.*, Ernest J. Weinrib, *Can Law Survive Legal Education?* 60 *VAND. L. REV.* 401 (2007); James Boyd White, *An Old-Fashioned View of the Nature of Law*, * *THEORETICAL INQ. L.* * (forthcoming 2010); Brett G. Scharffs, *The Character of Legal Reasoning*, 61 *WASH. & LEE L. REV.* 733 (2004).

³² KRONMAN, *supra* note 30, at 223-24.



theory perspective, it is essential to have all of these discourses about law in place, even if not necessarily in one institution.³³

None of this however implies “the death of the law,”³⁴ or the end of legal theory. We believe that alongside these helpful contributions – or maybe rather at their midst – legal theory plays an essential role. In this section we describe the added value of legal theory and explain why indeed it deserves a separate naming. There are two interconnected aspects to the distinct character of legal theory: the attention it gives to law as a set of coercive normative institutions and its relentless effort to incorporate and synthesize the lessons of the other discourses about law.

a. Coercive Normative Institutions

Legal theory, as we understand it, is typically structured – explicitly or (much more frequently) implicitly – around the central and persistent questions of jurisprudence, interrogating the law as a set of coercive normative institutions.

This understanding of law typifies many jurisprudential schools, with some (like John Austin) emphasizing law's coercive dimension and others (like H.L.A. Hart) highlighting its normativity.³⁵ Here we provide a brief summary of the realist take on it because the realist conception of law offers a powerful articulation of the idea that power and reason are equally essential to law, while at the same time appreciating the difficulties of their cohabitation.³⁶ Furthermore, the realist account of law carries another important lesson that also informs the title of this section: in understanding law as a going institution, realists view law as an enterprise that cannot be reduced to its constituent parts. This means that jurisprudence must go beyond adjudication to consider the numerous other

³³ On the other benefits of such diversity, see Menachem Mautner, *Beyond Toleration and Pluralism: The Law School as a Multicultural Institution*, 9 INT’L J. LEGAL PROF. 55, 56 (2002).

³⁴ See FISS, *The Death of the Law?*, in *THE LAW AS IT COULD BE*, *supra* note 27, at 191. See also Owen Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1989).

³⁵ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart ed., 1954) (1832); H.L.A. HART, *THE CONCEPT OF LAW* (1961).

³⁶ See Dagan, *supra* note 1, at 622-37, which the next three paragraphs summarize. Of course, choosing the realist perspective betrays our particular predilections, and our sense that the realist conception lays the groundwork for a wide range of familiar current legal theory. A source less familiar for American legal theory, but equally adamant about the uneasy cohabitation of power and normativity (or what he calls force and norm) is VON JHERING, *supra* note 4, at 239-62.



arenas which are replete with lawmaking, law applying, law interpreting, and law developing functions.³⁷

Realists justify their preoccupation with coerciveness in two steps: the first, obvious part of the argument, is that, unlike other judgments, those prescribed by law's carriers can recruit the state's monopolized power to back up their enforcement. But the second, more subtle part of the argument is just as important, and it rests on the institutional and discursive means that downplay some of the dimensions of law's power. These built-in features of law – notably: the institutional division of labor between “interpretation specialists” and the actual executors of their judgments, together with our tendency as lawyers and even as citizens, to “thingify” legal constructs and accord them an aura of naturalness and acceptability – render the danger of obscuring law's coerciveness particularly troubling. They explain the realists' wariness of the trap entailed in the blurring of law's coerciveness.

But realists also reject as reductive an alternative image of law, which portrays it as naked power or interest. They insist that law is also a forum of reason, and that modes of legal reasoning often function as constraints on the choices of legal decision-makers. Law is not *only* about interest or power politics; it is *also* an exercise in reason-giving. Furthermore, because so much is at stake in reasoning about law, legal reasoning ought to be urgent and rich, attentive, careful, and serious: the question of how rich legal reasoning will be is often a function of how hard people are willing to work in undermining unreflective understandings of what the law is or must be.³⁸ Reasons are appeals to a host of values in an attempt to justify law's coercion, values ranging from barely articulate longings for *justice* all the way down to a basic desire for security and order (or a fear of chaos), and everything in between. Reasons may be articulated at varying levels of abstraction, from the general proposition down to the argument contextually tailored for a particular situation of application. Reasons also range from the wholly substantive (e.g., “this legal arrangement contributes more than its alternatives to human flourishing”) to the technical (e.g., “this rule is administrable by courts with limited information”).³⁹

³⁷ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1991).

