Legal Scholarship and the Practice of Law

Robert Post
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
Post, Robert, "Legal Scholarship and the Practice of Law" (1992). Faculty Scholarship Series. 4650.
https://digitalcommons.law.yale.edu/fss_papers/4650

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
LEGAL SCHOLARSHIP AND THE PRACTICE OF LAW

ROBERT POST*

Very few academics today doubt that American legal scholarship is experiencing a crisis of identity. We are torn between the project of professional education and the aspiration for more general academic respectability; we veer unstably between celebrating the rule of law and deconstructing it in the most advanced postmodern fashion; we are ripped apart by divergent currents of Critical Legal Studies, Hermeneutic Theory, clinical education, Doctrinalism, Law and Economics, Feminism, Critical Race Theory, Positivism, Law and Literature, or, most recently, anti-normativism. We are in danger of dissipating our coherence as a professional discipline.

There are in my view two primary causes for the current chaos. Both are visible in the three papers about which I have been asked to comment. The first is the emergence of a form of legal scholarship that situates itself exogenously to the practice of law. This is the scholarship championed in the excellent paper by Meir Dan-Cohen. The second is a growing uncertainty about the purposes of legal practice, an uncertainty that is increasingly paralyzing to those legal academics who sincerely seek to improve the practice. This paralysis is apparent in the fine papers of John Henry Schlegel and Robert Weisberg, which well display the demoralization of contemporary legal scholarship.

These two causes have in common the concept of a social “practice.” The concept is essential to understanding the present state of American legal scholarship, and so it is necessary to explore it in some detail. Following the work of the philosopher Alasdair MacIntyre, I shall define a practice as:

[A]ny coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realised in the course of trying to achieve those stan-

* Professor of Law, University of California, Berkeley.
dards of excellence which are appropriate to, and partially defini-
tive of, that form of activity, with the result that human powers to
achieve excellence, and human conceptions of the ends and goods
involved, are systematically extended. Tic-tac-toe is not an exam-
ple of a practice in this sense, nor is throwing a football with skill;
but the game of football is, and so is chess. Bricklaying is not a
practice; architecture is.4

I hope it is clear that law, as an institution inhabited by judges and
lawyers, is a “practice” in this sense.5 Law is a coherent and complex
cooperative form of human activity that contains within it standards
of excellence. Lawyers and judges attempt to excel in the law, and
when they have done so they experience that special sense of accom-
plishment—which MacIntyre calls an “internal good”6—that can only
arise from having excelled within a practice.

MacIntyre makes a very important point about practices. He
tells us:

A practice involves standards of excellence and obedience to
rules . . . . To enter a practice is to accept the authority of those
standards and the inadequacy of my own performance as judged
by them. It is to subject my own attitudes, choices, preferences
and tastes to the standards which currently and partially define the
practice . . . . [T]he standards are not themselves immune from
criticism, but none the less we cannot be initiated into a practice
without accepting the authority of the best standards realised so
far. If, on starting to listen to music, I do not accept my own
incapacity to judge correctly, I will never learn to hear, let alone to
appreciate, Bartok’s last quartets.7

Practices subsist because of ongoing and shared standards about what
is appropriate for the practice. These standards are often controver-

5. For an excellent discussion, see Dennis M. Patterson, Law’s Practice, 90 COLUM. L. REV. 575
6. MacIntyre writes:

There are . . . two kinds of good possibly to be gained by [the practice of] playing
chess. On the one hand there are those goods externally and contingently attached to
chess-playing and to other practices by the accidents of social circumstance . . . such goods
as prestige, status and money. There are always alternative ways for achieving such goods,
and their achievement is never to be had only by engaging in some particular kind of prac-
tice. On the other hand there are the goods internal to the practice of chess which cannot
be had in any way but by playing chess or some other game of that specific kind. We call
them internal for two reasons: first, as I have already suggested, because we can only specify
them in terms of chess or some other game of that specific kind and by means of examples
from such games . . . ; and secondly because they can only be identified and recognised by
the experience of participating in the practice in question. Those who lack the relevant
experience are incompetent thereby as judges of internal goods.

MACINTYRE, supra note 4, at 176.
7. Id. at 177.
sial, but arguments for their alteration will differ fundamentally de-
pending upon whether they are made within the practice—that is, whether they appeal to the tacit understandings and purposes of the practice—or, whether they are made outside of the practice—that is, whether they make no such appeal.

