

Chapter 5

Law as an Academic Discipline

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I. Introduction

Although the vast majority of law school graduates are practising lawyers (or judges), the place of law schools at universities is never questioned. Law schools are clearly professional schools charged with the task of conveying the knowledge, the skills and also the ethical commitments germane to the legal vocation. But is law *really* an academic discipline? At first glance, the answer is obviously yes. Law is definitely a branch of learning and scholarly instruction,¹ displaying many of the characteristic indicia of academic disciplines such as academic journals and learned societies. And yet, notwithstanding its proud career as part of the modern university, legal academia faces a serious disciplinary challenge. For traditional doctrinal analysis, the challenge is distinguishing legal scholarship from high-skilled performance by non-academic members of the legal profession.² The various 'Law and ...' schools, which use 'the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system',³ face a mirror image of the same challenge. If law has no meaning except that which it absorbs from other disciplines and enquiries, is it 'a discipline in its own right'?⁴

My question in this chapter is whether law is an autonomous academic discipline, distinct and separate from neighbouring fields or merely an object of academic research that borrows its conceptual framework from the humanities or the social sciences.⁵ The choice between these two alternatives – and a possible third, middle position – is important both as such and as the foundation of a critical analysis of specific institutional arrangements concerning such issues as professional associations, specialized journals and, most notably, advanced legal education. This chapter investigates the two extreme alternatives of autonomy and assimilation and offers a preliminary account of a midway position, claiming that relevant lessons from the social sciences and the humanities are always potentially relevant to law but never exhaust the theoretical inquiry of it.

Past and current theories of law's autonomy do not fully account for the necessary extra-doctrinal underpinnings of legal materials, nor do they sufficiently appreciate the justificatory burden entailed by the prospective effects of every significant legal pronouncement. These shortcomings, however, do not imply the collapse of law as an academic enterprise robust enough to justify a separate category. Using the theories and methods of other disciplines definitely enriches our understanding of law, but these helpful exercises never suffice because they do not pay appropriate attention to the nature of law as a set of coercive normative institutions and, furthermore, tend to fragment rather than synthesize the interdisciplinary lessons on law.

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1 *The Oxford English Dictionary*, 2d ed, *sub verbo* "discipline".

2 See e.g. Douglas W Vick, "Interdisciplinarity and the Discipline of Law" (2004) 31 *JL & Soc'y* 163 at 187.

3 Richard A Posner, "The Decline of Law as an Autonomous Discipline: 1962–1987" (1987) 100 *Harv L Rev* 761 at 779.

4 Ernest J Weinrib, "Can Law Survive Legal Education?" (2007) 60 *Vand L Rev* at 429 [Weinrib, "Can Law Survive?"].

5 This focus should explain why this chapter will not study the history and sociology of the relationship between law and its neighbouring disciplines.

Legal theory compensates for both these limitations by focusing on the work of society's coercive normative institutions and through its synthetic character.

Legal theory, the core identifier of law as an academic discipline, studies the traditions of these institutions and the craft typical of their members while continuously challenging their outputs by demonstrating their contingency and testing their desirability. When performing these tasks, legal theory necessarily resorts to law's neighbouring disciplines. At its best, however, legal theory is more than a sophisticated synthesis of relevant insights from these friendly neighbours, because legal theory is consciously reflective on persistent jurisprudential questions regarding the nature of law, notably the relationship between law's normativity and its coerciveness, given law's institutional and structural characteristics.

II. Of Autonomy and Assimilation

A. From Classical Formalism ...

Any discussion of the modern notion of law as an autonomous academic discipline (at least in the US) must begin with Christopher Columbus Langdell of Harvard Law School, who culturally personifies classical formalism. Some claim that this conventional portrayal of Langdell et al. is a caricature.⁶ But this historical debate is beside the point here, given both the revival of American legal formalism among some judges and scholars⁷ and the European attempts to rehabilitate doctrinalism, understood as a 'quest' for 'systematic coherence' through 'the development of general concepts and structures and the perception of these as internal to and operative within the legal system'.⁸ Furthermore, doctrinalism seems alive and kicking given 'the ubiquitous practice, especially in the United States, of accusing judges who have reached substantively disagreeable results in appellate cases of having committed technical legal errors or "mistakes", rather than of simply having the wrong substantive views'.⁹

In formalism, law is governed by a set of fundamental and logically demonstrable principles.¹⁰ Two interrelated features of the formalist conception of law bear emphasis: the purported autonomy and closure of the legal world and the predominance of formal logic within this autonomous universe.¹¹ Law, on this view, is 'an internally valid, autonomous, and self-justifying science' in which right answers are 'derived from the autonomous, logical working out of the system'.¹² Law is composed of concepts and rules. With respect to legal concepts, formalism endorses 'a Platonic or Aristotelian theory', according to which 'a concept delineates the essence of a species or natural kind'.¹³ Legal rules, in turn, embedded either in statutes or in case law, are also capable of determining logically necessary legal answers. Induction can reduce the amalgam of statutes and case law to a limited number of principles, and lawyers can then provide right answers to every case that may arise using syllogistic reasoning – classifying the new case into one of these fundamental pigeonholes and

6 See Anthony J Sebok, *Legal Positivism in American Jurisprudence* (Cambridge, UK: Cambridge University Press, 1998) at 83–104; Brian Z Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2010) at chs 2–6.

7 See e.g. Antonin Scalia, *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997) at 25; "Symposium: Formalism Revisited" (1999) 10 U Chicago L Rev 527.

8 Armin von Bogdandy, "The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenge Facing Constitutional Scholarship in Europe" (2009) 7 International Journal of Constitutional Law at 1. See also Armin von Bogdandy, "Founding Principles" in Armin von Bogdandy & Jürgen Bast, eds, *Principles of European Law*, 2d ed (Oxford: Hart, 2009) at 1.

9 Frederick Schauer, "Legal Realism Untamed", Virginia Public Law and Legal Theory Research Paper No 2012–38, online: Social Science Research Network <<http://ssrn.com/abstract=2064837>> at 10.

10 See Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon, 1995) at 10; Paul D Carrington, "Hail! Langdell!" (1995) 20 Law & Soc. Rev. 691 at 709–10.

11 See Thomas C Grey, "The New Formalism", Stanford Law School, Public Law and Legal Series, Working Paper No 4, online: Social Science Research Network <<http://ssrn.com/abstract=200732>> at 5–6.

12 Richard H Pildes, "Forms of Formalism" (1999) 66 U Chicago L Rev 607 at 608–9.

13 Grey, *supra* note 11 at 11.

deducing correct outcomes.¹⁴ Thus, law is perceived as a comprehensive and rigorously structured doctrinal science, which can generate determinate and *internally* valid right answers; it need not resort to any social goals or human values and is thus strictly independent of the social sciences and the humanities.¹⁵

However, as legal realists have demonstrated, not only is such doctrinalism an inaccurate description of adjudication, but the indeterminacy and manipulability of the formalist techniques for divining the one essential meaning of legal concepts and deducing outcomes from legal rules render pure doctrinalism a conceptual impossibility.¹⁶ Admittedly, as H.L.A. Hart claimed, the indeterminacy of discrete doctrinal sources is limited: the gap between language and reality does not mean that there are no easy cases for the application of a given legal rule.¹⁷ But realism views legal doctrine as hopelessly indeterminate not (or, at least, not primarily) because of the indeterminacy of discrete doctrinal sources. Rather, the indeterminacy of legal doctrine derives first and foremost from the multiplicity of doctrinal materials potentially applicable at each juncture in any given case.¹⁸ Since legal norms are ‘in the habit of hunting in pairs’¹⁹ – because legal doctrine always offers at least ‘two buttons’ between which a choice must be made – none of the doctrine’s answers to problems is preordained or inevitable.²⁰

Thus, Karl Llewellyn claims that ‘all legal systems’ are patchworks of contradictory premises covered by ‘ill-disguised inconsistency’, because we find in all of them that ‘a variety of strands, only partly consistent with one another, exist side by side’.²¹ Any given legal doctrine, including the one guiding the lawyers’ interpretative activity (the canons of interpretation), suggests ‘at least two opposite tendencies’ at every point.²² For (almost) every case, then, there are opposite doctrinal sources that need to be accommodated: a rule and an exception (frequently vague), or a seemingly precise rule and a vague standard (such as good faith or reasonableness) that is also potentially applicable. The availability of such a multiplicity of sources on any given legal question, all of which can be either expanded or contracted, results in profound and irreducible doctrinal indeterminacy.²³ Similarly, the idea of inevitable entailments from legal concepts is also false, because the elaboration of any legal concept can choose from a broad menu of possible alternatives.²⁴ The heterogeneity of contemporary understandings regarding any given legal concept (e.g., property or contract)

14 See e.g. Duxbury, *supra* note 10 at 15; Morton Horwitz, *The Transformation of American Law, 1870–1960* (Oxford: Oxford University Press, 1977) at 16–18.

15 See Horwitz *ibid.* at 9–10, 15, 198–9; Carrington, *supra* note 10 at 707–8.

16 The following summary of the realist critique draws on Hanoah Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (New York: Oxford University Press, 2013) [Dagan, *Reconstructing*]. The descriptive and conceptual claims discussed in the text give rise to the realist normative criticism of legal formalism, i.e., that it serves as a means to mask normative choices and fabricate professional authority.

