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Normative Jurisprudence and Legal Realism

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# Normative Jurisprudence and Legal Realism

Hanoch Dagan

## Abstract

This review article examines Robin West's provocative new book *Normative Jurisprudence: An Introduction*. West provides a learned and sophisticated account of the decay of the three major jurisprudential traditions of North American legal theory: natural law, legal positivism, and critical legal studies, which leads to and is motivated by a spirited plea for the reinvigoration of distinctively legal normative scholarship. Her proposed genealogy is valuable and her preliminary blueprint for reform important. But I believe that both fronts can be significantly enriched by a more charitable reading of legal realism than the one she (briefly) provides. Thus, this review offers a competing genealogical account of the three contemporary approaches to law West criticizes, claiming that like critical scholars, promoters of institutional fit and of economic efficiency are also intellectual descendants of legal realism. Legal realism, I insist, provides a subtle conception of law as a set of institutions distinguished by the irreducible cohabitation of power and reason, science and craft, and tradition and progress. This conception, which was torn apart by the realists' heirs, offers the key to a proper cure to the predicament West identifies by pointing out to a robust understanding of legal theory and thus of the distinctive contribution legal scholars can make in normative debates.

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I. INTRODUCTION .....	2
II. JURISPRUDENTIAL GENEALOGIES .....	3
III. REVIVING LEGAL NORMATIVITY .....	11
IV. CONCLUDING REMARKS .....	15

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## NORMATIVE JURISPRUDENCE AND LEGAL REALISM

## I. INTRODUCTION

Robin West's provocative new book *Normative Jurisprudence: An Introduction*<sup>1</sup> is a learned and sophisticated account of a decay of 'the three major jurisprudential traditions of North American legal theory—natural law, legal positivism, and critical legal studies' (3), which leads to and is motivated by a spirited plea for the reinvigoration of distinctively legal normative scholarship. West argues that 'over the past half century or so' these traditions have 'largely turned [their] back on [] normative questions about law's value' (2). Natural law shifted from a 'decidedly substantive' mode of theorizing to 'thin' accounts of 'the legal good', which focus on 'procedural purity' or 'institutional fit', encouraging lawyers to examine whether a decision 'fits well with prior rules or decisions raising comparable facts' (3, 6, 9). Legal positivism deserted its original impetus—'to facilitate clearheaded criticism of law'—focusing instead on the analytical claim that 'the content of law must be determined by a nonmoral metric' and the concomitant economist 'identification of the good with the desired, and hence of human welfare with the product of choice and preference' (6-7, 10). Finally, critical legal theorists have dropped the 'constructive moral ambition' of earlier critical theorists, 'notably the early-twentieth-century legal realists', and are now preoccupied with uncovering how law 'furthers hegemony or . . . legitimizes the power of patriarchy or capital or the state or corporations' (7-9).

West decries these developments which sadly made questions regarding 'the legal good . . . absent in our contemporary jurisprudence' (11). She believes that legal scholarship 'can be normative . . . in ways that contribute distinctly to political and moral discourse', and accordingly urges legal scholars to 'contribute to the *criticism* of law, to its *reform*, and to its *formulation*' (197-8). West insists that legal scholars are the proper agents for the task because '[s]ensitivity to law's perils and promise is the content of their expertise' (203) and thus further proclaims that 'the demands of justice, the ideals we have or should have about law, [and] the 'good' that a good law exhibits or that a bad law lacks—should be defining questions of jurisprudence' (2). The fact that currently they are not, she concludes, amounts to 'an unwarranted dereliction of duty', which—given 'the demonstrated need for just that expertise'—is 'shameful' (203).

West's critique of contemporary jurisprudence is valuable and enlightening, and her call for the reinvigoration of normative jurisprudence is important and inspiring. This review focuses indeed on these two aspects of West's rich book. Part II offers a competing genealogical account of the three contemporary approaches to law she criticizes, claiming that they are all intellectual descendants of legal realism, which

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<sup>1</sup> Robin West, *Normative Jurisprudence: An Introduction* (Cambridge University Press, New York 2011). Subsequent references appear parenthetically in the text.

diverged in unfortunate ways from its legacy. To be sure, arguing that, like critical scholars, promoters of institutional fit and of economic efficiency continue important realist claims does not imply that they do not also owe intellectual debts to (respectively) natural law and legal positivism. But identifying legal realism as the common ancestor of all three contemporary schools points out to a diagnosis of the challenge we now face which is quite different than West's. Indeed, my main claim in these pages is that the key to a proper cure to the predicament West importantly highlights is refining the ways in which these three schools diverge from the realist legacy. (This review heavily relies on an interpretation of the realist legacy I develop at some length at *Realism Renewed*.<sup>2</sup>) Thus, in Part III I argue that while West's passionate invitation to rejuvenate normative jurisprudence is timely and important, her answers to the question she herself posit as to the *distinctive* voice that *legal* academics have for praising, lauding, panning, or denouncing the law (1, 181, 197) are helpful but quite preliminary. I further claim that a more robust response requires a revival of the legal realist legacy. Reconstructing this legacy—which West presents as a program of the amoral application of the social sciences and a source for what she denounces as 'faux-normativity' (184-7)—provides the most secure premise for law as an academic discipline and thus also the most promising foundation for a distinctive legal voice in normative debates.

