COMMENTARY

NEO-SCHOLASTICISM: TECHNIQUE, PURPOSE, AND LAW REVIEWS

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STAGE

A historical parallel to today's legal scholarship was the scholasticism of medieval churchmen—who, in their comfortable circumstances, debated arcane and trivial points of theology in a stilted and peculiar language while their world was immersed in darkness.

Legal scholarship has three purposes. First, legal scholars investigate, organize, and explain in an effort to add to the universe of knowledge in the field. They do this without a hypothesis about its application in the courtroom or firm library. This is similar to basic research in science, and it is truly academic.

Next, legal scholars write articles that serve only to show that they are participants in the fray—members of the tribe of legal academicians. This could be called *merely* academic rather than *truly* academic. These scholars talk only among themselves, disconnected from lawyers, clients, judges, and students.

Legal scholarship has a third purpose: it is to produce tools for those who work with law. This is similar to applied research in science. This is the legal scholarship that aims to furnish knowledge for decision—information for judgment.

This third category includes old-fashioned tools like encyclopedias and digests that are useful largely as indices to cases. The availability of casenotes by computer largely replaces

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works like the old *American Law Reports*, because, after all, those casenotes are essentially ALR articles generated through slave labor.

In this class of applied science lie the great texts—Williston on contracts, Freeman on judgments, Wright on procedure, and Areeda on monopolies. These works illuminate the origins, natures, inter-relations, and applications of principal segments of law. In this class, too, lie the codifiers, like the American Law Institute, which, when not "legislating," masterfully organizes the common law.

Within the law, the primary materials for scholarship are textual; the law is text—the Constitution, statutes, and common-law cases. In themselves, these are the definitive, constitutive atoms of our science; they are the elements of our chemistry.

Beyond text, there are two forms of context. Direct context includes cases that interpret statutes, legislative histories, parallel laws, and articles. Indirect context includes materials that might reveal a likely policy impetus for passage of a statute, political compromise for particular wording, and actual consequences of the rule. This category ultimately expands to include all inter-disciplinary studies.

GUILD

Lawyers—even those who do not pretend to be scholars—are reluctant to concede that anything worthwhile exists outside of law itself, with the occasional exception for statistics and possibly gravity. The material for genuine expansion of our understanding of law—of what we do when we do law—comes from beyond the immediate borders of self-absorbed legalism. The most profoundly enlightening research and writing about law is being accomplished in economics and history.

Economics reveals how our imagined legal solutions are counter-productive, and most significantly, it helps us understand why real people have devised the arrangements by which they live and work, confounding our visions of oppression and assistance. Context counts.

History allows us to understand the tensions that originated rules. History gives us a sense of terms when they were first used. It revivifies the context. Even within law, sources are important, for no one can thoroughly understand the law of securities regulation, for instance, without a grounding in contracts, torts, and agency. Origins count.

Less directly, anthropology also illuminates the function of our law—both in its studies of the American experience and, more generally, in its studies of comparative cultures.

Pure legalists denigrate the use of these studies as being inter-disciplinary. To them, the word *inter-disciplinary* is pejorative. These folks say that history should only be "used" by historians, philosophy by philosophers, and literature by nobody, unless you are de-constructing. This is snobbery.

The law cannot sensibly consider the objective realities of the community it serves to be merely peripheral. This broader sensitivity does not invite vague, sympathetic ramblings about political justice—although this rambling is apparently an accepted form. The law needs intellectual rigor, rather than personal vision—fidelity rather than sincerity.

Law is *inter*-disciplinary. Law does not arise, and it is not applied, in a vacuum. Law is about real things that matter in the real world to real people. Reality is not optional. When Thomas Carlyle heard a reformer announce that she accepted the universe, he responded, "'By God, she had better.'"[1]

Akhil Amar[2] at Yale is an example of a literate scholar doing original research and thinking about the founding of the Republic.[3] Harold Hyman[4] at Rice is an example of a literate scholar doing excellent research and thinking about the constitutional consequences of the Civil War.[5]

In economics, Thomas Sowell[6] at Stanford has produced a lot of data and even more understanding about the global history and economic origins of artificial distinctions among peoples.[7] Gary Becker[8] at Chicago has furnished explanations of social and market phenomena that—if read—will allow us to understand the source and nature of behavior, which is often a target of legal innovation—in support or attack.[9]

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1. Quoted in THOMAS SOWELL, IS REALITY OPTIONAL? 3 (1993).

2. Southmayd Professor of Law, Yale University.

3. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997).

4. W. P. Hobby Professor Emeritus of History, Rice University.

5. *See, e.g.*, HAROLD M. HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY (1959); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1975).

6. Senior Fellow in Public Policy, Hoover Institution, Stanford University.

7. *See, e.g.*, THOMAS SOWELL, CONQUESTS AND CULTURES (1998); THOMAS SOWELL, KNOWLEDGE AND DECISION (1980).