17 See HLA Hart, *The Concept of Law* (Clarendon Press, 1961) 123 at 141–2, 144.

18 See Karl N Llewellyn, “Some Realism about Realism” in *Jurisprudence: Realism in Theory and in Practice* (Chicago: University of Chicago Press, 1961) 42 at 58 [Llewellyn, “Some Realism”]; Felix S Cohen, “The Problems of Functional Jurisprudence” in Lucy Kramer Cohen, ed, *The Legal Conscience: Selected Papers of Felix S Cohen* (Newhaven, Conn: Yale University Press, 1960) 77 at 83. See also Edward A Purcell Jr, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, Ky: University Press of Kentucky, 1973) at 90; Andrew Altman, “Legal Realism, Critical Legal Studies, and Dworkin” (1986) 15 *Philosophy & Public Affairs* 205. To clarify: realists do not deny that legal doctrine as such rules out many – indeed most – options. They merely insist that there will always remain more than one option that can apply doctrinally.

19 Walter Wheeler Cook, Book Review of *The Paradoxes of Legal Science* by Benjamin Nathan Cardozo, (1929) 38 *Yale LJ* 405 at 406

20 Fred Rodell, *Woe Unto You, Lawyers!* (New York: Reynal & Hitchcock, 1939) at 154, 160. See also Jerome Frank, *Law and the Modern Mind* (New Brunswick, NJ: Transaction Publishers, 2009) at 138; John Dewey, “Logical Method and Law” in William W Fisher III, Morton J Horwitz & Thomas A Reed, eds, *American Legal Realism* (Oxford: Oxford University Press, 1993) 185 at 192 [Dewey, “Logical Method”]; Llewellyn, “Some Realism”, *supra* note 18 at 70.

21 Karl N Llewellyn, *The Case Law System in America*, edited by Paul Gerwitz, translated by Michael Ansaldi (Chicago: University of Chicago Press, 1933) [Llewellyn, *Case Law*]. This critique was picked up by Roberto Unger: see Roberto M Unger, *The Critical Legal Studies Movement* (Cambridge, Mass: Harvard University Press, 1983) at 15–22

22 See Karl N Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed” (1950) 3 *Vand L Rev* 395.

23 See Llewellyn, *Case Law*, *supra* note 21 at 51.

24 Felix S Cohen, “Transcendental Nonsense and the Functional Approach” (1935) 35 *Colum L Rev* 809 at 820–21, 827–9 [Cohen, “Transcendental Nonsense”]. See also Horwitz *supra* note 14 at 202.

within and outside any given jurisdiction, as well as the wealth of additional alternatives that legal history offers, defies the formalist quest for conceptual essentialism.²⁵

To clarify: this critique of doctrinal determinacy need not challenge the felt predictability of the doctrine at a given time and place. Contending that legal doctrine *qua* doctrine cannot constrain decision-makers is compatible with an appreciation of the significant measure of predictability generated by the convergence of lawyers' background understandings.²⁶ Thus, the realist claim need not threaten conventional understandings of legal professionalism.²⁷ But by insisting that such predictability does not inhere in the doctrine as such and rests instead on the broader social practice of law,²⁸ realists discredit the claim that 'the discovery of the principles from the cases' can similarly be the gist of law as an academic discipline.²⁹

B. ... to the Disciplinary Analysis of Law

The demise of classical formalism opens up a rich, interdisciplinary research agenda for legal scholars. If doctrinalism is only conventionally stable, academic lawyers must be oriented to the human ends served by law. And as Oliver Wendell Holmes famously claimed, providing reasons that refer to such social ends is bound to extract legal discourse from its disciplinary solitude. Jurists have to study 'the ends sought to be attained and the reasons for desiring them', and this inquiry necessitates the introduction of insights and methods from other disciplines into the legal discourse.³⁰

Carrying out the tasks on this agenda, according to Roscoe Pound, calls for "team-work" between jurisprudence and the other social sciences'.³¹ Pound insisted that jurists must take account of the 'social facts' to which various legal institutions apply, evaluate 'the actual social effects of legal institutions and legal doctrines', and choose among competing alternatives according to the desirability of their realization's actual consequences. This emphasis on the social effects of law and on the means for producing these effects, he argued, must become the courts' interpretive strategy, the proper way of preparing legislation within the legislative branch and an important focus of legal history.³² As Felix Cohen succinctly described it, this prevalent form of post-realist legal discourse shifts legal discourse 'away from the attempt to systematize and compare' legal doctrine, or 'from concern with the genesis and evolution' of law, toward 'a study of the consequences ... in terms of human motivation and social structure'.³³ It moves away from the lawyer-craftsman standards of 'legal beauty or finesse' toward 'concrete human values' and 'the effects of law upon human desires and feelings'.³⁴

For many legal scholars, this shift is a matter of degree but in its extreme version policy swallows law. Thus, as early as 1934, Edward Robinson described law as 'an unscientific science' and urged lawyers – especially academic lawyers – to become scientific by discarding law's 'conservative logic' and applying social scientific methods to the practical solution of socio-legal problems.³⁵ A little more than 50 years later, Richard Posner has happily reported 'the decline of law as an autonomous discipline' and the boom in 'the conscious

25 See e.g. Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge, UK: Cambridge University Press, 2004) at 221–4, 315–16; Hanoch Dagan, *Property: Values and Institutions*, part 1 (Oxford: Oxford University Press, 2011) [Dagan, *Property: Values and Institutions*].

26 See e.g. Larry Alexander & Emily Sherwin, *The Rule of Rules* (Durham, NC: Duke University Press, 2001) at 32–4.

27 C.f. JE Penner, "Decent Burial for Dead Concepts" (2010) 58 *Curr Legal Probs* 313 at 314.

28 See Frederick Schauer, ed., "Editor's Introduction" in Karl N Llewellyn, *The Theory of Rules* (Chicago: University of Chicago Press, 2011) at 1, 5, 7–8, 18, 20–24. See also Margaret Jane Radin, "Reconsidering the Rule of Law" (1989) 69 *BUL Rev* 781 at

29 See Stephen M Feldman, "The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)" (2004) 54 *J Legal Educ* 471 at

30 Oliver W Holmes, "The Path of the Law" in Oliver W Holmes, *The Collected Legal Papers* (Mineola, NY: Dover, 2007) 167 at 184, 187–9, 195 [Holmes, "Path of the Law"].

31 Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence" (1912) 25 *Harv L Rev* 489 at 510, 512–6.

32 *Ibid.*

33 Cohen, "Transcendental Nonsense", *supra* note 24 at 830.

34 Felix S Cohen, "Modern Ethics and the Law" (1934) 4 *Brook L Rev* 33 at 49–50 [Cohen, "Modern Ethics"].

35 See Edward S Robinson, "Law – An Unscientific Science" (1934) 44 *Yale LJ* 235 at 236–9, 256, 264.

application of other disciplines, such as political and moral philosophy and economics, to traditional legal problems'.³⁶ Posner observed 'the rise of [these] other disciplines to positions where they can rival the law's claim to privileged insight into its subject matter', and concluded that 'it seems unlikely that we shall soon (if ever) return to a serene belief in the law's autonomy'.³⁷ This proposition may be undisputed (as I will try to argue below), but Posner goes further and offers a definition of legal theory that openly perceives law as merely a context for applying methods from other disciplines and calling for the proper adjustment of advanced legal education and of academic law journals.³⁸

At this stage, readers may assume that my paradigmatic case of the assimilationist strategy is the economic analysis of law, but a very similar description applies to other contemporary schools that draw on other disciplines, such as history and sociology. Practitioners in these schools seek to establish sufficient distance from the law and its carriers, which would release legal academics from dependence on their objects of study. Thus, they tend to eschew normative impulses and refrain from attempts at solving concrete social problems through law. Taken to its logical endpoint, this position raises serious doubts about the very possibility of law as an academic discipline, with its advocates insisting on a sharp distinction between their own academic discourse – including its language, method, audience and goals – and instrumental orientations they associate with practical legal discourse and their policy-concerned brethren.³⁹

Indeed, while the cumulative work of various 'Law and ...' schools has contributed immensely to our understanding of law, its approach seems to be typified by a view of 'law as a parasitic discipline'.⁴⁰ Many (most?) practitioners in these schools take the theory or methodology of another discipline to explain legal doctrine, criticize it or call for its reform without referring, either explicitly or implicitly, to the concept of law or to the possible ramifications of law's constitutive characteristics for their proposed explanation, critique or reform. At times, their participation in this exercise, given that they usually lack academic credentials in the discipline they use, is justified by the fact that they 'bring perspectives, knowledge, and sensitivities'.⁴¹ But taken to its logical conclusion, '[t]he appearance of the law *ands* is part of the story of the displacement and disintegration of the prevailing [doctrinalist] creed, and its replacement with an arena of competing programs'.⁴² It was from this perspective that George Priest claimed that 'legal scholarship has become specialized according to the separate social sciences' so that a law school should be structured as 'a set of miniature graduate departments in the various disciplines'.⁴³ Priest argued that, given the dominance of these other disciplines, it is difficult to justify 'why law is a subject worthy of study at all' and, furthermore, he denied even the usefulness of 'extensive knowledge of the intricacies of legal doctrine and legal argument'.⁴⁴

Priest's proposal seems blunt, but is it indeed so remote from the contemporary scene of (American) legal academia? Contemporary US law school culture seems to offer two alternatives: adopt an external academic discipline (such as economics, philosophy, history, sociology or psychology) or relinquish academic or scientific pretensions and delve more deeply into practical professionalism.⁴⁵ This sense of 'no academic core' and the consequent fragmentation of legal academia have at least three significant institutional manifestations:

36 Posner, *supra* note 3 at 769.

37 *Ibid.* at 772.