## II. JURISPRUDENTIAL GENEALOGIES

Most of *Normative Jurisprudence* is dedicated to West's narrative of decline, in which contemporary carriers of veteran traditions betray their normative potential. One prime culprit in this story is Ronald Dworkin, who robbed, in her view, the natural law tradition of its critical and reformist potential. West calls Dworkin 'a Burkean conservative' (30) because by focusing on the subset of moral principles 'that are fairly inferable from past legal, political, and particularly adjudicative practices', his 'jurisprudence shrinks our understanding of the moral principles, or moral truths, that might be germane' to 'the evaluation, criticism, or development of law' (26-7). Overemphasizing the legal tradition in this way is unfortunate because it fails to capture 'another face of law', namely: its great potential to serve as an important means for the 'creation and re-creation of our social world, in light of demands of justice' (58), which at times require shifting the spotlight from adjudication to legislation (36-7, 43).

This failure is particularly stark, West maintains, when situated against the natural law tradition which Dworkin represents. Natural law stands for 'the quest [] to define the human good that the just law serves, or to give content to the common good that law, both real and idealized, promotes or protects' by reliance on 'practical reason', 'the

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<sup>2</sup> Hanoch Dagan, *Realism Renewed: Essays on American Legal Realism and Private Law Theory* (Oxford University Press, New-York 2013).

nature of the good life', and the like (31). West is aware of the (ab)use of natural law to attack a wide-range of sexual behaviors. But she insists that the wrongness of these 'overly intuitionist' and rather authoritarian claims does not imply that it is wrong 'to think that legal institutions ought to serve intrinsic human good' (51-2). She thus celebrates the core natural law proposition in which 'a law is just [only] if it furthers the common good' by serving 'as a vehicle for securing [the basic] goods', namely: those goods, which—based on 'human nature', 'human experience', and 'human universality'—are objective components of 'a conception of the good life' (36).

West's embrace of 'a jurisprudence aimed at elucidating the common good' that is 'informed by a description of human nature' (41) raises difficult questions regarding the possible vices (and virtues) of such essentialist moves (53-5), which are beyond the scope of this review. More relevant for my purpose is that alongside natural law, Dworkin's jurisprudence owes an important and underappreciated debt to legal realism.<sup>3</sup> Legal realism conceptualizes law as a going institution or set of institutions. Law, in John Dewey's words, is 'not something that can be done or happen at a certain date', but rather an endless 'social process' of 'testing and retesting'.<sup>4</sup> Presaging Dworkin, Karl Llewellyn celebrated the 'Grand Style' of the common law in which this quest 'for justice and adjustment' begins with the existing doctrinal landscape in an attempt to obey 'the law of fitness and flavor', whereby the instant outcome and rule always think 'with the feel' of the system as a whole, and 'go with the grain rather than across or against it'.<sup>5</sup>

Indeed, both the realist conception of law and Dworkin's conception of law as integrity appreciate legal tradition as an anchor of intelligibility and predictability as well as a potential source of valuable normative choices. They also both understand law as a justificatory practice that continually attempts to recast itself in the best possible normative light, and thus insist that the quest for justice is integral to law. These similarities make legal realism a significant precursor of Dworkin's *Law's Empire*, anticipating his account of fit and justification as the two dimensions of legal evolution.<sup>6</sup> They do not, however, render the realist conception of law as just an early incarnation of

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<sup>3</sup> To be sure, Both Dworkin and the legal realists drew upon the common law tradition. But as the following text implies, there are striking similarities between Llewellyn's account of the evolution of law and Dworkin's famous algorithm for his Herculean judge. For more elaborate discussion of these similarities (and differences), see Dagan, *Realism Renewed* supra note 2 at Pt IV of Ch.2.

<sup>4</sup> John Dewey, 'My Philosophy of Law' in (1941) *My Philosophy of Law: Credo of Sixteen American Scholars* (Fred B. Rothman, Littleton 1941, 1987) 73, at 77.

<sup>5</sup> Karl L. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, Boston 1960) at 36, 38, 190–1, 217, 222–3; K. N. Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method', (1940) 49 *Yale L.J.* 1355 at 1385.

<sup>6</sup> Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986) at 52-3, 164-258.

Dworkin's, because the differences between these two understandings of law are not less important than their similarities.

