The Law School Observer

Brian Leiter

Those of us who work in the interdisciplinary field of law & philosophy have long lamented the fact that the field still has not attained within American law schools the professional robustness of law & economics. The lament isn't, to be sure, that law & philosophy is not as influential: how could it be, given that law & philosophy has never been allied to a normative program the way law & economics has – let alone a normative program that coincided so completely with the economic interests of the resurgent ruling classes in the United States during the last two decades!

Professional robustness, in any case, is possible without widespread theoretical and practical influence. What is worrisome to serious law & philosophy scholars in the legal academy is that the intellectual standards appropriate to the cognate discipline have still had so little impact upon the academy. The top law reviews, as best I can tell from talking to colleagues, do not publish complete rubbish in the law & economics genre. But more than half of what appears in top law reviews purporting to deal with philosophy or philosophical topics is sophomoric, the kind of writing that would prevent an undergraduate from getting into a PhD program.[1] The rise of peer-edited journals with a significant interest in law & philosophy – like *Legal Theory* (of which I am an editor), *Canadian Journal of Law & Jurisprudence*, and *Oxford Journal of Legal Studies* – is, in significant part, attributable to the fact that the student-edited journals exercise zero quality control on the field.

Yet the large volume of sophomoric nonsense about law & philosophy in the student-

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1 See, e.g., James Boyle, "Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice," 51 *Stanford Law Review* 493 (1999); Pierre Schlag, "The Problem of the Subject," 69 *Texas Law Review* 1627 (1991).

edited law reviews is only one indication of the professional fragility of the field. Consider, for example, that if you were to ask, "What are the top law & economics schools in the U.S.?" the answer would obviously have to include the top four law schools in the U.S. – Yale, Harvard, Stanford, and Chicago – plus another solidly top ten school, Boalt (especially after their retention of **Aaron Edlin** in the face of an offer from Yale). Yet the comparable question about law & philosophy would really mention only Yale (for **Jules Coleman**) among the most elite law schools, and then other top schools like Columbia (**Joseph Raz**, **Jeremy Waldron**), NYU (**Ronald Dworkin**, **Liam Murphy**, **Thomas Nagel**), and Penn (**Anita Allen**, **William Ewald**, **Claire Finkelstein**, **Stephen Perry**, among others).[2] But surely it is indicative of the precarious condition of law & philosophy in the legal academy that a student *really* interested in law & philosophy would plainly be better off at the University of San Diego School of Law (with **Larry Alexander**, **Heidi Hurd**, and **Michael Moore**) than the Harvard or Stanford Law Schools! While almost no top law school – from Columbia to USC – is bereft of serious law & economics, the list of elite law schools bereft of serious law & philosophy is distressingly long.

Three considerations must surely figure in an explanation of this state of affairs.

First, philosophy is hard, and it does not lend itself to easy policy applications the way economics does. Exacting intellectual rigor without the prospect of prescriptive policy pay-off is not a formula for recruiting legal academics to an intellectual movement.

Second, the most prominent figure in the field, **Ronald Dworkin**, has enjoyed something of a mixed reputation among both legal scholars and legal philosophers. (Dworkin as a political philosopher is a different matter.) In the field in which he has intervened most – constitutional law – Dworkin is, in my experience,[3] often dismissed (no doubt unfairly) as an ideologue who is indifferent to constitutional doctrine and legal argument. Among philosophers, he has long been overshadowed by Raz, who is generally thought by specialists in the field to be the most important living legal philosopher. It is not just that Dworkin makes a mess of difficult philosophical topics when he tries to tackle them[4] – **Simon Blackburn**, who holds the Chair in Philosophy at Cambridge, has derided these "incursions … into philosophy" as "wearying, pointless, and unprofitable"[5] – but that too much of his work in jurisprudence has involved inaccurate representations of the views of his opponents. This is, by now, familiar in the case of his early paper attacking Hart – "The Model of Rules"[6] – but it is also

2 Chicago's **Martha Nussbaum** doesn't really work at the intersection of law & philosophy, as much as she works in philosophy *simpliciter*.