38 *Ibid.* at 778–9.

39 See Meir Dan-Cohen, "Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience" (1992) 63 U Colo L Rev 569 at 579–89; See also Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999) at 18; Austin Sarat & Jonathan Simon, "Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship" in Austin Sarat & Jonathan Simon, eds, *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Durham, NC: Duke University Press, 2003) 1 at 3–6.

40 Anthony Bradney, "Law as a Parasitic Discipline" (1988) 25 JL & Soc'y

41 Ron Harris, "Legal Scholars, Economists, and the Interdisciplinary Study of Institutions" (2011) 96 Cornell L Rev 789 at 808. See also Feldman, *supra* note 29 at 494–5.

42 Marc Galanter & Mark Alan Edwards, "The Path of the Law *Ands*" [1997] Wis L Rev 375 at 376.

43 George L Priest, "Social Science Theory and Legal Education: The Law School as University" (1983) 33 J Legal Educ 437 at 437 [Priest, "Social Science Theory"].

44 Priest, "Social Science Theory", *supra* note 43 at 438–41.

45 See Mattias Kumm, "On the Past and Future of European Constitutional Scholarship" (2009) 7 International Journal of Constitutional Law 401 at 410–12. Later, Priest added that interdisciplinarity does not imply the neglect of legal doctrine, but even his later writings attest that, by 'interdisciplinary research', Priest in fact meant research that uses

(1) The two most important professional associations of American academic lawyers – the American Law and Economics Association and the Law and Society Association – are not organized according to thematic alliances but rather according to their common reliance on another discipline or disciplines.⁴⁶ (2) Four of the five highest-ranked law journals in the ‘Jurisprudence and Legal Theory’ category are related to these two other-discipline(s)-based associations.⁴⁷ And, probably the most significant, (3) although American law schools increasingly favour faculty members with doctoral degrees in other disciplines,⁴⁸ they generally have no pretence of supplying sustained academic training for their own scholars.⁴⁹ The typical curriculum for gaining advanced degrees in law (both LL.M. and J.S.D./S.J.D.) in American law schools usually includes courses selected from the J.D. curriculum and adds few, if any, methodological or theoretical required courses.⁵⁰

If law has no theoretical core, these developments seem appropriate and indeed commendable. ‘As the disciplines broadened their scope, the overlap became so great that topical distinctions were rendered utterly meaningless ... [and the] distinction between the disciplines shifted from what they study to how they study it’.⁵¹ Thus, if ‘[t]he best reason for the existence of law schools as separate entities (in addition to the professional training they provide students) is ... that it makes great sense for people interested in a common set of problems and institutions to work in a common environment in order to share knowledge of what is a complex set of social institutions’,⁵² then the study of law should be understood similarly to that of area studies and law schools are destined to become (or remain) loose coalitions of distinct and fragmented sub-disciplines, whose only common denominator is their interest in law. Readers who share my sense that such an endgame would entail a real intellectual loss must realize that their opposition to this vision can be justified if, but only if, they can identify some theoretical and/or methodological core of law as an academic discipline rather than merely as perspectives, knowledge and sensitivities.

the methodology of another discipline. See George L Priest, “The Growth of Interdisciplinary Research and the Industrial Structure of Legal Ideas: A Reply to Judge Edwards” (1993) 91 Mich L Rev 1929 at 1936.

46 See American Law and Economics Association, online: ALEA <<http://amlecon.org>> and the Law and Society Association, online: LSA <<http://www.lawandsociety.org>>.

47 These are the *Journal of Empirical Legal Studies*, *The Journal of Legal Studies*, *Law & Social Inquiry*, and *Law & Society Review*. For rankings, see the Washington and Lee School of Law Library, online: WLU <<http://lawlib.wlu.edu/LJ/index.aspx>>. (The other law journal in this prestigious group – which is ranked third – is *Theoretical Inquiries in Law*.)

48 For an extreme manifestation of this practice, see David E Van Zandt, “Discipline-Based Faculty” (2003) 53 J Legal Educ 332 at 335.

49 Yale Law School’s PhD in Law Program promises to be an exception, providing ‘an alternate path into law teaching alongside existing routes such as fellowships, advanced degrees in cognate fields, and transitioning directly from practice or clerkships’. At the core of this programme’s coursework is ‘a two-semester pro-seminar on canonical legal scholarship and methodologies’. But other than that, a student may take relevant courses offered within the law school or at other university departments. PhD students at Yale will have to complete two qualifying examinations; the first, written exam will measure ‘the breadth of a student’s knowledge’, whereas the second, oral exam ‘is an opportunity to demonstrate mastery of the candidate’s area of specialization’. See Yale Law School, “Ph.D. Program”, online: <http://www.law.yale.edu/graduate/PHD_program.htm>.

50 See e.g. Yale Law School, “Degree Programs”, online: <<http://www.law.yale.edu/academics/degreeprograms.htm>>; University of Chicago Law School, “Prospective Students”, online: <<http://www.law.uchicago.edu/prospective>>. Harvard Law School requires SJD students in their first year to follow an ‘approved study plan’ of courses, readings and other academic work, which ‘should be organized around three or four fields chosen with reference to the candidate’s dissertation proposal and future teaching plans’. See Harvard Law School, “S.J.D. Programs of Study”, online: <<http://www.law.harvard.edu/academics/degrees/gradprogram/sjd/programs-of-study.html>>. But even there, no canonical course of legal theory is required. The only rigorously structured advanced degree programmes that I could trace in the US were specialized. See e.g. Stanford Law School’s Program in International Legal Studies: “”, online: <<http://www.law.stanford.edu/degrees/advanced-degrees-for-international-students/spils>> and Berkeley Law – University of California, “PhD Program (JSP)”, online: <<http://www.law.berkeley.edu/jsp.htm>>. The predicament of parallel programmes in other leading English-speaking universities is not very different. See e.g. Oxford University Faculty of Law, “Taught Postgraduate Courses”, online: <<http://www.law.ox.ac.uk/postgraduate/taught.php>>; University of Cambridge Faculty of Law, online: <<http://www.law.cam.ac.uk/courses/>>; University of Toronto Faculty of Law, “Graduate Programs”, online: <<http://www.law.utoronto.ca/academic-programs/graduate-programs>>; McGill University Faculty of Law, “Advanced Programs in Law”, online: <<http://www.mcgill.ca/law-gradprograms/programs>>.

51 Kenneth T Grieb, “Area Studies and the Traditional Disciplines” (1974) 7:2 The History Teacher 228 at 231–32.

52 Van Zandt, *supra* note 48 at 334.

C. ... and Back to Formalism?

Ernest Weinrib's ambitious and sophisticated effort to reclaim the autonomy of law as an academic discipline should be read against this background. Weinrib is a harsh critic of this 'interdisciplinary turn', which he describes as 'the most dramatic development in legal education over the last generation'.⁵³ While congratulating the 'brilliant mobilization of the insights of other disciplines ... to the analysis of legal material', Weinrib argues that if '[l]aw provides only the authoritative form into which the conclusions of non-legal thinking are translated', legal scholarship becomes no more than 'the application of a particular non-legal discipline to examples drawn from the law'.⁵⁴ Focusing on private law, Weinrib laments this predicament and insists that it is the inevitable outcome of the structure of instrumentalist academic inquiry that prevails in contemporary legal academy. 'Regardless of the goal it advances, an instrumentalist analysis of private law mischaracterizes its object' because 'it imports outside goals for immanent concepts of private law', 'it ignores the relationship between a plaintiff and a defendant' and 'it wrongly converts all private law into public law'.⁵⁵ Weinrib's project, then, is to elucidate law's 'independent voice', which can be a proper object of university study and in respectful conversation with other disciplines.⁵⁶ This voice 'is inevitably concerned with the activity of "judges, legislators, and practitioners"'.⁵⁷

Weinrib's specific prescription is provocative. Alongside the rejection of the instrumentalist framework that 'inevitably mischaracterizes' private law, 'obscuring the law's distinctive character', '[t]he primary task of the university study of private law – what it should do, whatever else it does – is to enquire into' the 'special character of private law'.⁵⁸ This character, Weinrib explains, is 'an ideal construct that makes the particulars of the practice of private law intelligible in the light of the practice's most general and pervasive features'.⁵⁹ As such, it cannot be challenged by the sheer fact that positive law's treatment of a particular problem is out of line. Quite the contrary: such cases evidence 'law's self-critical commitment to "work itself pure"', because the character of private law then 'provides the standpoint, internal to private law as a whole, from which to criticize the particular legal arrangement'.⁶⁰ Only in this way can law as an academic discipline 'both [maintain] its continuity with the legal practice, which is its starting point, and yet [go] beyond that practice to disclose its implicit structural and normative ideas'.⁶¹