While legal realists claim that existing doctrine is oftentimes the starting point for analysing legal questions, they deplore, with Oliver Wendell Holmes, the 'blind imitation of the past' that may limit 'the possibilities of our imagination'; thus, they insist that appeal to existing law must be 'the first step toward an enlightened skepticism, that is, [. . .] a deliberate reconsideration of the worth of [the existing] rules'.<sup>7</sup> Indeed, legal realists understand law's quest for justification as a perennial process that constantly invites criticism of law's means, ends, and other (particularly distributive) consequences. This is why, like Bentham whom West praises (61-2, 65-6) and unlike Dworkin, Llewellyn was careful to preserve the distinction between the legal *is* and the legal *ought*: to enable—indeed facilitate—legal criticism; to 'hold the responsibility for working toward the Right and the Just within the hard legal frame . . . to *defuse* and *deconfuse* the merely authoritative . . . from the Just or the Right, and to get into the pillory so much of the Law as has no business to be Law'.<sup>8</sup>

The foundation of these more critical and reformist components of legal realism becomes clear once we contrast Dworkin's ideal judge (Hercules), who is presented as one who transcends his self-interest and group affiliation,<sup>9</sup> with the realists' more complex portrayal of law's carriers. Indeed, while realists perceive law as an exercise in reason-giving and are impatient with attempts to equate normative reasoning with parochial interests or arbitrary power, they also distrust claims by law's carriers that they represent the pure voice of reason. This suspicion derives from the distinctive nature of judgments issued by the carriers of law (*vis-à-vis* other normative judgments). Not only that 'the whole power of the state will be put forth, if necessary, to carry out [these] judgments',<sup>10</sup> but they also have a more figurative and less transparent feature, because they tend to essentialise (or at least privilege) their contingent choices—which too often turn out to work for 'entrenched interests'—thus legitimizing them and delegitimizing (or

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<sup>7</sup> Oliver W. Holmes, 'The Path of the Law' in *Collected Legal Papers* (New York: Harcourt, Brace & Co., 1920) 167 at 186-7; Oliver W. Holmes, 'Law in Science and Science in Law' in *Collected Legal Papers*, *ibid.* at 210, 211. See also, e.g., Llewellyn, *Common Law Tradition* *supra* note 5 at 36, 38, 217; Llewellyn, 'The Normative' *supra* note 5 at 1385.

<sup>8</sup> Llewellyn, 'The Normative', *supra* note 5 at 1372-3; Karl N. Llewellyn, 'Some Realism about Realism' in Karl N. Llewellyn, *Jurisprudence: Realism in Theory and in Practice* (Chicago: University of Chicago Press, 1962) 42 at 55; Karl N. Llewellyn, 'On the Good, the True, the Beautiful in Law' in *Jurisprudence*, *ibid.* 167 at 189. See also Myres S. McDougal, 'Fuller v. The American Legal Realists: An Intervention' (1941) 50 *Yale L.J.* 827 at 835.

<sup>9</sup> See Dworkin, *Law's Empire*, *supra* note 6 at 259-60.

<sup>10</sup> Holmes, 'Path of the Law', *supra* note 7 at 167.



obscuring) other alternatives.<sup>11</sup> Thus, while realists reject the reductive equation of law to sheer power (or interest, or politics), they also warn against subsidizing or domesticating law's coerciveness, insisting that in any credible account of the law power and reason are fated to coexist.<sup>12</sup>

Integrating power into their conception of law pushes realists to constantly challenge law and be wary of implying that the pace of legal change should always be restrained. It is also part of the reason for at least two additional features which distinguish legal realism from law as integrity:<sup>13</sup> (1) realists opt for a 'style of jurisprudence' which goes beyond adjudication to consider the numerous other arenas 'replete with lawmaking, law applying, law interpreting, and law developing functions'<sup>14</sup>; and (2) realists do not treat the dimension of fit(ness) as a global imperative, but rather seek coherence at a far more localized level, embracing law's structural pluralism,<sup>15</sup> which tends to limit law's coercive effects.<sup>16</sup>

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A second major target of West's critical survey is the economic analysis of law, which she presents as the contemporary heir of Bentham's legal positivism. But lawyer economists are again, for West, disappointing students. Bentham separated 'expository' from 'censorial' jurisprudence and used the latter, which he conceptualized in terms of hedonic utilitarian calculus of pleasures and pains, in order to facilitate 'the *criticism* of the law that is . . . and to do so toward the end of legal reform' (61, 99). By contrast, economic analysis of law identifies 'the good with the desired' (10) and thus focuses on 'tabulation of preferences, costs, and benefits' (41). But 'our well-being, our capabilities, our flourishing, our functioning, and even our much-maligned pleasure cannot be reduced to the sum of utilities we seek, whether the latter is measured by revealed, satisfied, consumerist, citizen, first-order, second-order, or any order preferences' (44). Hence

<sup>11</sup> Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum. L. Rev. 809 at 814-18, 840, 827-9; John Dewey, 'Logical Method and Law' in William W. Fisher III *et al.*, eds., *American Legal Realism* (New York: Oxford University Press, 1993) 185 at 193; Louis L. Jaffe, 'Law Making by Private Groups' (1937) 51 Harv. L. Rev. 212.