In *Law's Empire*, Ronald Dworkin conveys a useful image of "legal practice" as essentially "argumentative." Dworkin writes that "[e]very actor in the practice understands that what it permits or re-
quires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions." Dworkin con-
trasts "the external point of view of the sociologist or historian, who asks why certain patterns of legal argument develop in some periods or circumstances rather than others," with "the internal point of view of those who make the claims." The internal point of view is always framed by a concern for the achievement of the proper purposes of legal practice; the external point of view, in contrast, has no such frame. It carries within it instead the distinct purposes of whatever practice the speaker brings to bear, whether that of history, economics, or anthropology.

This distinction between internal and external perspectives on the practice of law is different from the distinction between the presence or absence of the law's "autonomy as a discipline" evoked by Richard

---

8. On this point I quite disagree with the thrust of Schlegel's observation that "to understand a practice only in one's fingers is to leave one with no purchase on, no distance from, that practice and thus no way to criticize it, except from within its premises (a notoriously limited enterprise)." Schlegel, *supra* note 2, at 606. That a pianist learns her craft "in her fingers" does not prevent her from vigorously disputing the proper interpretation of a Chopin nocturne. Such a dispute is not "notoriously limited" in any sense except that it is "only" about how properly to play the piano. Any reasonably complex and living practice will contain within itself the resources for sharp and fundamental disputa-

10. Id.
11. Id.
12. It has been astutely observed that this distinction is essentially "constative" and "performa-
tive" in nature. Pierre Schlag, *Normativity and the Politics of Form*, 139 U. Pa. L. Rev. 801, 917-26 (1991). Like any judgment, the distinction between the external and internal perspectives on law "im-
plies a community that supplies common grounds or criteria by which one attempts to decide." *Ron-
ald Beiner, Political Judgement* 143 (1983). Thus those invoking the distinction simultaneously define and instantiate the relevant community engaged in the practice of law. See generally Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *Harv. L. Rev.* 603, 649-67 (1990). This observation, however, does not discredit or undermine the distinction, but rather records one of the important ways in which practices (like communities) subsist through forms of communicative action.
Posner.\textsuperscript{13} For Posner the law is autonomous insofar as its proper practice depends upon specifically legal materials like "judicial opinions, statutes, and rules."\textsuperscript{14} Posner believes that the law should not be autonomous, because its proper practice should also include "the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system."\textsuperscript{15} Posner makes this claim, however, as one that is internal to the practice of law. He is not arguing that the practice of law should be abandoned, but rather that it should be expanded to include non-legal materials. Having mastered the internal standards of the practice, Posner advocates their revision.

In this stance Posner represents the traditional relationship between legal academics and the practice of law. Since the origins of legal academia in the late 19th century, legal scholars have almost always situated themselves as internal participants in the practice of law, taking as their task its refinement and improvement. This was true even of the legal realists, who, like Posner, believed that legal practice could be improved through the incorporation of non-legal insights.\textsuperscript{16}

I.

This conclusion sets me somewhat apart from Meir Dan-Cohen's apparent claim that practitioners and academics cannot, as a theoretical matter, share a common discourse. It is true, of course, that judges, lawyers, and academics are each differently situated within the practice of law. But we can draw a telling analogy to the theatrical profession evoked by Dan-Cohen, in which actors, directors, and playwrights have distinctly different roles and perspectives and yet are each dedicated to the common practice of the theatre and to the goal of producing excellent plays. Lawyers, judges, and academics have similarly differentiated roles, and yet are each dedicated to the common practice of law and to the attainment of excellence within the law. Certainly the traditional professional task of legal scholarship has been the improvement and clarification of that practice, bringing to bear a unique freedom of speculation and leisure for comprehensive and careful analysis.

Dan-Cohen writes that "the theorist cannot address the practitioner without thereby losing the purity of her own communicative

\begin{itemize}
  \item\textsuperscript{14} \textit{Id.} at 771.
  \item\textsuperscript{15} \textit{Id.} at 779.
\end{itemize}
action and lapsing into strategic communication herself." But this point rests on a distinction between "strategic communication" and "communicative action" that is itself relative to the boundary of a relevant practice. The question of whether we view an expression as strategic or as non-strategic depends upon whether the expression conforms to the standards of the pertinent practice.