Weinrib argues that in order to understand private law's 'implicit structural and normative ideas ... particular attention should be paid to aspects of private law that are already general', namely, 'the institutional

53 Weinrib, "Can Law Survive?", *supra* note 4, at 403–4. For another attempt to reject any form of instrumentalism and divine law's autonomy, which focuses on public – in particular international – law, see Martti Koskeniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization" (2007) 8 *Theor Inq L* 9. Koskeniemi conceptualizes constitutionalism as 'a programme of moral and political regeneration' in search of 'validity beyond the inclinations of the speaker', which focuses 'on the practice of professional judgment in applying' the laws, rather than on 'the functional needs or interests [they] may seek to advance', making 'jurists rather than positive rules ... law's nucleus, as educators and enlighteners' (*ibid.* at 11, 18, 33). He thus understands 'law as a crystallization of personal virtue' and celebrates 'the constitutional mindset that is not a priori bound up with any determinate institution, a mindset building on a tradition understood from a Kantian perspective as a project of "freedom"' (*ibid.* at 23, 33). Although this account is substantively quite different from Weinrib's, being inspired by the European constitutional experience rather than by the private law tradition of the common law, it still seems vulnerable, *mutatis mutandis*, to much of my critique of Weinrib.

54 Weinrib, "Can Law Survive?", *supra* note 4 at 410–11.

55 *Ibid.* at 428–37.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.* at 415–16, 437. To be sure, Weinrib admits that instrumentalism, even in its bluntest form of economic analysis, 'may lodge itself within the practice through the influence of ... scholarship on judges, who then apply it in their judgments' (*ibid.* at 410, n 18). He acknowledges that '[t]o the extent that this occurs, the disjunction between academic study and legal practice is lessened' (*ibid.*). But he insists that this would raise an 'ultimately more serious problem' – namely, 'a disjunction internal to the legal practice' – between 'law's fundamental concepts and relational structure' and the instrumentalist analysis (*ibid.*).

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

nexus' between 'a particular plaintiff and a particular defendant'.⁶² Thus, for private law 'to be understood as a normatively coherent practice, the justification for liability in any particular case has to reflect the structure of this linkage'.⁶³ This 'bipolar' logic of private law adjudication, understood as a unique forum for the vindication of infringed rights, implies both that the reasons underlying the plaintiff's right be the same as the reasons that justify the defendant's duty, and that these reasons also explain the specific remedy inflicted on the defendant. This injunction of 'correlativity' is robust: because 'correlativity marks the character of private law as a distinctive normative order', it 'excludes considerations, no matter how appealing ... which break apart the relationship between the parties by invoking social goals that operate on one or the other of them and on persons who are similarly situated'.⁶⁴ Thus, for Weinrib, correlativity leaves no room for any social value since 'no combination of [such] one-sided considerations can produce a correlatively-structured justification'.⁶⁵ Weinrib happily endorses 'correlativity as the most general structuring idea immanent in [legal] practice' (and the one which makes private law 'categorically different from public law') because it manifests the character of private law 'as the juridical realization of a bipolar normativity in which one purposive being is directly related to another through a system of rights and their correlative duties'.⁶⁶ Indeed, 'correlativity presupposes an abstract conception of the interacting parties', in which they 'are viewed as exercising the capacity for purposive action, whatever might be their particular purposes'.⁶⁷ In this way, 'the parties are equal, in that they are both treated as the loci of self-determining freedom; and they are free, in that neither is subordinated to the unilateral purposiveness of the other'.⁶⁸

Weinrib's claim that law, as an academic discipline, must account for its constitutive features, as well as his more particular assertion regarding the significance of correlativity to private law, are both convincing and significant. Law is a coercive mechanism, which means that it must also be a justificatory practice. Given that private law has a specific structure, judges should be able to justify to defendants all aspects of their state-mandated power, including, as Weinrib helpfully emphasizes, both the identity of the party benefiting from any liability imposed on them, and the type and magnitude of that liability.⁶⁹ But Weinrib's further contention – that correlativity exhausts 'the legal perspective' on private law so that '[its] distinctiveness excludes other perspectives', although it 'does not deny their authority within their own spheres' – cannot stand.⁷⁰

The first difficulty with this declaration of independence is that, at least in many areas of private law, correlativity and the attendant ideal of equality of formal freedom must rely on social values. Weinrib, to be sure, denies this reliance on values, which in his view must be excluded from legal discourse. Accordingly, he derives the thesis of private law autonomy from the correlativity requirement by relying on the idea of property. Property, in this view, serves as a benchmark requiring no reference to collective values: while voluntary changes in the distribution of property cannot generate any legitimate grievance, involuntary changes both justify owners' complaints and specify the appropriate remedial response.⁷¹ But for property to serve as such a safe haven for private law autonomy, Weinrib must defend a conception of property that is securely detached from social values. Weinrib faces this challenge by advancing a regime in which the state functions both as a guarantor of people's pre-social and robust property rights against one another, and as the authority responsible for levying taxes 'in order to fulfill a public duty to support the poor'.⁷² Strong property rights and a viable welfare state, he claims, cluster as a matter of conceptual necessity.⁷³

62 *Ibid.* at 418–25

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 See e.g. Dagan, *Reconstructing*, *supra* note 16

70 Weinrib, "Can Law Survive?", *supra* note 4 at 430

71 See e.g. Ernest J Weinrib, "Restitutionary Damages as Corrective Justice" (2000) 1 *Theor Inq L* 1 at 6–7, 12, 24

72 Ernest J Weinrib, *Corrective Justice*, ch 8: "Poverty and Property in Kant's System of Rights" (Oxford: Oxford University Press, 2012)

73 *Ibid.*

But such a strict division of labour between a libertarian private law and a robust welfare state wherein the threat of dependence is universally alleviated is quite implausible. As I show elsewhere, the public law of tax and redistribution is unlikely to supplement private law with rules adequately remedying the injustices of a libertarian private law, if not in terms of distribution at least in terms of interpersonal dependence. The realities of interest group politics in the promulgation of tax legislation render egalitarian tax regimes, such as one based on Rawls's difference principle, a matter of political theory rather than of empirical reality. This difficulty is intrinsic to the concept of democracy, which respects people's preferences and not only their principles. Furthermore, because our understandings of the responsibilities of owners and the limits of what we perceive to be their legitimate interests are influenced by our legal conception of ownership, an extreme libertarian private law regime might undermine social solidarity and dilute people's responsiveness to claims from distributive justice. Finally, treating the property-less as passive recipients of welfare and mere beneficiaries of the public duty to support the poor entrenches their dependent, subservient status rather than their dignity and independence. Shifting dependence from the context of private law to that of the individual's relationship with the state *via* the welfare bureaucracy does not solve the problem and, indeed, might actually exacerbate it.⁷⁴

This failure to provide context-independent secure starting points for the bipolarity constraint of private law does not mean that such starting points are unavailable. Quite the contrary: because our social values inform our ideals regarding the relationship between the plaintiff and defendant categories (as, for example, spouses, neighbours, co-owners, members of the same community, transactors or competitors), they legitimately and properly inform the initial entitlements of private law, from which correlativity is measured. Social values that are credibly relevant to these normative inquiries – 'internal' social values – define the *ex ante* entitlements of the litigating parties and hence their legitimate expectations. They serve as the foundation of the parties' bilateral relationships. Such values are different from other, 'external' values or public policies whose guidance is more problematic to private law since they impose goals on the parties alien to their bipolar relationship. Weinrib, of course, rejects the notion that correlativity is founded upon social values, insisting that the reasons for the parties' entitlements – and not only the entitlements themselves – should be internal to the parties' relationship. But this additional requirement of relational reasons is excessively demanding and unwarranted. The bipolar form of private law is only one object of the justificatory burden prompted by each application of state coercion. Therefore, even if the reasons for the parties' entitlements are not correlative, private law may justifiably sanction the plaintiff's complaint if the implications with respect to the parties' entitlements are sufficiently convergent.⁷⁵

Weinrib's overstatement of the significance of relational considerations is also the reason for the second major problem of his account of law's disciplinary solitude. Weinrib's apt emphasis on the special justificatory burden that judges face concerning defendants cannot imply that judges should bear no burden of justification concerning their decisions *vis-à-vis* society at large, notwithstanding the precedential effect of their rulings. Indeed, the opposite is true: given the forward-looking consequences of any significant legal pronouncement, law's carriers are necessarily responsible to other parties who may be affected. As Weinrib recently acknowledged, '[i]n adjudication, a court combines these two dimensions by projecting its own omnilateral authority onto the parties' bilateral relationship ... thereby extend[ing] the significance of its decision beyond the specific dispute, making it a norm for all members of the state'.⁷⁶ Weinrib, however, considers that the implications of this forward-looking dimension of adjudication are modest and are exhausted by two

⁷⁴ See e.g. Dagan, *Property: Values and Institutions*, *supra* note 25 at 63–66.