<sup>12</sup> See Dagan, *Realism Renewed* supra note 2 at Pt II of Ch.2.

<sup>13</sup> A further distinction relates to the realist caution *vis-à-vis* judicial review. See Dagan, *Realism Renewed* supra note 2 at \*.

<sup>14</sup> See Roy Kreitner, 'Biographing Legal Realism', (2010) 35 L. & Soc. Inq. 765 at 580.

<sup>15</sup> Karl N. Llewellyn, 'A Realistic Jurisprudence: The Next Step' in *Jurisprudence* supra note 8 at 3, 27-28, 32; (1962); Karl N. Llewellyn, 'Some Realism' supra note 8 at 59-60; Karl N. Llewellyn, 'The Current Recapture of the Grand Tradition' in *Jurisprudence*, *ibid.* 215 at 217, 219-20.

<sup>16</sup> See Hanoch Dagan, 'Pluralism and Perfectionism in Private Law', (2012) 112 Colum. L. Rev. 1409 at 1426-27.

another tragic discontinuity of an admirable tradition, which explains why ‘whatever else it is and whatever its usefulness’, economic analysis of law ‘is *not* a moral critique of law’ (102).

West’s dismissal of the morality of preference satisfaction deserves a critical analysis given the significance of choice for any credible account of personal autonomy. But my discussion begins again with the observation that the economic analysis of law is frequently and correctly identified as a rightful heir of legal realism.<sup>17</sup> This association is based on the realist program of recruiting the social sciences into law’s service.<sup>18</sup> But *pace* West, this program is *not* premised on ‘disparagement of normative thought in law’ or the dismissal of ‘the demands of justice’ (186). Quite the contrary: it derives from the realist insistence that jurists’ obligation of responsible decisionmaking pervades ‘the whole of law in life’ making the use of ‘moral insights’ indispensable to law.<sup>19</sup> Thus, Holmes’ prophecy that legal discourse is bound to discard its disciplinary solitude, so that ‘the man of the future is . . . the master of economics’, was founded on the claim that with the collapse of legal formalism the ‘duty of weighing’ considerations of ‘social advantage’ becomes ‘inevitable’, and jurists will have to study ‘the ends sought to be attained and the reasons for desiring them’.<sup>20</sup>

This premise of the realist resort to interdisciplinary insights explains some of the differences between realist instrumentalism and contemporary economic analysis of law. Thus, while some realists subscribed to the view (fashionable in the 1920s and 1930s) that the only real knowledge about society is empirical and measurable,<sup>21</sup> my prototype realists rejected the notion that social progress can be judged only in terms of such scientific expertise. Law, Holmes argued, cannot be treated as a matter of ‘doing the [. . .] sums right’ and lawyers should ‘hesitate where now they are confident, and see that really they are taking sides upon debatable and often burning questions.’<sup>22</sup> Reference to science cannot dissolve this difficulty, Felix Cohen explained, because while science can ‘throw light upon the real meaning of legal rules by tracing their effect throughout the social order’, appraising this effect is the task of ethics; moral judgment will always be

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<sup>17</sup> See Judith W. DeCew, ‘Realities about Legal Realism’ (1985) 4 *Law & Phil.* 405 at 421; Edmund W. Kitch, ‘The Intellectual Foundations of Law and Economics’ (1983) 33 *J. Legal Educ.* 184 at 184.

<sup>18</sup> See Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995) at 80.

<sup>19</sup> Harry W. Jones, ‘Law and Morality in the Perspective of Legal Realism’ (1961) 61 *Colum. L. Rev.* 799 at 801, 809.

<sup>20</sup> Holmes, ‘Path of the Law’, *supra* note 7 at 184, 187-9, 195.

<sup>21</sup> See Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973) at 15, 19, 21-2, 24-7, 31-2.