³⁸ For an account of the way legal materials and legal reasoning constrain decision-making that builds on the centrality of the work of the interpreter (and thus her responsibility), see DUNCAN KENNEDY, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation*, in *LEGAL REASONING: COLLECTED ESSAYS* 153, 158-61 (2007).

³⁹ At times, reasons could devolve to aesthetics, as we believe most claims for a rule on the basis of internal coherence do. We happen to think that aesthetic reasons for legal rules are not usually good reasons, but it is clear that they are still reasons, and we would admit that other things being



Recognizing this range of registers for reasoned argument, it would appear bizarre to equate normative reasoning with parochial interests or arbitrary power as a general matter. In (legal) theory, normative reasoning must aspire to appeal beyond the parochial or the arbitrary, even as legal theory invites the analyses that expose some instances of existing argumentation as covers for interest. Analyses that give up on the aspiration to reasoned persuasion are problematic to the extent that they relinquish responsibility: the responsibility of legal theory to offer possibilities of critique of status quo power arrangements and the option of marshalling the law for morally required social change.

Legal theories of institutions, forms of reasoning, or particular doctrines take these lessons seriously. Because reasoning about law is reasoning about power and interest, legal theory is frequently suspicious of the reasons given by law's carriers and it invites criticism of law's means, ends, and (particularly distributive) consequences.⁴⁰ This stage often uses insights of socio-historical analyses of the law. But the critique of legal doctrine often leads legal theory to a reconstructive stage, guided by the dynamic understanding of law as a great human laboratory continuously seeking improvement: an "endless process of testing and retesting,"⁴¹ as part of an interminable quest for more just societies. And it is at this stage in particular that important inputs come into play from various law and policy schools (including, of course, those schools that question the legitimacy of resorting to policy, as opposed to considerations of principle).

Furthermore, legal theorists often incorporate in their analysis an institutional perspective.⁴² At its best, legal theory overcomes jurisprudential tunnel-vision that sees the legal universe through judicial eyes. Instead of an adjudication-centered perspective, legal theory expands its view to the set of institutions through which law is created, applied, or otherwise becomes effective. Some of the institutions upon which legal theory lavishes attention actually enforce norms (courts; prosecutors; administrative agencies);

equal, elegant wording is preferable to clumsy wording, even assuming no functional difference. Of course, *other things* are never actually equal.

⁴⁰ This is the response of legal theorists to the characteristic features of practitioners and judges' communication as strategic and insincere. See Dan-Cohen, *supra* note 14. Dan-Cohen claims that the only adequate remedy for this is "that substantive legal theory decidedly does not participate in a dialogue in which judicial and other official pronouncements count as interlocutors." *Id.*, at 590. For a convincing response to this provocative claim, see Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615 (1992).

⁴¹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921). See also RONALD DWORKIN, *LAW'S EMPIRE* 400-13 (1986).

⁴² For a survey of recent institutionalist work, see Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 85-90 (2009).



some are hierarchical and rule-based with readily identifiable agents involved in norm obedience (corporate counsel; tax advisors; etc.); and some are webs of social norms, including the norm of deference to the symbolic power of law. The core of the institutional vision is an image of law as a going enterprise that is not usefully reduced to its constituent parts. Analyses of discrete parts are crucial to institutional knowledge, but understanding the complete phenomenon requires a non-reductive account.

b. Synthesizing the Other Discourses

Legal theory, as we define it, seeks to shed light – either explanatory, justificatory, or reformist – on society's coercive normative institutions. In order to perform these tasks, it often resorts, as we have already mentioned, to insights of the other discourses about law. But as the previous paragraphs explain, the synthetic spirit of legal theory is not just a matter of methodological inclination; rather, it is justified – indeed mandated – by the appreciation of the nature of law as a set of coercive normative institutions.⁴³

Legal theorists resort to socio-historical analyses of the law, as well as to comparative law (a traditional tool of academic lawyers), because they can offer contextual accounts that help explain the sources and the evolution of the legal terrain. Socio-historical analyses are also instrumental in opening up the legal imagination by undermining the status quo's (implicit) claim of necessity and revealing the contingency of the present. At times they can help unearth competing legal possibilities and provide hints as to the possible ramifications of their adoption.