⁷⁵ This paragraph summarizes the claim in Hanoch Dagan, "The Public Dimension of Private Property", (2013) 24:2 *King's Law Journal* 260. Happily enough, as I demonstrate elsewhere, private law reflects these conclusions. See Hanoch Dagan, "Pluralism and Perfectionism in Private Law" (2012) 112 *Colum L Rev* ; Hanoch Dagan, "Autonomy, Pluralism, and Contract Law Theory" (2013) *Law & Contemp Probs* 19. As I explain in these papers, reliance on social values as the foundation of the parties' entitlements is not necessarily problematic from the perspective of personal autonomy, however interpreted. The reason is that, at least insofar as the idea of property as the benchmark for correlativity is concerned, these values participate in the construction of multiple property institutions and provide a rich variety, both between and within contexts. They thereby allow more than one option to people who, for example, want to become homeowners, engage in business or enter into intimate relationships.

⁷⁶ Ernest J Weinrib, "Private Law and Public Right" (2011) 61 *UTLJ* 191 at 196–8.

requirements: ‘publicness’ (namely, ‘exhibiting justifications for liability that are accessible to public reason’) and ‘systematicity’ (that is, ‘acting within its competence as an adjudicative body’ and making ‘[t]he principle of the decision ... cohere with the entire ensemble of similarly binding decisions’).⁷⁷ Given the significance of these forward-looking effects of adjudication, however, limiting the implications of the practice of precedent in this fashion is puzzling.

Indeed, it is hard to see why judges should have no *substantive* duty to justify their decisions to those who will be subject to them, even if they are not participating in the judicial drama at hand. To be sure, legislatures have an important role to play in a democracy in considering these broad ramifications of the law. In certain contexts – as where a legal innovation requires a regulatory structure, depends on specialized knowledge available elsewhere or involves excessive widespread redistribution – judges should generally avoid taking part in this drama. They should likewise be significantly deferential regarding newly enacted legislation. But other than these competence-based and democracy-based qualifications of judicial authority, or parallel ones I may have failed to mention, both legislators and judges should utilize their distinct comparative advantages in order to adjust our private law, and law more generally, to new circumstances, challenges and opportunities.⁷⁸ Furthermore, even where *judicial* activity should be precluded, legal practice does not, or at least should not, cease to be a culture of justification.⁷⁹ So even where or if this broader justificatory burden (that necessarily involves considerations Weinrib wants to exclude from legal discourse) is irrelevant to adjudication, it is nonetheless significant to numerous other arenas of legal practice that are also ‘replete with lawmaking, law applying, law interpreting, and law developing functions’⁸⁰ and thus must be part of the subject matter of law as an academic discipline.⁸¹

Weinrib may respond by reminding us that he acknowledges the validity of these instrumental perspectives ‘for the understanding of the transactions governed by the law’ as long as they operate within their ‘own disciplinary boundaries’ and do not attempt to infringe upon the legal perspective.⁸² He further argues that preserving the distinctiveness of law’s perspective vis-à-vis these ‘non-legal modes of enquiry’ may be a prerequisite for a viable interdisciplinary study of law because only if ‘law has an independent voice’ can it ‘contribute to the conversation among the university’s disciplines’.⁸³ After all, ‘[t]he object of this conversation is not to have one voice suppress any of the others but to maintain the individuality of each.’⁸⁴ When every voice contributes the insight that derives from its own distinctive activity, the conversation can enlarge the understanding of its participants’.⁸⁵

This response is both correct and important insofar as it warns against the domination of academic legal discourse by the toolkit of another discipline (such as economics) or against the effacement of law’s distinctive features, which may occur if legal theory is understood as the aggregation (or even the synthesis) of insights on law gained by using theories and methods of other disciplines. But Weinrib’s claim goes much further than that, by insisting that, notwithstanding their relevance to ‘the transactions governed by the law’, these insights should be excluded from the core of law both as a practice and as an academic discipline.⁸⁶ Such exclusion, however, must be unacceptable, and the reason for this is founded on nothing less than one of law’s most distinctive constitutive features: the fact that its normative prescriptions recruit the state’s monopolized power to back up their enforcement. Indeed, because legal prescriptions have such far-reaching effects on people at large rather than only on the litigating parties, legal reasoning – the bread and butter of law both as a

77 *Ibid.*

78 See Hanoch Dagan, “Judges and Property” in Shyam Balganesh, ed, *Intellectual Property and the Common Law* (Cambridge, UK: Cambridge University Press, 2013) 17.

79 *C.f.* Weinrib, “Can Law Survive?”, *supra* note 4 at 427

80 Roy Kreitner, “Biographing Legal Realism” (2010) 35 *Law & Soc Inq* at

81 See Edward L Rubin, “Law and the Methodology of Law” [1997] *Wis L Rev* at

82 Weinrib, “Can Law Survive?”, *supra* note 4 at 430–31, 436

83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

practice and as an academic discipline – should not blind itself to these broader social ramifications,⁸⁷ even if, in appropriate cases, it may end up realizing that it cannot or should not address them. If any discipline should be willing to incorporate insights from its neighbours, if synthesis is to be an acceptable, indeed important, part of the self-understanding and the disciplinary core of any academic field, it is law.

II. Legal Theory and Legal Realism

The collapse of pure doctrinalism as a credible academic paradigm seems to invite two diametrically opposed strategies: assimilating law into ‘stronger’ disciplines and turning inward in an attempt to strengthen the porous boundaries between law and its neighbouring disciplines. I have claimed that both these strategies are unsatisfactory. Law’s assimilation into the social sciences and the humanities generated an influx of new insights on law and rejuvenated its academic exploration. But the assimilationist strategy tends to fragment the interdisciplinary lessons of law,⁸⁸ and ultimately poses a real threat to the identity of law as an academic discipline. By contrast, excluding the expert knowledge of these disciplines from the core toolkit of academic lawyers may strengthen the cohesion of legal academia. Paradoxically, however, the solitude strategy relies on an unacceptable conception of law, and may end up rendering legal academia esoteric, irrelevant and obsolete.⁸⁹

There is, however, a third way that obviates the pitfalls of these threatening scenarios. This suggested middle position seems implicit in the thriving industry of distinctly legal theories of, for example, property, regulation, international relations and human rights, and may also explain the resilience of law to colonization by the purportedly stronger disciplines from which academic lawyers commonly borrow.⁹⁰ As Roy Kreitner and I argue elsewhere, there are two interconnected aspects of legal theory’s distinct character, which is the core identifier of law as an academic discipline: the attention it gives to law as a set of coercive normative institutions and its relentless effort to incorporate and synthesize the lessons of other discourses about law.⁹¹

The burden of the remaining pages of this chapter is to articulate the skeleton of this conception of legal theory, to explain its added value and to show that it can be both stable and reliable. Some critics of the assimilation of law may find my argument surprising. Weinrib and other critics of assimilation tend to associate its blunt instrumentalism, which not only invites theories from other disciplines but leaves no space for an indigenous legal theory, with legal realism.⁹² By contrast, I will argue that the most promising starting point for a viable understanding of legal theory is the realist conception of law. The fault lies with the purported heirs of the legal realists who, rather than carrying the realist legacy forward, have torn it apart, robbing it of its most promising lessons.

87 See Max Radin, “My Philosophy of Law” in *My Philosophy of Law: Credo of Sixteen American Scholars* (Boston: Boston Law Book Co, 1941; reprint: Littleton, Colo: FB Rothman, 1987) 285 at 299. C.f. Joseph Raz, “Formalism and the Rule of Law” in Robert P George, ed, *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992) ([‘s]ince there are things, and institutions, which are both intrinsically and instrumentally desirable, we will not understand them unless we realize their dual nature’ at 314).

88 C.f. Paul J Stancil, “The Legal Academy as Dinner Party: A (Short) Manifesto on the Necessity of Interdisciplinary Legal Scholarship” [2011] U Ill L Rev 1577.

89 C.f. Armin Krishnan, “What Are Academic Disciplines? Some Observations on the Disciplinarity vs. Interdisciplinarity Debate”, Economic and Social Research Council, National Centre for Research Methods (NCRM) Working Paper Series (March 2009), online: NCRM <http://eprints.ncrm.ac.uk/783/1/what_are_academic_disciplines.pdf> at 48–50.

90 C.f. JM Balkin, “Interdisciplinarity as Colonization” (1996) 53 Wash & Lee L Rev 949 at 965.

91 See Hanoch Dagan & Roy Kreitner, “The Character of Legal Theory” (2011) 96 Cornell L Rev . For a similar conception of legal theory, growing out of important concerns as to the limits of analytical jurisprudence, see Gerald J Postema, *Jurisprudence, the Sociable Science: An Essay in Retrieval* [unpublished manuscript, on file with author].

92 See Ernest J Weinrib, “Restoring Restitution”, Book Review of *The Law and Ethics* by Hanoch Dagan, (2005) 91 Va L Rev 861 at 876. See also John CP Goldberg, “Introduction: Pragmatism and Private Law” (2012) 125 Harv L Rev 1640.