<sup>22</sup> Holmes, ‘Path of the Law’, *supra* note 7 at 180-2, 184.

necessary ‘in order to render normative significance to brute facts’.<sup>23</sup> Thus, as Llewellyn concluded, in legislation, advocacy, counseling, and judging lawyers should use the information gathered on the law in action and its impact in society, as well as ‘technical data of fact and expert opinion’, in order to supplement, rather than supplant, the normative aspect of their judgment.<sup>24</sup>

Since realist instrumentalists lacked the technical sophistication of economics we now have,<sup>25</sup> they did not get to specify the appropriate way for responsibly integrating economic insights into legal discourse. This is obviously a broad and challenging task, which I cannot hope to properly address here. But given the humanist and reformist foundation of realist instrumentalism, it is safe to claim that while realists should not dismiss the moral significance of people’s existing preferences, they should nonetheless reject the idea that these preferences, even if fully rational and aptly informed, can be the *sole* guide of social welfare.<sup>26</sup> Because the value of these preferences relies on the injunction to respect people’s right to be authors of their lives, preference satisfaction must be understood as *instrumental* to autonomy, which is of course *intrinsically* valuable. This means that certain preferences, even if prevalent, ‘do not stand comparison with accepted norms of morals’ and must therefore be outright rejected,<sup>27</sup> especially given the realist recognition of the expressive and shaping functions of law.<sup>28</sup> This also means that law should promote *everyone’s* autonomy, which requires realist instrumentalists to be particularly sensitive to the potential regressive implications of the injunction of maximizing people’s willingness to pay given the marginal utility of income,<sup>29</sup> and accordingly to be also committed to corrective measures in appropriate contexts. Furthermore, because legal realism perceives human values as ‘pluralistic and multiple, dynamic and changing’,<sup>30</sup> it would tend to be cautious towards the prevalent

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<sup>23</sup> Felix S. Cohen, ‘Modern Ethics and the Law’ (1934) 4 Brooklyn L. Rev. 33 at 45.

<sup>24</sup> Llewellyn, ‘On the Good’, *supra* note 8 at 189.

<sup>25</sup> Cf. Alan Schwartz, ‘Karl Llewellyn and the Origins of Contract Theory’ in Jody S. Krause & Steven D. Walt, eds., *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge: Cambridge University Press, 2000) 18.

<sup>26</sup> Contra Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002) at 18-28, 413-31.

<sup>27</sup> See Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921) at 108-10.

<sup>28</sup> See *supra* text accompanying note 11.

<sup>29</sup> See Anthony T. Kronman, ‘Wealth Maximization as a Normative Principle’, (1980) 9 J. Legal Stud. 227 at 240.

<sup>30</sup> Hessel E. Yntema, ‘Jurisprudence on Parade’ (1941) 39 Mich. L. Rev. 1154 at 1169.

commensurality presupposition of economic analyses of law,<sup>31</sup> and prefer instead to incorporate the efficiency analysis in a broader normative account.<sup>32</sup> Finally, because for realists the ideal lawyer combines the technical expertise of the social sciences with the practical wisdom of the legal craft, they tend to include in their normative analysis, alongside such broad instrumentalism, reference to the distinctive institutional, procedural, and discursive characteristics of the various lawmaking venues.<sup>33</sup>

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Lastly, West agonizes over '[t]he disappearance of the moral brief that once defined the critical legal studies movement' (174). Critical legal scholarship, she reports, 'has turned aggressively against even remotely utopian or moral arguments for change' and is 'increasingly focused solely on machinations of power, as reflected in law' (118). The fundamental problem with the neo-critical movement is its broad endorsement of Foucault's 'claim regarding the omnipresence of power', since if everything we know 'is a function of power', critical theory can 'expose the dynamics of power', but its 'moral brief has no referent' (165-6).

As may be recalled, West herself notes that current crits are descendants of legal realism. It is thus instructive to recall that legal realists insist to accommodate in their conception of law *both* a critical take on the power wielded by law's carriers *and* a robust commitment to normativity. Legal realists insist, as noted, that an account of power must play a central role in any credible conception of law, and they further acknowledge that, since the interests and preferences of legal reasoners are always (at least potentially) part of the legal drama, law's coerciveness threatens its normativity. But they refuse to accept the reductive view that law is power. While the coexistence of power and normativity is admittedly uncomfortable, in law struggles for power and normative discourse are inextricably linked. 'Protagonists of divergent normations', Llewellyn noted, 'struggle to capture the backing of the *system* of imperatives; and that is a struggle for power, and by way of power and strategy. The protagonists struggle also to persuade relevant persons that such capture will serve the commonweal; that is both a tactic for capture and a tactic for more effective operation after capture'. Thus, although law 'reaches beyond the normation of oughtness into the imperative of mustness', and, at times, law-stuff 'is neither right nor just', law 'is not brute power exercised at odds with, or without reference to the going order'. Law claims 'observance, obedience, authority', and therefore it is not enough for law to effectively enforce its supremacy. Law needs an

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<sup>31</sup> Alon Harel & Ariel Porat, 'Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics' (2011) 96 Cornell L. Rev. 749 at 751-67.

<sup>32</sup> For a prime example for such an attitude by one of the founders of law and economics, see Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, CT: Yale University Press, 1970).