Thus Dan-Cohen observes: "In strategic communication . . . participants are oriented toward success; they have a specific goal determined antecedently to their discursive behavior that the latter is designed to promote." But the definition of a given practice determines which goals comprise the discursive behavior in question, and which goals are apart from and "antecedent" to that behavior. So, for example, a playwright may have the strategic goal of entertaining her audience, but because this goal is itself part of the professional practice of dramaturgy, it becomes part of the relevant communicative action of the play. Similarly, the goal of the trial judge may be to create durable forms of social order, or to influence the development of law in other jurisdictions, but these goals are part of the communicative action of judging because they comprise the very standards by which excellent judging is assessed.

If the distinction between strategic and non-strategic communication tracks the difference between communicative goals that are exogenous from and internal to the relevant practice, the fundamental issue must be the definition of the relevant practice. It follows from this analysis that Dan-Cohen has not established that legal practitioners and legal academics cannot in principle inhabit a common practice of law; such a conclusion would in any event have been suspect given the established historical identification of legal academics with legal practice. It also follows, however, that if academics and legal practi-

17. Dan-Cohen, supra note 1, at 587.
18. Id. at 575.
19. Id. (emphasis added).
20. The definition of a practice, which is to say its standards, are of course always and everywhere potentially controversial. The distinction between strategic communication and communicative action often forms part of the vocabulary of such controversies. Thus those who believe that the practice of legal scholarship should be dispassionate and detached argue that the current appeal to narrativity is an inappropriate "strategic" effort to emotionally coerce certain reader reactions. But the appeal can equally well be read as a form of communicative action designed to change the standards of the practice of scholarship.
21. The same conclusion may be said to apply to Dan-Cohen's other variables of role-detachment and sincerity. The question of whether Laurence Olivier is "sincere" during his portrayal of Othello cannot be coherently addressed independent of some understanding of the norms of the practice of acting. And the same is true of the sincerity of the lawyer in his practice of law. This is true because almost all successful practices require that their practitioners internalize relevant standards.
22. Dan-Cohen has elsewhere recognized this identification, criticising the work of "academic
tioners in fact inhabit distinct practices, Dan-Cohen has identified significant barriers to their mutual communication.

One can interpret Dan-Cohen's paper, therefore, to rest on the claim that legal academics ought to engage in a practice that is distinct from the practice of law. Dan-Cohen's invocation of the ideas of Habermas might thus be read as conveying the aspiration that legal academia conform to the usual standards of traditional humanistic scholarship. From the detached perspective of that scholarship, the practice of the law does appear to be merely strategic and hence contradictory to the scholarly enterprise.

Seen from this angle, Dan-Cohen's paper represents a rigorous accounting of the deep theoretical implications of the emergence within the past fifteen years of a form of legal scholarship that is self-consciously external to the practice of law and that takes its bearings instead from traditional academic pursuits. For convenience, I shall call this "external scholarship." Dan-Cohen's argument reveals the fundamental theoretical reorientation required by such external scholarship. And John Henry Schlegel's paper suggests how very hostile the general law school community is to such scholarship. Schlegel records the "monotonous and depressing" fact that newer forms of scholarship appear to survive only as they can be assimilated to the traditional legal practice of rule interpretation. He notes that the criterion for successful legal scholarship is whether it will "be useful to an appellate judge."24

The work of Dan-Cohen and Schlegel displays one source of the present crisis of the legal academy. Traditionally allied in the strongest fashion with the internal practice of law, law schools are now for the first time seriously tempted by forms of scholarship that are external to that practice. This temptation is reinforced by the increasing tendency of law schools to hire entry-level professors with no experience in the actual practice of law, but with advanced degrees in non-legal areas of scholarship.

A candid appraisal of the current state of legal academia reveals many severe institutional difficulties that might obstruct the growth of serious external scholarship. The model for such scholarship may of course be found in traditional disciplines like anthropology, philosophy, political science, sociology, and so forth. The success of these disciplines rests upon obvious structural foundations. They have his-

---

23. Schlegel, supra note 2, at 611.
24. Id. at 613.
torically established standards of scholarly evaluation; they support publications that are policed through mechanisms of peer review to ensure the application of these standards; they have rigorous programs of scholarly training; they recruit new professors based upon actual scholarly achievement in the form of doctoral dissertations.