A. Legal Realism

So I begin this part with what I perceive to be the realist conception of law, as I have tried to articulate in my book, *Reconstructing American Legal Realism & Rethinking Private Law Theory*.⁹³ The starting point of the realist account of law is its critique of classical legal formalism, summarized above,⁹⁴ which evokes two major concerns.⁹⁵ First, what can explain past judicial behaviour and predict its future course? Second, and even more significantly, how can law constrain judgments made by unelected judges? How, in other words, can the distinction between law and politics be maintained despite the collapse of law's autonomy? The legitimacy prong of the realist challenge is particularly formidable because, as legal realists show, it is bolstered by the insidious tendency of pure doctrinalism to obscure contestable value judgments made by judges and entrench the claim of lawyers to an impenetrable professionalism.⁹⁶

Legal realists answer this challenge by insisting on a view of law as a going institution (or, more precisely, institutions) distinguished by the difficult accommodation of three constitutive yet irresolvable tensions:⁹⁷ between power and reason, science and craft, and tradition and progress. They thus (implicitly) reject the attempts, typical to many post-realist legal scholars (including the various stripes of assimilationists), to dissolve these tensions or to focus only on one of these features of law, thereby obscuring the most distinctive and irreducible characteristic of the legal phenomenon.

* * *

Thus, the realist conception of law finds room for both power and reason, although it appreciates the difficulties of their coexistence. The realists' preoccupation with coercion is justified not only by the obvious fact that, unlike other judgments, those prescribed by law's carriers can recruit the state's monopolized power to back up their enforcement. It is also premised on the institutional and discursive means that tend to downplay some dimensions of law's power. These built-in features of law – notably the institutional division of labour between 'interpretation specialists' and the actual executors of their judgments, together with our tendency to reify legal constructs and accord them an aura of obviousness and acceptability – render the danger of obscuring law's coerciveness particularly troubling.⁹⁸ They explain the realists' wariness of the trap entailed by the romanticization of law.

But realists also reject as equally reductive the mirror image of law, which portrays it as sheer power (or interest, or politics). They insist that law is also a forum of reason, and that reason imposes real – albeit elusive – constraints on the choices of legal decision-makers, and thus on the subsequent implementation of state power. Law is never *only* about interest or power politics; it is also an exercise in reason giving. Furthermore, because so much is at stake when reasoning about law, legal reasoning becomes particularly urgent and rich, attentive, careful and serious. Reasons can justify law's coercion only if properly grounded in human values. Realists are thus impatient with attempts to equate normative reasoning with parochial

93 Dagan, *Reconstructing*, *supra* note 16. The following paragraphs heavily rely on chapter 2 of that book. The chapter uses texts by legal realists in order to demonstrate how major claims attributed to legal realism fit into a particular understanding of law. My claim, however, is not the discovery of legal realism's true essence. My reading of legal realist literature is unashamedly influenced by my own convictions about law, though I do not pretend to have invented the ideas I present.

94 See text accompanying notes 16–29, *supra*.

95 See Anthony T Kronman, "Jurisprudential Responses to Legal Realism" (1988) 73 Cornell L Rev 335 at 335–6.

96 See Rodell, *supra* note 20 at 3–4, 6–7, 153, 157–8, 186, 189, 196, 198.

97 I deliberately use the softer term 'tension' rather than stronger ones such as 'contradiction'. The relationships I discuss are not contradictory. But although the terms in these pairs are not antithetical, they do 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.

98 See Cohen, "Transcendental Nonsense", *supra* note 24 at 811–12, 820–21, 827–9; Dewey, "Logical Method", *supra* note 20 at 191–3; Oliver W Holmes, "Law in Science and Science in Law" in Oliver W Holmes, *The Collected Legal Papers* (Mineola, NY: Dover, 2007) at 210, 230, 232, 238–9. See also Robert Cover, "Violence and the Word" in Martha Monow, Michael Ryan & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) 203.

interests or arbitrary power. They also find such exercises morally irresponsible because they undermine both the possibility of criticizing state power and the option of marshalling the law for morally required social change.⁹⁹

And yet, realists are also wary of the idea that reason can displace interest or that law can exclude all force except that of the better argument. Because reasoning about law is reasoning about power and interest, the reasons given by law's carriers should always be treated with suspicion. This caution accounts for the realists' endorsement of value pluralism, as well as for their understanding of law's quest for justification as a perennial process that constantly invites criticism of law's means, ends and other (particularly distributive) consequences.¹⁰⁰

Legal realists do not pretend they have solved the mystery of reason or demonstrated how reason can survive in law's coercive environment. Their recognition that coerciveness and reason are doomed to coexist in any credible account of the law is nonetheless significant. Making this tension an inherent characteristic of law means that reductionist theories employing an overly romantic or too cynical conception of law must be rejected. This approach also steers us toward a continuous critical awareness of the complex interaction between reason and power. It thereby seeks to accentuate the distinct responsibility incumbent on the reasoning of and about power, minimizing the corrupting potential of the self-interested pursuit of power and the perpetuation of what could end up as merely group preferences and interests.

* * *

I turn now to the type of reasons that realists invite into the legal discourse, introducing law's second constitutive tension. Realists argue that the forward-looking aspect of legal reasoning relies on both science and craft. Realists recognize the profound differences between, on the one hand, lawyers as social engineers who dispassionately combine empirical knowledge with normative insights, and, on the other, lawyers as practical reasoners who employ contextual judgment as part of a process of dialogic adjudication. They nonetheless insist on preserving the difficulty of accommodating science and craft as yet another tension constitutive of law.

Realists insist on the importance of empirical inquiries, such as investigating the hidden regularities of legal doctrine in order to restore law's predictability, or studying the practical consequences of law in order to better direct the evolution of law and further its legitimacy.¹⁰¹ But my prototype realists reject any pretence that knowledge of these important social facts can be a substitute for political morality. They realize that value judgments are indispensable, not only when evaluating empirical research but also when simply choosing the facts to be investigated. Moreover, they are always careful not to accept existing normative preferences uncritically. Legal realists insist that neither science nor an ethics that ignores the data of science offers a valid test of law's merits. Legal analysis needs both empirical data and normative judgments.¹⁰²

Because law affects people's lives dramatically, these social facts and human values must always inform the direction of legal evolution. But while legal reasoning necessarily shares this feature with other forms of practical reasoning, the realist conception of law also highlights that legal reasoning is, to some extent,

99 See KN Llewellyn, "The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method" (1940) 49 Yale LJ 1355 at 1362–5, 1367–8, 1370, 1381–3, 1387 [Llewellyn, "Normative"]. See also Thomas W Bechtler, "American Legal Realism Revaluated" in Thomas W Bechtler, ed, *Law in a Social Context: Liber Amicorum Honouring Professor Lon L Fuller* (Deventer, The Netherlands: Kluwer, 1978) 3 at 20–21; Harry W Jones, "Law and Morality in the Perspective of Legal Realism" (1961) 61 Colum L Rev 799 at 801, 809; Hessel E Yntema, "The Rational Basis of Legal Science" (1931) 31 Colum L Rev 255 at 295.

100 See Holmes, "Path of the Law", *supra* note 30 at 181; Karl N Llewellyn, "On the Good, the True, the Beautiful, in Law" in *Jurisprudence: Realism in Theory and in Practice* Chicago: University of Chicago Press, 167 at 167, 211–2; Hessel E Yntema, "Jurisprudence on Parade" (1941) 39 Mich L Rev 1154 at 1169.

101 See respectively, for example, Joseph W Bingham, "What Is the Law?" (1912) 11 Mich L Rev 1 at 17; John Henry Schlegel, *American Legal Realism and Empirical Legal Science* (Chapel Hill, NC: University of North Carolina Press, 1995) at ch 2, 4.

102 See Cohen, "Modern Ethics", *supra* note 34 at 45; Cohen, "Transcendental Nonsense", *supra* note 24 at 75–76; William Twining, "The Idea of Juristic Method: A Tribute to Karl Llewellyn" (1993) 48 U Miami L Rev 119 at 151–2.

a distinct mode of argumentation and analysis. Hence, realists pay attention to the distinctive institutional characteristics of law and study their potential virtues while still aware of their possible abuse. The procedural characteristics of the adversary process, as well as the professional norms that bind judicial opinions – notably the requirement of a universalizable justification – provide a unique social setting for adjudication. The procedural characteristics establish the accountability of law's carriers to law's subjects and encourage judges to develop what Cohen terms 'a many-perspectived view of the world' or a 'synoptic vision' that 'can relieve us of the endless anarchy of one-eyed vision'.¹⁰³ Moreover, because the judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and to actual problems of contemporary life. This contextuality of legal judgments facilitates lawyers' unique skill in capturing the subtleties of various types of cases and in adjusting the legal treatment to the distinct characteristics of each category.¹⁰⁴

* * *

The extended realist treatment of science and craft derives from the conviction that law is profoundly dynamic, hence my third constitutive tension. Law's inherent dynamism implies that the legal positivist attempt to understand law statically by sheer reference to verifiable facts – such as the authoritative commands of a political superior or the rules identified by a rule of recognition – is hopeless.¹⁰⁵ In the realist conception, law is 'a going institution' or, in John Dewey's words, 'a social process, not something that can be done or happen at a certain date'.¹⁰⁶ As a going institution, law is structured to be an 'endless process of testing and retesting'.¹⁰⁷ Thus understood, law is a great human laboratory continuously seeking improvement.¹⁰⁸

This quest 'for justice and adjustment' in the legal discourse is invariably constrained by legal tradition. Law's past serves as the starting point for contemporary analysis, not only because it is an anchor of intelligibility and predictability. Legal realists begin with the existing doctrinal landscape because it may (and often does) incorporate valuable – although implicit and sometimes imperfectly executed – normative choices. In other words, since the adjudicatory process so uniquely combines scientific and normative insights within a legal professionalism premised on institutional constraints and practical wisdom, its past yield of accumulated judicial experience and judgment deserves respect. Although legal realists do not accord every existing rule overwhelming normative authority, they do obey Llewellyn's 'law of fitness and flavor', whereby the instant outcome and rule think 'with the feel' of the case law system as a whole, and 'go with the grain rather than across or against it'. Realists celebrate common law's Grand Style, described by Llewellyn as 'a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need', mediating between 'the seeming commands of the authorities and the felt demands of justice'.¹⁰⁹

103 Felix S Cohen, "Field Theory and Judicial Logic" in Lucy Kramer Cohen, ed, *The Legal Conscience: Selected Papers of Felix S Cohen* (Newhaven, Conn: Yale University Press, 1960) at 121, 125–6.