<sup>33</sup> See Dagan, *Realism Renewed* *supra* note 2 at \*.

additional ‘element of recognition that what is done or commanded or set as imperative or as norm is part of the going order of the Entirety concerned’. Thus, ‘[I]legalistic normation . . . has its own sophisticated claims to being just’ by choosing between conflicting claims ‘in tune with the net requirements of the Entirety’. Law is an arena with a ‘persistent urge to purport to speak for the Entirety, and, in some measure, to make the purport real’.<sup>34</sup>

Legal realists like Llewellyn do not dismiss or marginalize the concern about legal actors using reason as a mere mask for power and interest. Quite the contrary: as noted, they are suspicious regarding the idea that reason can displace interest or that law can exclude all force except that of the better argument, hence their commitment to constantly challenge law’s most accepted commonplaces. But they still insist that justification plays a central role in law—that law is never *only* about interest or power politics—noting that legal reasons refer to ideals of justice, which is a real constraint. This position is driven by the same commitment as West’s—to preserve the very possibility of criticizing existing law and of recruiting law for morally required social change. To be sure, legal realists have neither solved the mystery of reason nor conclusively demonstrated how reason can survive in law’s coercive environment. But because the consequences of severing law from moral reasoning are just as grave as those of conflating law with morality, the realist conception of law accepts the uncomfortable accommodation of reason and power as a constitutive feature of law while remaining acutely aware of the potentially devastating consequences of this unhappy union. Too much is at stake to renounce the realist project of reconciling law’s coerciveness with its claim to normativity.<sup>35</sup>

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To conclude, I argue that the three important contemporary schools West studies share an ancestor in the form of legal realism. While West subscribes to (one of) the caricature(s) of legal realism as a program of the amoral application of the social sciences (184-7), implicit in my discussion is a very different understanding of the legacy of legal realism. Legal realism, as I have argued at some length elsewhere,<sup>36</sup> conceptualizes law as a going institution (or, more precisely, institutions) distinguished by the difficult, but inevitable, accommodation of three constitutive yet irresolvable tensions<sup>37</sup>: between power and

<sup>34</sup> Llewellyn, ‘The Normative’ supra note 5 at 1364, 1367, 1370, 1381-3, 1398-9.

<sup>35</sup> See Dagan, *Realism Renewed* supra note 2 at \*.

<sup>36</sup> Dagan, *Realism Renewed* supra note 2.

<sup>37</sup> I deliberately use a softer term such as “tension” rather than stronger ones such as contradiction. The relationships I discuss are not contradictory. Yet, although the terms in the pairs are not antonyms, they each refer to alternative allegiances, to competing states of mind and perspectives. The difficulty of accommodating them is thus similar to that of reconciling incommensurable goods or obligations.

reason, science and craft, and tradition and progress. To be sure, contemporary schools—notably, those criticized by West—refine and improve our understanding of the specific components of this conception of law. But the post-realist process of specialization and fragmentation—with its endless (and futile) debates between law-as-power and law-as-reason, law-as-science and law-as-craft, and law-as-tradition and law-as-progress—has torn apart the realist legacy and obscured the most distinctive and irreducible feature of the legal phenomenon: its difficult accommodation of power *and* reason, science *and* craft, and tradition *and* progress.

The alternative genealogy offered in this Part may not be that important for its own sake. After all, my claim is not that West has her genealogy wrong as a historical matter; nor do I criticize her for reconstructing the betrayed ancestors by picking and choosing parts of the natural law, positivist, and critical traditions that fit her contemporary agenda. My own account of the legacy of legal realism is also admittedly selective because it is explicitly aimed at offering a reconstruction of a vision of law that is currently valuable, rather than a piece of intellectual history. Indeed I share the project of *Normative Jurisprudence* of reconstructing our precursors in order to work out our own theory of law so that it properly cultivates a distinctively legal normative scholarship. This task we share implies that the contest between our genealogies must be settled by comparing their usefulness for generating such legal theory.

### III. REVIVING LEGAL NORMATIVITY

West concludes her book with a harsh indictment of the present-day legal academia, which neglects its scholarly mission to produce normative legal scholarship. This task, she argues, cannot be discharged by scholarship which incorporates ‘insights drawn from other disciplines’ without any distinctive legal added value, so that law becomes merely an object of research, subject to ‘the disciplines of the humanities or the social sciences’ (181). This mission can also not be performed by what she terms ‘faux-normativity’, namely: ‘extremely circumscribed . . . normative claims’ which ‘are drawn from quasi-historical claims about what the ‘true’ law really was’ and ‘are made within larger arguments about what the current law really *is*’ (181). Not only that faux-normativity ‘forecloses recourse to any moral principles by which law could arguably be judged that are truly outside the scope of existing legal authority’; it also ‘denies the possibility of doing so’ (189). West bemoans the current ‘abandonment’ of true normativity in legal scholarship, emphasizing the significant ‘costs of antinormativity’: the lack of a ‘sustained accounting of how law achieves or fails to achieve justice’, a ‘sustained scholarly inquiry into the nature of individual or social good that law ought to further’, and a ‘legal perspective from which meaningful criticism of law can be mounted’ (191-3, 195).