8. Professor of Economics and Sociology, The University of Chicago.

9. *See, e.g.*, GARY S. BECKER, ACCOUNTING FOR TASTES (1996); GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (1957).

In anthropology, John Conley[10] at North Carolina has shown how people respond to the formal procedures that lawyers consider self-explanatory and self-contained.[11]

MISCUES

A. Style

The relevance of legal scholarship is undermined by the same condition that cripples most published opinions. The writing is—in a polite term—inaccessible. The legalists have intimidated most judges into adopting the academic style—and frankly, intimidating judges is, at least, an accomplishment. Worse than an artificial style that obsesses on footnotes and reveres Roman numerals, the articles are impossibly dense; they are simply poorly written.

Two techniques of legal scholarship—footnote counting and circuit counting—are forms of sub-vegetable arithmetic. While these may seem like form, they infect substance. Footnotes have value for two purposes. A note tells you how to find a source, and it indicates the weight—or at least the potential significance—that might be derived from that source. That is all a footnote can do. A footnote that lapses into text or a footnote that lists every conceivable parallel reference serves only to lengthen the article. It may be that many of the notes are published without the expectation that they will be read. They are added in the hope that someone *thumbing* through the article will be, somehow, impressed by the length and number of annotations.

Mindlessly putting *idem*—or "id." as you know it—after every sentence in a paragraph is scholarship only to the terminally silly.

For all of these criticisms of law review practice, which is the legal scholarship in America, here is an improvement that can be made immediately—or at least as soon as the next edition of the *Bluebook* is out. The improvement is to expand, by one, the academically-approved Latin footnotes.

The ever-popular *idem*, *infra*, *supra*, and some others are essentially Latin for "I read." Now, legal scholars should

10. William R. Kenan, Jr., Professor of Law, The University of North Carolina School of Law, and Adjunct Professor of Cultural Anthropology, Duke University.

11. *See, e.g.*, JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990).

recognize the reference *cogitavi*. *Cogitavi* is Latin for "I thought."[12]

B. Funny Arithmetic

Supporting your analysis of an issue by adding the number of courts in favor of it, less the number of those following an alternative, is arithmetic of the bewildered. Because ten courts adopt a bad rule, the rule is not made sound—neither sound in its consistency with its predicates nor sound in its consonance with the principles involved.

As bad as counting circuits is, the development of "law of the circuit" is worse. Circuit centrism. A bill adopted by the House and Senate, when signed by the President, is an American statute. It may mean nothing, but whatever it means, it means the same for those in the Eighth Circuit as well as those in the Third, the Eleventh as well as the First.

If a person finds himself in litigation in Denver, he is entitled to use the American statute, and he should be entitled both to the best explanation and to the most analogous application of it in American law. Where a court opinion happens to have been written does not persuade.

Not only does saying that a rule has been adopted by seven circuits against four tell you nothing about the soundness of the rule, but the two clusters of courts are as likely to be equally misguided as the more numerous is to be correct.

In addition to balkanizing American law by the political geography of circuit lines, we have in our jurisprudence rules that a panel of a circuit controls in that circuit until the court en banc visits the issue. Although a court—judge or judges—may decide the case before it, the judgment binds only the parties; our writs do not run to the rational faculties.

There is a difference between *stare decisis* and institutionalization of error. The administrative convenience of panel dominance and circuit centrism guts the principle of nationality and the quest for reason. It seems peculiar for courts to announce—without apparent embarrassment—that internal consistency is more important that external fidelity.

It is also true that courts should not be personalized. A decision by the Second Circuit is not necessarily weighty because it is New York anymore than the decision of the Ninth Circuit is necessarily flighty because it is California.

12. Pronounced, I am told, *co gee ta wee*.

Parochialism within and personalization of courts negate the rule of law. If a judge of a court of common pleas in Ohio lucidly and cogently explains the relation between two sections of a federal statute, that explanation should be useful in every circuit and in every district.

C. Industrialized Law School

Part of the problem of scholarship in American law is the rise of the industrial law school. A law school is no longer a place for the acculturation of young people in the Anglo-American legal tradition. It has become an unrelated cluster of specialties—specialties that support the interested faculty. Law schools' prestige, among other law schools at least, is not derived from teaching real property to first year students or teaching the Constitution to anyone. Prestige is derived from the schools' institutes and centers, their clinics, and their magazines.

Here is an example of the wrong attitude: A dean of a law school, disappointed with his school's ranking by *U.S. News & World Report*, announced that he found the several criteria employed by the magazine inadequate to measure a school's greatness. He then substituted his own single standard for law-school quality. His criterion was the number of times that law review articles by a school's faculty had been referred to in law review articles by the faculty of prestigious law schools. This criterion is circular, insular, and wholly unrelated to any aspect of teaching students.