Law and policy is obviously helpful in figuring out the real life ramifications of current law. This task, which is important both in order to understand the law and to evaluate it, often relies on social scientific methods (from economics, psychology, sociology, anthropology, and political science), both empirical and theoretical. Insofar as this stage of research is aimed at assessing the normative desirability of law, it typically leads to a second stage which looks at law's goals and thus resorts to guidance from the evaluative neighboring disciplines, notably ethics and political philosophy. And where legal theorists aim at reconstruction – at designing alternatives and comparing their expected performances – they again typically use both social scientific tools and normative ones.⁴⁴

⁴³ For a refreshing recognition of the significance of such synthesis by a legal economist and a legal philosopher, see Daniel Markovits & Alan Schwartz, *The Dual Performance Hypothesis and the Myth of Efficient Breach* 74 (unpublished manuscript).

⁴⁴ The distinction is rough, and solely methodical. We do not mean to imply that social science can actually be value-free, or devoid of normative underpinnings.



Law as craft is no less vital for legal theory than the two other discourses about law. As with many human practices, deep understanding of the evolution and dynamics of law requires some inside information that only law as craft can provide. By the same token, a robust acquaintance with law's institutional, structural and discursive characteristics is also necessary in order to appreciate the potential of alternative legal reforms and to caution us against programs that are insufficiently sensitive to law's typical and recurrent limitations.⁴⁵ Thus, moreso than their counterparts in the social sciences and the humanities who write about law, legal theorists often synthesize, explicitly or implicitly, these critical dimensions into their accounts.⁴⁶

Legal theorists who recognize the possibilities of synthesizing these languages of legal scholarship might not be overly concerned with the dismissal of the legal tradition as unscientific⁴⁷ nor by the fear of intellectual cooptation by legal practice.⁴⁸ The range of starting points for analysis is immense: some legal theorists will begin with existing doctrine or existing proposals for legal reform, convinced that a starting point in the actual arrangements governing some aspect of life is a recognition of the social basis of the law;⁴⁹ others will begin with a general analytical problem, and may not discuss particular doctrines in much detail at all;⁵⁰ others still might begin with an abstract question but make extensive use of doctrine to illustrate or test their claims.⁵¹ Legal theory comes in many flavors, from the apologetic to the radical, and of course at varying levels of quality. We can allow ourselves to hope that theorists will examine legal doctrines or institutions with both a critical eye and a reconstructive spirit, while utilizing the insights of all three discourses about law in the ways we have just described.⁵² And

⁴⁵ One manifestation of the power of law and craft over legal theory is its tendency to be less abstract than the philosophical, economic or other theories from which it borrows.

⁴⁶ For a discussion of other aspects in which legal theory can benefit social scientists writing about law, see Christopher McCrudden, *Legal Research and the Social Sciences*, 122 L.Q. REV. 632, 647-49 (2006). For an account of "what lawyers can teach moral and political theorists" see Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 936-50 (2009).

⁴⁷ See *supra* text at note 9.

⁴⁸ See *supra* text at note 22.

⁴⁹ For one example where hundreds might be cited, see Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469 (2007).

⁵⁰ For an example complete with an account of what legal theory is, see DAN COHEN, *supra* note 18.

⁵¹ See EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010).

⁵² The subset of legal theories which emphasize reconstruction is allied to the Grand Style of the common law, described by Llewellyn as "a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need," mediating between

we can similarly hope that legal theorists will not shy away from reaching a conclusion that nothing short of radical transformation may be required for law to be acceptable.⁵³

Thus conceived, legal theory combines lessons from interfacing disciplines of the social sciences and the humanities, but it cannot be reduced to any of them. By the same token, although legal theory acknowledges the significance of the internal insights of law as craft, it has no aspiration of closure. Rather than seeking to establish law as an autonomous academic discipline, it celebrates its own embeddedness in the social sciences and the humanities. Finally, although the synthetic enterprise of legal theory sounds academically ambitious (and it is indeed), it is – or at least can be – highly relevant to the practice of judges and practicing lawyers, at least insofar as they are interested in explaining, justifying, or reforming the law.⁵⁴

3. THE FAMILY OF LEGAL DISCOURSES

Legal theory, as we have tried to characterize it, is both inherently self-confident and intrinsically tormented. These seemingly contradictory dispositions may explain why good legal theory does not simply accept the surroundings of the other discourses about law in patient resignation, but in fact doggedly seeks out interaction with those surroundings.

The self-confidence of legal theory springs from its internalization of the complexity of law, and a belief that only an engagement with complexity can generate useful accounts of legal phenomena. The reasons for this are already implicit in the previous section. If what typifies law is indeed the institutional cohabitation of power and reason,

“the seeming commands of the authorities and the felt demands of justice.” LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 24, at 37-38.