West vigorously proclaims that legal scholars can make a distinctive contribution to normative discourse and are therefore obligated to ‘contribute to our capacity and store of legal criticism: criticism of law, on the basis of legal expertise, and criticism of societal structures, hierarchies, or milieus, for law’s lack’ (195). She vehemently resists the response of ‘the conventional skeptic’ regarding legal scholars’ unique disciplinary capacities (197, 199). Her answer to this challenge is inspiring and helpful, but quite preliminary. West mentions that legal scholarship is already and necessarily ‘filled with stated and unstated normative premises, arguments, implications, and conclusions about the law we ought to have’ (197). She further argues—and this seems to be her main answer—that ‘it is legal scholars, and only legal scholars, who have the knowledge base, the research tools, and the professional inclination to take on’ the questions dealing with legal criticism, reform, and formulation (199). West repeatedly invokes the lawyers’ knowledge base (199-202), arguing that ‘[l]aw scholars know a thing or two about law, about what it does well, where it fails and why’, while ‘[o]thers do not, either outside or inside the academy, except intermittently . . . as such knowledge has impacts on other disciplines or professions’ (193, 200).

This observation is clearly correct. But it can hardly provide the disciplinary foundation for West’s purposes, because if law has no theoretical core, legal academics have no distinct theoretical voice.<sup>38</sup> And thus West further hints at what she perceives to be a distinctive legal theory or methodology which can provide the distinctive ‘research tools’ of academic lawyers. Legal scholars should undertake ‘deep criticism of extant law’ because they can identify ‘the inadequacies of constitutionalism and legalism, their promises, their fundamental commitments, and their attendant pathologies’ (200); they should ‘embrace the reform of law as the work of the academy’ both because they ‘understand the forms, processes, and limitations of [] legislation and regulation . . . and have the tools to study the promises they hold out’ and due to their unique placement ‘at the nexus of moral philosophy, political theory, and political science’ (201); and lastly, ‘legal scholars should be peculiarly capable of moral and politically essential work of diagnosing the pathologies that follow from law’s absence’ due to their distinct knowledge of law’s potential, history, pitfalls, and promise, namely: ‘the private chaos, subordination or terror created by law’s absence, and the arid rigidity, oppression, or stifling conformity that is risked by its overintrusive presence’ (201-3).

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Regaining the realist conception of law as a set of institutions accommodating power and reason, science and craft, and tradition and progress is key for translating these brief, but indeed important, observations into a more robust program for a distinctively legal

<sup>38</sup> See Ernest J. Weinrib, ‘Can Law Survive Legal Education?’, (2007) *Vand. L. Rev.* 401 at 403-4, 410-1, 428-9, 436-7; Hanoeh Dagan, ‘Law as an Academic Discipline’ (unpublished manuscript).

normative theory. As Roy Kreitner and I argue elsewhere, there are two interconnected aspects to the distinct character of legal theory (normative or otherwise): 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.<sup>39</sup> Both aspects naturally follow from the legacy of legal realism, which has been unfortunately dissipated by the realists' heirs.

The first feature—interrogating the law as a set of coercive normative institutions—is a condensed restatement of the various aspects of the realist conception of law discussed in Part II. It emphasizes the inherent tension between power and reason. It likewise highlights the fact that in law this tension is always situated institutionally. This institutional perspective implies that legal theory expands its view to the whole range of institutions through which law is created, applied, or otherwise becomes effective. This institutional focus also requires attention to law's dynamism, namely: to the tension between tradition and progress as well to both science-based and craft-based engines of legal evolution. This requires legal theory to pay careful attention to law's structural and procedural features as well as the character traits conducive to lawyers' expertise in practical reasoning; it also implies that insights of other disciplines of the social science and the humanities are always potentially relevant to legal theory.

Thus, in order to perform its tasks of shedding light on society's coercive normative institutions in general and for the particular tasks, highlighted by West, of legal criticism, reform, and formulation, legal theory often resorts to insights from the application of other disciplines' theories and methodologies to law. This synthetic spirit of legal theory—its second distinctive feature—is not just a matter of methodological inclination. Rather, it is premised upon and justified by the legal realist conviction that in order to generate useful accounts of legal phenomena legal theorists must engage with the irreducible complexity of law and thus need to adopt a principled antipurist position. This position is particularly strengthened for legal theorists of the normative type—on which West focuses—because the responsibility in potentially affecting people's lives forces upon them a duty to doubt as well as a duty to decide, and one cannot discharge these obligations from any single perspective on law.<sup>40</sup>

Indeed, in contradistinction to the contemporary fragmentation of the legal academy, the legacy of legal realism implies that synthesis must be part of the self-understanding and the law's disciplinary core and thus the second distinctive feature of legal theory, at

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<sup>39</sup> See Hanoch Dagan & Roy Kreitner, 'The Character of Legal Theory', (2011) 96 *Cornell L. Rev.* 671.