D. Consumption

In Texas, fortunately, the legislature may meet regularly only in odd-numbered years. Recently, in the 1999 session, it passed 6,647 pages;[13] that is one page of law for every 2,956 Texans—man, woman, and child.[14] Congress, in 1997, passed 2,691 pages, and unlike the Texas legislature, it never goes home.[15] What is the academic response to this excess? More excess.

In Westlaw, there were 21,545 law review articles published in 1999[16]—roughly one for every 12,000 Americans.[17] As an index

13. *See* Tex. H.R.J. Res. 95, 76th Leg., R.S., 1999 Tex. Gen. Laws 6647.

14. *See* BUREAU OF VITAL STATISTICS, TEXAS DEP'T OF HEALTH, TABLE 45, TEXAS POPULATION PROJECTIONS (1998), *available in* <http://www.tdh.state.tex.us/bvs/stats98/ANNR_HTM/98t45.HTM>.

15. *See* Act of Dec. 17, 1997, Pub. L. No. 105-153, 1997 U.S.C.C.A.N. (111 Stat.) 2691.

16. Search of Westlaw, JLR File (Mar. 7, 2000).

of their utility, a search of the same data shows that in 6,210 opinions in the Federal Supplement in 1999, only about 250 of them referred to law review articles. That is a rate of about four percent. To be fair, this does not reflect the number of times that an article was used to find a case, which case was in turn used as a reference.

Ordinarily, we would expect that the majority of the references were to a minority of the articles. Similarly, many articles are going to be about long-passed statutes, like the Sherman Anti-Trust Act of 1890.[18] Even with those exceptions, one law review article probably exists for every page of the United States Code and every page of every statute of every state.

E. Technology

Misguided arithmetic has been supplemented by technology. Judges and scholars have converted the availability of new, easy electro-mechanical tools into the compulsion to use them indiscriminately.

The typewriter did not make a bad lawyer into a good one; however, it may have made him into a legible one. Similarly, photocopiers make it easier for a good lawyer to do her research and organize her papers, but poor lawyers just have more copies of stuff. Technology does not replace human capital; it may make it more productive, but it cannot replace perspective, insight, or discretion.

When cases were hard to find and harder to type, this physical difficulty limited their use. No old lawyer's nostalgia has ever included typing a table of authority using a manual Remington and carbon paper. The arrival of computer research and word processing made it physically easy to produce endless citations. With these mechanics, technique triumphs over purpose. We have replaced reasoning with references.

F. Authority

The means of finding and including cases have fueled our preoccupation with an illusory quest for authority. What makes a lawyer's work interesting is that the case at the moment is not certain and cannot be made certain—except afterwards through

17. *See* U.S. Census Bureau, *Resident Population Estimates of the United States by Age and Sex: April 1, 1990 to November 1, 1999* (released Dec. 23, 1999) <http://www.census.gov/population/estimates/nation/intfile2-1.txt>.

18. 15 U.S.C. §§ 1-7 (1994).

the decision itself. Lawyers and judges work with facts—facts as best they can be known.

Judges and lawyers rely on a statute or a common-law rule; it may have a few cases decided under it on facts in the neighborhood of the facts in their dispute. If the statute is not clear, if the cases do not explain the ambiguity, they can look to legislative histories. The legislative reports, however, are largely staff-produced, nearly-fraudulent window-dressing; no more thought is given to their clarity than to the draftsmanship of the statute itself. The evolution of a statute as it has been amended sometimes explains its current meaning, and a study of rejected alternatives and votes is occasionally helpful. Law reviews are useful for finding cases and, secondarily, for discovering lines of advocacy—alternative themes—that may have escaped you.

A single case that is consistent with the long-term evolution of a rule and that is decided on facts reasonably parallel to the current case is as good as it gets. New wrinkles in facts or law may require resort to parallels and antecedents as well as articles. No number of cases, badly repeating a rule and sloppily applying it to wholly distinct facts, eases the work of advice or decision.

If legal advice and judicial decision were a process of numbers—of counting cases and courts, adding the square root of articles, and then multiplying the prestige of the author's faculty—then computers would advise and decide.

While it is probably true that no quotation from Shakespeare is legally authoritative, his phrase may capture the essence of a point better than all of the parentheticals in all of last year's law reviews.

CURTAIN

The importance of being a lawyer—even as professor or judge—is in your helping someone resolve a dispute—a dispute described by facts not of your making, according to laws not of your devising, and with both facts and law uncertain.

Scholarship is relevant when it marshals, with clarity if not grace, the materials of law and of the life it reflects to those disputes. In cases—in law—the problems are not equations to be solved; they are dilemmas to be understood.

Understanding in law requires Constitution and statute, text and context, history and economics, and yes, a touch of the poet. There is no footnote for judgment, no citation for reason, no *Bluebook* for justice.