⁵³ Indeed, legal theory is not limited to the ‘happy middle’; genuine insight often comes from what are perceived as extremes. While such insights might require domestication for implementation through law, we would still hope to see the insights themselves arise and develop in legal theory.

⁵⁴ In this sense, legal theory may help to ameliorate the disjunction between the legal academia and the profession. Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). For a convincing platform of cooperation between the academia and the bar, see Robert W. Gordon, *Lawyers, Scholars, and the “Middle Ground,”* 91 MICH. L. REV. 2075, 2098 (1992). For a corresponding vision of legal education, see LLEWELLYN, *The Study of Law as a Liberal Art*, in *JURISPRUDENCE*, *supra* note 5, at 375. Llewellyn insisted that studying law as a liberal art, by combining “[t]echnique, the intellectual side, the spiritual – the true, the beautiful, the good” – is the best practical training, since it accords students “vision, range, depth, balance, and rich humanity” which are the key for effective and good practical work. *Id.*, at 394.



and if this core feature of law necessitates a synthesis of the type described above, then any one-dimensional account of law – or of any specific legal doctrine or practice – is by definition partial and deficient. This conviction leads legal theorists to a principled anti-purist position.⁵⁵ This position is further strengthened for legal theorists of the evaluative (justificatory or reformist) type, because the responsibility in potentially affecting people's lives forces upon them a duty to doubt as well as a duty to decide and these obligations cannot be discharged from any single perspective on law.⁵⁶

But alongside its self-confidence, legal theory is typified by an almost constitutive discomfort. This disposition seems to us to derive from the fact that in most dimensions of law, legal theory is positioned somewhere midway between the other discourses about law⁵⁷ and is thus always exposed (albeit to a moderate degree) to the professional hazards of their practitioners. Thus, on the one hand, legal theory typically puts less emphasis on law's coerciveness and the risks of its collapse to brute politics than do socio-historical analyses; therefore, it is subject, at least to some degree, to the risk of lack of critical reflectivity that haunts both law and craft and (to a lesser degree) law and policy (because they rarely pay attention to these dimensions). On the other hand, by distancing itself to some extent (that is: more than law as craft) from legal doctrine and from jurists' internal point of view, legal theory may be insufficiently attuned to law's distinctiveness vis-à-vis other social, economic, and cultural institutions. By the same token, although legal theory is more responsive than both socio-historical analyses and law as craft to the normative dimension of law and to its potential role as an instrument for social change, legal theory is typically less reform-minded than law and policy and thus may be subject – at least to an extent – to the risks of either romantic conservatism or ivory-tower playfulness.

The core convictions underlying legal theory, as we have described them above, require legal theorists to navigate these unstable middle positions. They imply that legal theory will generally rely on pragmatic judgments as to the optimal degree of suspension from the practice of law and as to the optimal mix of socio-historical and normative perspectives that should be called in for its analysis. While there is no reason to disparage the enterprise because of the imprecision of such judgments, there is always good reason for not being complacent about them. The environment of the other discourses not only

⁵⁵ Cf. McCrudden, *supra* note 46, at 645, who argues that the "methodological pluralism" which typifies "current legal scholarship" demonstrates "a mature openness to other disciplines that demonstrates a welcome self-confidence."

⁵⁶ See Eyal Zamir, *Towards an Integrative Legal Scholarship*, 4 HAIFA L. REV. 131, 142-43 (2008). See also Singer, *supra* note 46.

⁵⁷ One exception to this rule is the institutional one, to which legal theory seems to us to be the most sensitive, while law as craft is the least sensitive (with law and policy and socio-historical analyses taking midway positions).



provides legal theory with essential inputs as discussed above; each of them also serves as a potential source of critique towards excesses or shortcomings in striking this delicate and sensitive balance. The critiques are obviously different from each other; indeed at times they may be diametrically opposed. Legal theorists, whose accounts often serve as bridges among these opposing positions, can rely on the critical attitudes of the other members of the family of legal discourses as checks on what may be the most challenging task of a solid legal theory: properly accommodating the insights of socio-historical analyses of law, of law and policy, and of law as craft into a workable theoretical frameworks that rely on a robust understanding of law as a set of coercive normative institutions.

CONCLUSION

We will conclude, not with any truly conclusive statement, but rather with a reflection on three rather loose implications one might draw from our exercise in characterization. We'll begin by laying out the implications, and only then try to tie them together in our reflection. The three implications deal with the relationship between law and other academic disciplines; the institutional structure of the legal academy; and advanced legal education.

