

Social Science Theory and Legal Education: The Law School as University

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I should like to address some implications of what I believe to be the most important development in legal scholarship of the past fifty years. Over this period, scholarship in the law, like scholarship in other intellectual fields, has undergone a tremendous specialization of interest. The direction this specialization has taken, however, is sharply different from the one that might have been expected fifty years ago. In 1930, prior to the realist revolution, future specialization in legal scholarship might have suggested increasingly detailed and narrow treatises addressing traditional legal subjects. Today, authorship of the legal treatise has been cast off to practitioners. The treatise is no longer even a credit to those competing on the leading edge of legal thought. Instead, legal scholarship has become specialized according to the separate social sciences. Specialization according to the social sciences has broken down older conceptions of distinctive legal categories. No modern scholar can usefully distinguish the various subjects of civil liability. The agency, corporations, and securities fields are only the most current subjects of this form of intellectual reorganization.

The most significant implication of this development is the change in the position that law and the legal system occupy as subjects of research. It is accepted today, virtually universally, that the legal system can be best understood with the methods and theories of the social sciences. It follows from this view, however, that one must abandon the notion that law is a subject that can be usefully studied by persons trained only in the law. Furthermore, it follows necessarily that one must reject the notion that the legal system is somehow self-contained or self-sufficient instead of simply another setting for the expression of whatever are the deeper determinants of human behavior. As a consequence, the importance of law and of the study of law is radically transformed.

The social sciences—more particularly, the behavioral sciences—challenge legal education substantively. They deny the importance of law as a subject.

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The phenomenon of interest to them is behavior. These sciences demonstrate refinement and sophistication by their increasingly complex understanding and explanation of behavior. As a result, a legal scholar with an interest in a behavioral science is torn between development of the implications of the behavior theory and mastery of the particular legal subject. As a legal scholar becomes serious about some behavioral science and sophisticated in its practice, he is pulled away from the law as a distinct subject and even as an interesting subject. Indeed, the more seriously the scholar takes the behavioral theory, the more difficult it becomes to justify why law is a subject worthy of study at all.

Let me offer a personal example. I am interested in economic theory. In economic theory, as in other behavioral theories, law is not a particularly important subject. Law as a phenomenon, of course, is socially omnipresent; it affects all of us one way or another, which gives it some claim on our attention. On this basis, to an economist, the study of law is of equivalent interest, say, to the study of the oil industry or, perhaps, of armament manufacture. From the standpoint of economic *theory*, law is much less important as a subject. There is no good economic theory of how individual, utility-maximizing behavior generates a legal system. The legal system can be viewed as a consumption good of the society, suggesting a form of public choice analysis. But public choice approaches, for the most part, have not been successful empirically, and on subjects of much less complexity than the legal system. More typically, law is viewed in economics as a constraint on individual behavior. This is the approach of the many studies of the effects of specific laws or rules. Economic theory, of course, addresses behavior subject to constraint, but the study of behavior subject to constraint is different from the study of the constraint itself. In our current state of knowledge, law is a constraint on behavior in the way the need for eight hours of sleep is a constraint on the workday or as the molecular construction of nitrogen is a constraint on the effectiveness of fertilizer. Economic theory tells us very little about these constraints. In the most successful applications of economics, these constraints are taken as given. As a consequence, in this intellectual framework, law disappears.

Of course, as an ambitious science, economics aspires to explain these constraints, as it aspires to explain all social phenomena. But to date economic theory has explained the determinants of law about as fully as it has explained the determinants of the world's religious beliefs. Professor Posner's efficiency-of-the-law theory has attracted great attention to the intersection of law and economics, but his theory is of interest to legal scholars—as I have described elsewhere¹—because it is essentially a legal theory, not an economic theory. Currently, there is no behavioral basis for the efficiency of the law.

The lack of theoretical interest in law is not peculiar to economics. I could describe similarly the relationship of law to any of the other behavioral sciences. In those fields associated with law that most closely resemble

1. George L. Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 *Yale L. J.* 1284 (1981).

sciences—psychoanalysis, political science, sociology—there is an increasing distance between science and the law. The concern is less crucial, perhaps, in fields such as history—because much of the work in the field is essentially atheoretical. In addition, there are some forms of social theory in which law is a subject of particular interest—Unger's work is an example²—but again because the theory itself lacks rigor. Yet as even history and social theory become more precise and detailed and generalizing—that is, as they become more scientific—the systematic character of law loses relevance and is submersed in the particular historical or social explanation. Douglas Hay's work is illustrative.³

The demands of scientific theory create extraordinary internal conflict for the lawyer who develops an interest in social science. The lawyer-economist, -sociologist, -political scientist, -social theorist finds himself a modern-day Henry Adams, whose education teaches him that his training is obsolete and that the more he develops his scientific interest, the more obsolete his basic training—legal training—will become. The legal scholar may have been certain as he selected his career that the law and the legal system were subjects of central intellectual importance, but now theory tells him that he was wrong. Those with true intellectual courage would abandon the law and become full-time social scientists—but I know of none who have done so. Many convince themselves that extensive knowledge of the intricacies of legal doctrine and legal argument and legal tradition will perhaps make possible some deep theoretical discovery. This is a false hope. It is equivalent to the belief that Einstein would finally have discovered a unified force theory if only he had stayed a few more years in the patent office.