104 Herman Oliphant, "A Return to Stare Decisis" (1928) 14 ABA J 71 at 73–4, 159. See also Karl N Llewellyn, "A Realistic Jurisprudence: The Next Step" in *Jurisprudence: Realism in Theory and in Practice* Chicago: University of Chicago Press at 3, 27–8, 32; Walter W Cook, "Scientific Method and the Law" in William W Fisher III, Morton J Horwitz & Thomas A Reed, eds, *American Legal Realism* (Oxford: Oxford University Press, 1993) 242 at 242, 246.

105 See respectively John Austin, *The Province of Jurisprudence Determined*, edited by HLA Hart (London: Weidenfeld & Nicolson, 1954) 14; Hart, *supra* note 17 at 107. See also Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) at 40.

106 John Dewey, "My Philosophy of Law" in *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston: Boston Law Book Co, 1941; reprint: Littleton, Colo: FB Rothman, 1987) 71 at 73, 77 [Dewey, "My Philosophy"]. See also KN Llewellyn, "My Philosophy of Law" in *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston: Boston Law Book Co, 1941; reprint: Littleton, Colo: FB Rothman, 1987) 181 at 183, 183–4; Radin, *supra* note 87 at 295.

107 Dewey, "My Philosophy", *supra* note 106.

108 *Ibid.*

109 Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (New York: WS Hein, 1960) at 38, 190–1, 217, 222–3; Llewellyn, *Case Law*, *supra* note 21 at 25, 77; Karl N Llewellyn, "Law and the Social Sciences" in *Jurisprudence: Realism in Theory and in Practice* Chicago: University of Chicago Press, at 357, 361–2; Llewellyn, "Normative", *supra* note 99 at 1385.

B. Legal Theory

Contemporary accounts of law's violence, or of its role as a forum of reason, may be richer than the realist accounts of power and reason in law. By the same token, the use of science in legal discourse is today more sophisticated than at the pinnacle of legal realism, and some aspects of the craft of lawyering are better understood now than they were by Llewellyn et al. Finally, contemporary accounts of legal evolution can enrich the sketchy realist thesis about the constitutive dynamism of law. But the (lost?) lesson of the legal realist legacy is that this process of specialization and fragmentation of legal scholarship involves a real intellectual loss because any one-dimensional account of law is hopelessly deficient.

Therefore, the starting point for deciphering the distinctive character of legal theory, which lies at the core of law as an academic discipline, is to regain the realist appreciation of law's most distinctive feature: its difficult, but inevitable, accommodation of power and reason, science and craft, and tradition and progress. To clarify: I am not claiming that legal realism exhausts legal theory. Rather, legal theory is a genus and legal realism is one species of that genus. Legal theorists can obviously argue about which legal theories are good or valuable, and even about the very terms of reference of such a debate. Thus, while realism's constant balancing of reason and power recommends it as a legal theory, other legal theories could have a completely different take on the relationship between reason and power.¹¹⁰ But the key move in appreciating the significance of the species, and thus of the added value of law as an academic discipline, lies in the two interconnected aspects of the distinct character of legal theory. Both these aspects – the attention that legal theory 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 – spring naturally from the legacy of legal realism.¹¹¹

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. It emphasizes the inherent tension between power and reason. It likewise highlights the fact that, in law, this tension is always situated institutionally.¹¹² 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 as to both science-based and craft-based engines of legal evolution. In this way, insights from other disciplines of the social sciences and the humanities are always potentially relevant to legal theory. And yet, alongside these 'external' data, legal theory pays careful attention to law's structural and procedural features as well as to the character traits conducive to lawyers' expertise in practical reasoning.¹¹³

Indeed, in order to perform its tasks of shedding light – either explanatory, justificatory or reformist – on society's coercive normative institutions, legal theory often resorts to insights from other discourses about law, drawing on the various applications of theories and methodologies from other disciplines. As noted, however, the synthetic spirit of legal theory is not just a matter of methodological inclination; rather, the appreciation of the nature of law as a set of coercive normative institutions justifies it or even mandates it. Synthesis is indeed the second distinctive feature of legal theory.

110 Kantian legal theories, for example, take the possibility of coercion as a mandate for reason to be the sole motivator in law (i.e., for there to be law, all coercive power must be subjugated to reason); see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009) at 4–29. By contrast, some Marxist theories maintain that, while law exhibits an internally consistent and reasoned framework, the entire mode of reason flows from and is dependent on (economic) power, so that law's reason serves power; see Evgeny B Pashukanis, *Law and Marxism: A General Theory*, ed by Chris Arthur, translated by Barbara Einhorn (London: Ink Links, 1978) at 63–4. Analytical jurisprudence is also similarly divided, with some (such as John Austin) emphasizing law's coercive dimension and others (such as HLA Hart) highlighting its normativity. Compare Austin, *supra* note 105 at 9–33 with Hart *supra* note 17 at 55–9.

111 See Dagan & Kreitner, *supra* note 91, on which this section draws.

112 For a survey of recent institutionalist work, see Victoria Nourse & Gregory Shaffer, "Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?" (2009) 95 Cornell L Rev 61 at 85–90.

113 To be sure, realists tend to present just one particular (and particularly optimistic) view of thinking like a lawyer. Legal theory's attention to law as rhetoric or discourse may reach conclusions quite opposed to the view of lawyers as enjoying illumination or unmediated access to human situations. See e.g. Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford: Oxford University Press, 2007) at 4–11, 207–23.

Legal theory often resorts to socio-historical analyses of the law as well as to comparative law (a traditional tool of academic lawyers) because they can offer contextual accounts that help to explain the sources and the evolution of the legal terrain.¹¹⁴ Socio-historical analyses and comparative law also helpfully open up the legal imagination by undermining the status quo's (implicit) claim of necessity and revealing the contingency of the present. At times, they can help unearth competing legal possibilities and provide hints as to the possible ramifications of their adoption. Policy-oriented scholarship, in turn, is obviously helpful in figuring out the real life ramifications of current law. This task, which is important both to understand the law and to evaluate it, often relies on social scientific methods (from economics, psychology, sociology, anthropology and political science), both empirical and theoretical. Insofar as this stage of research is aimed at assessing the normative desirability of law, it typically leads to a second stage that looks at law's goals and thus resorts to guidance from neighbouring evaluative disciplines, notably ethics and political philosophy. And where legal theorists aim at reconstruction, designing alternatives and comparing their expected performances, they again typically use both social scientific and normative tools.¹¹⁵

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 always requires a robust acquaintance with law's institutional, structural and discursive characteristics as well. This may explain why, more so than their counterparts in the social sciences and the humanities who write about law, legal theorists often explicitly or implicitly synthesize into their accounts the typical and recurrent advantages and limitations of law (vis-à-vis other social institutions), as well as the subtle differences between various legal fields and legal institutions.¹¹⁶ It may also explain the tendency of legal theory to be less abstract than the philosophical, economic or other theories with which it interacts.¹¹⁷ Finally, it points to the enduring role of doctrinalism – the (internal) language of legal professionals – as an object of our study as well as to the significance of Weinrib's insistence on correlativity as a constitutive feature of private law, even though the isolationist conclusions he draws from this insight must be rejected.

Legal theorists who recognize the possibilities of synthesizing these languages of legal scholarship are not overly concerned with the dismissal of legal tradition as unscientific, nor by the fear of intellectual co-opting by legal practice.¹¹⁸ They are also undeterred by the worry that the synthesis prescription calls for only a superficial command of the synthesized theories and methodologies. While superficiality should always be a concern, there is no reason to believe that it is necessarily more acute where the division of our knowledge about human affairs changes. Their range of starting points for analysis is immense. For example, some legal theorists will begin with existing doctrines or proposals for legal reform, convinced that starting with the actual arrangements governing some aspect of life properly recognizes law's social basis and is also the most fruitful mode of critical engagement.¹¹⁹ 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. Legal theory comes in many flavours, from the apologetic to the radical and, of course, at varying levels of quality. One can hope that theorists will examine legal doctrines or institutions with both a critical eye and a reconstructive spirit. And one can similarly hope

114 See e.g., in the present volume, Rosalie Jukier, "The Impact of 'Stateless Law' on Legal Pedagogy", ch 16.

115 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.