Law schools, which have traditionally relied on their close connections to legal practice to discipline their scholarly enterprise, have none of these basic institutional mechanisms. Law schools do not train students to be scholars. Law schools tend to hire new recruits on the basis of law school grades rather than scholarly accomplishment. Law schools have no historically established standards to measure achievement in the area of external scholarship, as the notorious and contentious tenure battles of the past decade have made painfully apparent. Major publications in the area of legal scholarship are policed by students, who are bright but not yet competent to articulate and apply scholarly standards, particularly new and contestable ones.

The result is unfortunately predictable. Instead of the elegant and endless conversation envisioned by Dan-Cohen, we have a tower of babel: profuse, exhilarating, insufferable. As Schlegel accurately points out, we never seem to get anywhere. If we in the legal academy wish seriously to engage in the project of external scholarship, we ought systematically to set about the business of creating the structural conditions necessary for such scholarship to flourish.

II.

It is questionable, however, whether legal scholars do in fact wish to engage in that project. I agree with Schlegel that the vast majority of legal academics remain committed to their traditionally internal connection to the practice of law. They would be most unhappy with Dan-Cohen’s strict deduction that law students, insofar as they wanted to become lawyers, can be educated only in their capacity as “eavesdroppers” on the scholarly work of their professorate.25 Certainly Schlegel himself would appear to reject this conclusion. He writes that the true measure of legal education ought to be the facilitation of “an honorable professional life.”26 He thus seems to be arguing for a better form of practice, one that would be liberated from “the

25. Not to mention, of course, the probable effect which the professional reorientation advocated by Dan-Cohen would have on the privileged status of law schools. That status flows from the fact that law schools train lawyers. To the extent that this function is diminished, even in the pursuit of Dan-Cohen’s more vaguely defined project of “education,” it is foreseeable that the privileges of law schools will correspondingly suffer. Most law professors are not likely to welcome this consequence.
26. Schlegel, supra note 2, at 607.
silly notion of law as rule" and that would incorporate nondoctrinal insights into the "many things other than legal rules [that] interact to produce results."

But it is difficult to remain content with this simple interpretation of Schlegel. Scholarship internal to the practice of law must ultimately revolve around the purposes of that practice, which traditionally have been understood in terms of the realization of the rule of law. Schlegel definitively rejects his understanding of this ideal, forcefully repudiating its purported equation between "THE LAW" and "THE RULE." Insofar as Schlegel desires his scholarship to retain an internal relationship to the practice of law, therefore, he must conjure a different standard of excellence for that practice. He must offer criteria for determining whether that practice is functioning well or badly.

But Schlegel precisely refuses to accept this responsibility. He tells us nothing about how, apart from the rule of law, the law ought to be practiced. And when he must commit himself to a positive curriculum for "the school in [his] mind's eye," he can only appeal to scholarship explicitly devoted to studying legal formations from purely external, anthropological perspectives. Schlegel devastates contemporary understandings of the practice of law, but leaves nothing standing in their place. The result is the intellectual equivalent of a scorched earth policy: The practice is savaged from within.

The stance of Schlegel's paper is thus highly ambiguous. The paper claims to be located within the practice of law and to be addressed to the improvement of that practice. But the paper refuses to accept the responsibilities necessarily incumbent upon such a location, and it also warmly embraces various forms of external scholarship. As a consequence Schlegel seems paralyzed, half in and half out of the traditional legal academy. He appears unwilling to disgorge either the prerogatives of legal practice or the delights of external scholarship. The self-defeating tension of Schlegel's position is an increasingly common characteristic of bright, innovative legal scholarship.

III.

If Schlegel is consumed with revulsion at the traditional practice of law, Robert Weisberg is merely demoralized. Weisberg comprehen-

27. Id. at 608.
28. Id. at 610.
29. Id. at 609.
30. Id. at 614.
31. Id. at 603-05.
sively notes the difficulties and deficiencies of the contemporary practice of criminal law and procedure. He excoriates the formulaic, lifeless quality of current criminal law scholarship. He does not, however, despair, but instead initiates a search for forms of external expertise and insight by which criminal law and scholarship might be resuscitated.