<sup>40</sup> See Alan Schwartz, 'Two Cultural Problems in Law and Economics', 2011 *U. Ill. L. Rev.* 1531, 1532; Joseph William Singer, 'Normative Methods for Lawyers', (2009) 56 *UCLA L. Rev.* 899, 910–11; Eyal Zamir, 'Towards an Integrative Legal Scholarship', (2008) 4 *Haifa L. Rev.* 131, 142–43.



least of the normative type. Legal theory should resort to sociohistorical 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 and also open up the legal imagination by undermining the status quo's (implicit) claim of necessity and revealing the contingency of the present. At times, sociohistorical analyses and comparative law can help unearth competing legal possibilities and provide hints as to the possible ramifications of their adoption. Policy-oriented scholarship is also helpful in figuring out the real life ramifications of current law. This task, which is important not only to understand the law, but also to evaluate it, often relies on social scientific methods (from economics, psychology, sociology, anthropology, and political science), both empirical and theoretical. Normative legal theory, more specifically, follows up the analysis of law's effect with a second stage that critically 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 typically use again both social scientific tools and normative ones.<sup>41</sup>

All these external insights are essential to legal theory, hence its deep commitment to interdisciplinarity. But a thorough understanding of the evolution and dynamics of law as well as its possible reform and formulation requires also a robust acquaintance with law's institutional, structural, and discursive characteristics. This may explain why more so than their counterparts in the social sciences and the humanities who write about law, legal theorists often synthesize, explicitly or implicitly, into their accounts law's typical and recurrent advantages and limitations as well as the subtle differences among different legal fields and legal institutions; it may also explain legal theory's tendency to be less abstract than the philosophical, economic, or other theories with which it interacts.

Legal theorists who, in the spirit of legal realism, synthesize these languages of legal scholarship are not overly concerned with the challenge of West's conventional skeptic or with West's own denunciation of reliance on legal tradition. The range of starting points for their analysis is thus immense. Some legal theorists will begin with existing doctrine or proposals for legal reform, convinced—*pace* West—that a starting point in the actual arrangements governing some aspect of life is recognition of the social basis of the law and also the most fertile source for its critical engagement.<sup>42</sup> Others will begin with a general analytical problem and may not discuss particular doctrines in much detail at all. Others still might begin with an abstract question but extensively use doctrine to illustrate or test their claims. With West, one can hope that—loyal to the realist legacy—theorists

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<sup>41</sup> This distinction is rough and solely methodical; it does not mean to imply that social science can actually be value free or devoid of normative underpinnings.

<sup>42</sup> *Cf.* Michael Walzer, *Interpretation and Social Criticism* (Cambridge, MA: Harvard University Press, 1987) at 22, 30, 41, 43, 46-48, 61.

will examine legal doctrines or institutions (or the lack thereof) with both a critical eye and a reconstructive spirit and that they will not shy away from reaching a conclusion that nothing short of radical transformation may be required for law to be acceptable. Indeed, legal theory in the legal realist tradition is not limited to the happy middle; genuine insight often comes from what some perceive as extremes. Although such insights might require domestication for implementation through law, they can and should arise and develop in legal theory.

#### IV. CONCLUDING REMARKS

*Normative Jurisprudence* provides a fascinating voyage to the intellectual history of the most important and influential jurisprudential schools of our time. It offers a lucid analysis of their development and a sharp critique of their failures. West's proposed genealogy is valuable and her preliminary blueprint for reform important. But I believe that both fronts can be significantly enriched by a more charitable reading of legal realism than the one she (briefly) provides. Rather than an amoral program of applied social sciences or a source of contemporary faux-normativity, legal realism—which is, I claim, an important ancestor of all three contemporary schools West studies—offers a subtle conception of law as a set of institutions distinguished by the irreducible cohabitation of power and reason, science and craft, and tradition and progress. This conception, which was torn apart by the realists' heirs, provides the most promising platform for developing a robust understanding of legal theory as a scholarly reflection on legal questions typified by a sustained attention to law as a set of coercive normative institutions and a relentless effort to incorporate and synthesize relevant insights from other disciplinary perspectives on law. Thus, regaining the lost legacy of legal realism is key to the reinvigoration of the distinctive contribution legal scholars can make in normative debates.