116 Cf. Penner, *supra* note 27 at 328 (while law should be compatible with morality, it is irreducible to morality).

117 Cf. *ibid.* at 335–7, 340–42 (arguing that because overly abstract theories do not take seriously important legal distinctions, legal theory can either 'explore the philosophically interesting or puzzling questions the law raises' with no interest in any aspect of legal doctrine or purport only to provide rich description of such particular areas of law).

118 Quite the contrary: the 'methodological pluralism' that typifies 'current legal scholarship' evinces 'a mature openness to other disciplines that demonstrates a welcome self-confidence': Christopher McCrudden, "Legal Research and the Social Sciences" (2006) 122 Law Q Rev 632 at 645.

119 Cf. Michael Walzer, *Interpretation and Social Criticism* (Cambridge, Mass: Harvard University Press, 1987) at 22, 30, 41, 43, 46–8, 61.

that legal theorists will not shy away from reaching a conclusion that nothing short of radical transformation may be required for law to be acceptable.¹²⁰

Thus conceived, legal theory combines lessons from interfacing disciplines in the social sciences and the humanities, but is irreducible to any of them. By the same token, although legal theory acknowledges the significance of internal insights, it does not aspire to closure and, rather than seeking to establish law as an autonomous academic discipline à la Weinrib, it celebrates its embeddedness in the social sciences and the humanities.¹²¹ Finally, although the synthetic enterprise of legal theory sounds (and indeed is) academically ambitious,¹²² it is or at least can be highly relevant to the practice of judges and practising lawyers, at least insofar as they are interested in explaining, justifying or reforming the law. In this sense, legal theory may help to reduce the gap between legal academia and the legal profession.¹²³ It also sets up an attractive vision of legal education. As Llewellyn insisted, studying law as a liberal art by combining ‘[t]echnique, the intellectual side, the spiritual – the true, the beautiful, the good’ – is the best practical training since it accords students ‘vision, range, depth, balance, and rich humanity’, which are key for effective and good practical work.¹²⁴ Such self-confidence in legal theory’s synthetic spirit springs from the legal realist conviction that only an engagement with the complexity of law can generate useful accounts of legal phenomena. This conviction leads legal theorists to a principled anti-purist position. In turn, this position is strengthened even further for evaluative (justificatory or reformist) legal theorists, because the responsibility of potentially affecting people’s lives forces upon them a duty to doubt as well as a duty to decide, obligations one cannot discharge by endorsing any single perspective on law.¹²⁵

Yet, alongside its self-confidence, an almost constitutive discomfort typifies legal theory. This discomfort may explain why, typically, legal theory does not simply accept other discourses about law in patient resignation but, in fact, doggedly seeks out interaction with them. This disposition derives from the fact that, in most dimensions of law, legal theory is positioned somewhere midway between the other discourses about law, and it is thus always exposed (albeit to a moderate degree) to the professional hazards of their practitioners. Thus, on the one hand, legal theory typically puts less emphasis on law’s coerciveness and the risks of its collapse to brute politics than do socio-historical analyses. Therefore, at least to some degree, it risks a lack of critical reflectivity that haunts both purely internal analyses of law and, to a lesser degree, policy-oriented ones that rarely pay attention to these dimensions. On the other hand, by drawing away (more than internal analyses of law) from legal doctrine and from the jurists’ point of view, legal theory may be insufficiently attuned to law’s distinctiveness vis-à-vis other social, economic and cultural institutions. Similarly, although legal theory is more responsive than both socio-historical analyses and internal analyses of law to the normative dimension

120 Indeed, legal theory 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. C.f. Robin West, *Normative Jurisprudence: An Introduction* (Cambridge, UK: Cambridge University Press, 2011).

121 See also Hanoch Dagan, “Defending Legal Realism: A Response to Four Critics” (2014) 1 Critical Analysis of Law 254 at 261–3. In itself, this position may be controversial: legal theory can be conceived as a sub-system with the kind of autonomy described by autopoiesis. A detailed argument with systems theorists is beyond the scope of this chapter, but it is important to note that the conflict is actually minimal. Systems theorists believe that systems are cognitively open but operatively closed. For my purposes, it suffices to note that since legal theory (as imagined here) does not actually have an operative mode, its cognitive openness is all that is at stake in the current formulation of embeddedness. See Niklas Luhman, *Law as a Social System*, edited by Fatima Kastner et al, translated by Klaud A Ziegert (Oxford: Oxford University Press, 2004) at 76–141.

122 Indeed, if synthesis is crucial to legal theory, as I claim, it needs to become a focal point of our reflective methodological attention.

123 See Harry T Edwards, “The Growing Disjunction between Legal Education and the Legal Profession” (1992) 91 Mich L Rev 34 at 41–2. For a convincing platform of cooperation between legal academia and the bar, see Robert W Gordon, “Lawyers, Scholars, and the ‘Middle Ground’” (1993) 91 Mich L Rev 2075 at 2098.

124 Karl N Llewellyn, “The Study of Law as a Liberal Art” in *Jurisprudence: Realism in Theory and in Practice* (Chicago: University of Chicago Press, 1960) at 375, 376, 394. See also Kathleen M Sullivan, “Foreword: Interdisciplinarity” (2002) 100 Mich L Rev 1217.

125 See Alan Schwartz, “Two Culture Problems in Law and Economics” (2011) 2011 U Ill L Rev 1531 at 1532; Joseph William Singer, “Normative Methods for Lawyers” (2009) 56 Rev 899 at 910–11; Eyal Zamir, “Towards an Integrative Legal Scholarship” (2008) 4 Haifa Law Review 131 at 142–3.

of law and its potential role as an instrument for social change, it is typically less reform-minded than policy-based analyses. It may thus be subject to the risks of either romantic conservatism or ivory-tower playfulness.

The core convictions underlying legal theory require legal theorists to navigate these unstable middle positions. They imply that legal theory will generally rely on pragmatic judgments as to the optimal degree of suspension from the practice of law and the optimal mix of socio-historical and normative perspectives that should be included in its analysis. Though the imprecision of such judgments does not justify their disparagement, complacency about them does not seem appropriate either. Not only do other discourses supply legal theory with essential inputs, they also serve as potential sources for criticizing excesses or shortcomings in striking this delicate and sensitive balance. The critiques are obviously different from one another and at times may indeed be diametrically opposed. Legal theorists, whose accounts often serve to bridge these contradictory positions, can rely on the critical attitudes of other members of the legal discourses family as checks on what may be the most challenging task of a solid legal theory: properly accommodating the insights of all these schools into workable theoretical frameworks that rely on a robust understanding of law as a set of coercive normative institutions.¹²⁶

III. Concluding Remarks

Law is a serious academic discipline and legal academics study a set of increasingly important social institutions. Analysis of these institutions requires careful attention to their significant features and notably to the difficult accommodation of power and reason, science and craft, and tradition and progress. This core distinctive characteristic of law as a set of coercive normative institutions also explains the typical emphasis of legal theory on synthesis, namely, its characteristic recourse to insight on law or its various branches and doctrines from other disciplines in an attempt to incorporate them into its corpus. As an academic discipline, then, law should reject both assimilation and isolation.

The institutional implications of this conclusion are modest, but important. This understanding of law as an academic discipline values both internal analyses of law, which resist synthesis, and external analyses of law, which use theories and methods from other disciplines. It insists, however, that practitioners from these schools should be able to *speak* legal theory (as defined here), if not with native proficiency then at least as a second language. Requesting participants in a social practice to command a language that is deemed to be the core of that practice raises the risk of creating a hegemonic discourse that might marginalize unorthodox languages. But given the secure positions of both the inner language of law and of languages that rely on other disciplines, applying this request to legal theory does not entail such a risk. Quite the contrary, rather than silencing disputes, broad recognition of the importance of legal theory as a common language is likely to trigger a fruitful and probably vigorous debate as to its precise characteristics.

Thus, while the development of high-powered other-discipline(s)-based academic associations and peer-review journals is important, it is likewise imperative to develop parallel institutional venues that can similarly nurture legal theory, both in general and respecting the various branches of the law. Indeed, like other academic disciplines, legal theory (or the theory of a particular legal branch) allows the initiated to engage in a deeper inquiry, but becoming adept at it requires focus and training. This means that while law faculties definitely have room for philosophers, economists, historians and practitioners from other neighbouring disciplines, legal academia should not rely on these disciplines too heavily in the training of its own scholars. Legal academics should have a background in legal theory and study it as a field, and doctoral or other research-based advanced degree programmes in law in which legal theory takes centre stage should be supported and developed for this purpose.¹²⁷

¹²⁶ In other words, there are good reasons why, from the point of view of legal theory, it is essential to have all these perspectives on law in place, even if not necessarily in one institution.

¹²⁷ For one example, which I have spent considerable energy supporting, see “The Zvi Meitar Center for Advanced Legal Studies”, online: Tel Aviv University Buchmann Faculty of Law <<http://www.law.tau.ac.il/Eng/?CategoryID=191>>.