His search lies in the grand tradition of progressive legal scholarship, which throughout most of this century has attempted to meet Brandeis's 1916 challenge to assemble the "necessary knowledge of economic and social science" for the law "to meet contemporary economic and social demands." 33 Weisberg's quest ultimately leads him to conclude that "the hope for . . . criminal law scholarship" must lie in "some combination of ethnography and social theory that is willing to see criminal law as well as crime as observable social data." 34

Weisberg thus firmly ties legal scholarship to legal practice. If Dan-Cohen attempts sharply to divide the former from the latter, if Schlegel hangs agonizingly suspended between the two, Weisberg affirms the established enterprise of the legal scholar to clarify and improve the practice of law. He adopts a stance within that practice, hoping to find the means to reform it. He confidently surveys and evaluates existing scholarly projects, forcefully demonstrating their inadequacy. But when his attention turns toward the necessary task of articulating a positive vision of the function of criminal law and criminal law scholarship, his tone changes to one of detachment and disillusion that is distinctly new and modern. Earlier generations of scholars wielded critical insight in the palpable conviction of actual legal improvement. But Weisberg displays no such conviction. His paper almost seems to be going through the motions, as though Weisberg were bound by duty to carefully and comprehensively canvas the academic scene, but without any real expectation of succor.

A close reading of the paper reveals the source of this malaise. Weisberg repeatedly circles back to questions of what he calls "epistemology," by which he initially means the question of what "does criminal law scholarship study," 35 but by which he means at the end of his paper the question of what we want to achieve through the criminal law. 36 These questions are genuine and passionately experienced; they are, given Weisberg's internal stance, mutually entailing. In them we can discern the second source of the crisis of the traditional legal aca-

---

34. Weisberg, supra note 3, at 568.
35. Id. at 528.
36. Id. at 549-50, 568.
demic enterprise: The loss of any firm sense of the internal purposes and function of the practice of law. Because Weisberg is uncertain what he wants to achieve through criminal law, his writing lacks conviction about how to clarify or improve it. He remains stuck attempting to locate first principles, a scholarly position increasingly familiar to those who follow closely the contents of contemporary legal publications.

IV.

The current crisis in legal academia is thus proceeding simultaneously on two fronts. Traditional legal scholarship is being challenged on the one side by the emergence of a new form of external scholarship, and it is being undermined on the other by the collapse of any internal consensus as to the purposes and function of law. Of these it is the second that is the more pervasive and corrosive, for it touches, in one degree or another, the work of all sensitive and aware legal academics. Its effects can vary from a mild unease, to the demoralization of Weisberg, to the outright paralysis of Schlegel.

The causes of this internal crisis are no doubt extensive and complex. One important cause, however, is almost certainly the deterioration of legal authority. The law has traditionally understood its authority as founded in the rule of law, which has embodied the values of universality and impersonality. But as we have come to see the law as itself a culturally specific form of discourse, and as we have come to see culture as increasingly splintered and heterogeneous, legal authority and the rule of law have grown correspondingly problematic. In a world where value is socially constructed, the old aspirations for universality and impersonality can no longer be taken for granted, for their meaning must be attributed to one or another of the many cultures competing for control of the law. It is unclear what impersonal, universal, or authoritative ground the law can assume in this landscape of cultural diversity and division.

The search for this ground represents a formidable task in today’s contentious atmosphere. It is far easier to abandon the search, sidestep the internal problem of legal authority, and shift one’s orientation to the external perspectives of sister scholarly disciplines. It is certainly the case that a shift toward such perspectives is visible across significantly increasing patches of modern legal scholarship. The fundamental question raised by this shift is whether it is a distinctly aca-

ademic phenomenon, or whether it also implicates other participants in the practice of law like judges or lawyers. To the extent that the latter is true, we may be facing a genuine and far-reaching crisis of the legal system in America. To the extent that the former is true, however, we may be witnessing instead the slow detachment of legal academics from the practice of law.

Influenced by the resurgent insights and prestige of various forms of external scholarship, affected by changing patterns of professional recruitment and diminishing connections to the professional bar, legal academia may simply be moving inexorably toward an exogenous framework for its scholarship. But because most law professors have refused to cut the umbilical cord to legal practice with the clean precision of Dan-Cohen, we have managed to produce merely a smoldering academic breakdown of internal definition. We increasingly undermine the foundations of a practice that we cannot bring ourselves to abandon. And we flirt with forms of scholarship whose institutional implications we cannot bring ourselves to own.

Not surprisingly, we experience the resulting contradictions as a crisis of identity.