Most (including me) justify to themselves mining the intersection of the disciplines: employing behavioral theory to criticize the law. This approach makes possible rapid insights in comparison with ordinary legal scholarship, as should well be expected. A well-drafted set of rules will have anticipated most objections that derive from the ideas that dominate standard legal thought. But such rules will be as vulnerable as an alien who cannot speak the native language to the criticisms of a science with different presuppositions and organizing thoughts. The best evidence that the law is not uniformly efficient is that economists have so much to say about the legal system that seems truly novel.

Scholarship of this nature—the criticism of one language by another—is essentially shallow. Its relationship to the development of the theory itself is only the relationship between any translation and an original text. The scholar who takes theory seriously knows that such work is derivative and does not advance the theoretical enterprise. The lawyer-economist may seem powerful today, but only because of the undeveloped theoretical base of competing methods of legal thought. Furthermore, we can confidently expect that what passes today as sophisticated law and economics will be

2. Roberto M. Unger, *Law in Modern Society* (New York: Free Press, 1976).

3. See, for example, Douglas Hay, *Poaching and the Game Laws on Connock Chase*, in *Albion's Fatal Tree*, ed. Douglas Hay et al., at 189 (New York: Pantheon Books, 1975).

brushed away without reference once serious theorists begin to examine carefully the behavioral basis of legal phenomena.

The conflict between social science theory and the law is made particularly sharp by the demands of law teaching. There is always some tension between writing and teaching. For standard legal scholarship, it is most often the tension between the specific and the general. The scholar writes about a legal subject in a detail unsuitable for the classroom. Regardless, it is usually complementary to some degree, even to detailed work, to take another overview of a subject.

For the behavioral scientist, however, an overview of a *legal* subject as opposed to the *theory* itself is a diversion. Even where one can introduce theory into the classroom, the low level of theoretical training and interest of law students frequently makes one wonder whether the effort is worthwhile. In economics, for example, it is not helpful for one working on differential equations or econometrics in the morning to be exchanging hunches with students about least-cost avoiders in the afternoon. Thus, as the scholar becomes more theoretically sophisticated, law teaching in the standard form becomes increasingly remote from his work. The scholar serious about his teaching will strive to transform his course to make it theoretically challenging—that is, challenging to him. In our current state of theory, this objective often can be achieved within the bounds of the standard law curriculum. But the more sophisticated social science theory becomes, the stronger the pressures will be to alter the curriculum itself.

Behavioral science contradicts the primacy of law. As a greater proportion of law teachers become interested in the behavioral sciences, the structure of the law school will be forcibly changed. A law school, of course, could react to these developments by searching out a faculty devoted to the unique interest and importance of the legal system. But that will never do. Law-school curricula will always follow the most persuasive explanations of the law. And the best writing about the legal system is interdisciplinary. As a consequence, the structure of the law school and its curriculum must change. Currently, to the student, legal education resembles undergraduate education. The student takes a sampler of courses. The objective of the course of study is a liberal education: to expose the student to a broad set of different subjects. There is little writing and little specialization. From the standpoint of the instructor, however, legal education is more primitive than college education, and most closely resembles high school or perhaps junior high school education. Today, virtually every law-school faculty member is able to teach every subject in the curriculum. One might grouse if one were assigned a remote course. But most of us, I would guess, would pride ourselves on our ability, were it important enough to the institution, to teach any subject at all in the law-school curriculum. Indeed, the response of all but the junior faculty would be to engage in a challenge as to whether one needed one week's preparation or one day's. In contrast, the virtues of the generalist are foreign to college faculties and unknown in graduate departments. In this respect, faculties of modern law schools resemble faculties of medieval universities. We await the Enlightenment.

The Enlightenment is coming. Its source seems to be the increasing specialization of legal scholarship. If these intellectual trends continue—as I believe they will—the structure of the law school will change. The law school will of necessity become itself a university. The law school will be comprised of a set of miniature graduate departments in the various disciplines. Introductory courses may be retained (if not shunted to colleges). Even then, a wedge deeper than the one we see today will be driven between those faculty members with pretensions of scholarship and those without. The ambitious scholars on law-school faculties will insist on teaching subjects of increasingly narrow scope. The law-school curriculum will come to consist of graduate courses in applied economics, social theory, and political science. Specialization by students, which is to say, intensified study, follows necessarily.

It might be thought initially that the technical curriculum I have described is poorly suited for training *lawyers*. But our courts and legislatures are no less influenced than our curricula by current theories and ideas about the legal system. Indeed, my experience with practitioners suggests that they are desperate for new theories. A student trained in the law of torts by James Barr Ames would have a very hard time in today's legal regime. The law student of the future will be equally out-of-place without an education of increasingly greater sophistication in social science theory.