After several years of unsystematic gathering of anecdotal evidence, we believe that many people involved in the legal academy experience a certain discomfort regarding the academic status of legal scholarship.⁵⁸ A recurring thought seems to be that there are two alternatives: adopt an external academic discipline (economics, sociology, psychology, philosophy, etc.), or relinquish academic or scientific pretensions and delve more deeply into practical professionalism. As against this somewhat untheorized (but we think, quite widespread) outlook, we are suggesting that those alternatives offer a false choice. Legal theory, distinctive in its synthetic openness and its focus on coercive institutional normativity, should be understood as an internal academic alternative. The strong version of this claim is this: legal theory has – just as other academic fields do – generated a language with which the initiated can advance more nuanced arguments than

⁵⁸ We refer to the academic status of legal scholarship in the minds of legal academics, i.e., their own self-doubt; we are not talking about how the law school or the scholarship produced there is viewed by members of other university faculties. That question could be related to our inquiry, but for now it is too far afield.



would be available to lay audiences. The language is far from impenetrable, but it does require training to gain facility with it, and it does allow for a deepening of inquiry.⁵⁹

The second implication touches on the structure of the law school as a community of scholarship. Law faculties are collections of people, and as such prone to combination and division. Sometimes those divisions are generational; at times they may be thematic; often they seem to be methodological; sometimes they map onto institutional or more general politics. We are not suggesting a way to overcome such divisions – indeed, they may be valuable overall in preventing boredom (and boring scholarship). However, the implication of our discussion is that legal theory is a place where those divisions don't simply divide, but rather become the focus of discussion. This is most pertinent regarding methodological differences: the discussion of legal theory brings the specialist part-way out of a form of isolation and forces an engagement with additional perspectives and agendas. In its strongest form, the implication would be that while people in the law school could do anything in the way of scholarship, they would also have to *speak* legal theory, if not with native proficiency then at least as a second language.

This brings us to the third implication of our mapping, dealing with advanced legal education. And here, we will allow ourselves to be blunt to the point of vulgarity. If we are right about legal theory, then the legal academy should not rely too heavily on other disciplines to train its scholars.⁶⁰ There is certainly room for a great many philosophers and economists on law faculties. However, a reliance on other fields for advanced training may mean that many people who join law faculties will have to learn the language of legal theory on the fly. To the extent that legal theory has content, as we have argued that it does, then legal theory itself should be part of the tool-kit imparted to the aspiring legal academic. In other words, legal academics should have a background in legal theory – they should study it as a field. And the way to do that, it seems to us,

⁵⁹ Why would one want deeper and more nuanced inquiry? Well, part of that desire must be based simply on a will to know and possibly an aesthetics that determines that deeper and more nuanced knowledge is more satisfying. But there are also more instrumental ways to think of the value of depth and nuance: one issue is that depth and nuance are avenues for innovation, for new ways of seeing, for overcoming the kinds of roadblocks to thinking that often arise from stale polarizations, from arguments that have reified into “positions.” This too can be understood as a pragmatic benefit (better, more convincing results), or an existential benefit of a chance to experience something new, or a political benefit in the sense that self-governance is heightened when choice is better informed. Again, this is only meant to suggest; a serious discussion of the phenomenology of legal academia is way beyond our scope here.

⁶⁰ Cf. Matthias Kumm, *On the Past and Future of European Constitutional Scholarship*, 7 I-CON 401, 410-12 (2009).



would be to develop and support PhD (or other research-based advanced degree) programs in law.⁶¹

Our reflection on these three implications brings us back to the nature of our project, to the question of what we are doing by generalizing about legal theory. We have been trying to figure out what legal theory is and what it could be. In doing so, we are not involved in a maximization project that calls for an advanced algorithm. Rather, the project is more like an appeal to character, and thus our title has a double meaning. On the one hand, there is a descriptive project of characterizing existing legal theory (and that to come). But on the other hand, we are trying to draw out a type of participant, a character in a particular institutional drama. If you are persuaded, you already identify with that character.⁶² If not, we hope the character of legal theory is at least interesting enough for further engagement.

⁶¹ The suspicious reader will say this sounds particularly self-serving coming from authors who have spent considerable energy supporting such a program. We make no claim of impartiality, and this point, like the rest of the essay, is based much more on reflection about experience than on research. At the same time, we have considered the idea seriously, and are willing to argue about and defend it without appealing to the authority of experience.

⁶² Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 873 (1988).