3 Given the relative strength in constitutional law of the two top schools where I have taught – Texas and Yale – I expect my exposure to professional sentiment among constitutional scholars is representative.

4 See, e.g., Ronald Dworkin "Objectivity and Truth: You'd Better Believe It," 25 *Philosophy & Public Affairs* 87 (1996). For criticism of Dworkin's mishandling of these issues, see Simon Blackburn's reply at the ethics page of the Brown Philosophy Department: http://www.brown.edu/Departments/Philosophy/bears/symp-dworkin.html; Brian Leiter, "Objectivity, Morality and Adjudication," in *Objectivity in Law and Morals*, ed. B. Leiter (Cambridge: Cambridge University Press, 2001).

5 Blackburn, *supra* n.4.

6 Reprinted in Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977). Hart's most extended reply is in the second edition of *The Concept of Law*, ed. P. Bulloch & J. Raz (Oxford: Clarendon Press, 1994), where Hart is repeatedly forced to say things like "nothing in my book or in anything else I have written supports [Dworkin's] account of my theory" (*id*. at 246),

true even of his "mature" work, like *Law's Empire* (1986). Thus, for example, in the latter work he attacks other legal philosophers for trying to give a semantic account of the meaning of the word "law." This has led Raz to comment, with palpable exasperation, "By the time [*Law's Empire*] was published, Dworkin was aware of the fact that Hart and others did not think of themselves as explaining the meaning of 'law.' Nevertheless, he persisted in thinking that that is exactly what Hart was doing."[7] Plainly, things are not going well for an interdisciplinary field when the most visible figure in the field engenders this kind of reaction from his peers.

Third, the most widely influential movement in law schools with a philosophical component, Critical Legal Studies, has been an amateurish affair philosophically. This criticism is not, to be sure, meant as a reprise of the mindless and sanctimonious outbursts that CLS has long inspired, of which **Paul Carrington**'s remains the most disgraceful.[8] Indeed, the "nihilistic" view of law that Carrington decried is, to my mind, the most defensible one, as decidedly non-CLS scholars have argued.[9] The worry about CLS has always been rather different – namely, that it became the vehicle for the introduction of all kinds of bad philosophy (deconstructionism, misreadings of Wittgenstein, postmodernism) into academic law. The hostility to CLS, in any case, has always had little to do with the bad philosophy that underwrote it, since numerous schools that eschewed CLS – from Columbia to Carrington's Duke – have embraced "critical theories" with comparably sophomoric intellectual content. Rather, at bottom, hostility to CLS has always reflected the fact that CLS dissented from the free market paradigms – whether libertarian or welfare state – which dominate intellectual life in American law schools.

It would be wrong to end on a negative note, however, since the professional landscape appears to be changing. Almost every scholar interested in jurisprudence hired at a major law school in recent years also has a PhD in philosophy, and from legitimate departments as well: **Scott Brewer** at Harvard; Ewald and Finkelstein at Penn; **Jody Kraus** at UVA; **Christopher Kutz** at Boalt; and Murphy at NYU, among others. The leading senior scholars in law & philosophy, like Coleman at Yale or Waldron at Columbia, are committed to *genuine* interdisciplinarity, and command an audience among both legal scholars and philosophers. There is now reason to hope that serious interdisciplinary work in law & philosophy will gradually become the norm throughout the legal academy over the next decade.

"there is no trace of such a doctrine [as attributed to me by Dworkin] in my work" (*id*. at 247), "I expressly state" that I do not accept the plain-fact positivism Dworkin attributes to "my theory" (*id*.), "there is nothing in my theory to support Dworkin's view, which I certainly do not share, that the purpose of law is to justify the use of coercion" (*id*. at 248), Dworkin "ignores my explicit acknowledgment that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles" (*id*. at 250), and so on.

7 Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison," 4 *Legal Theory* 249, 250 n. 6 (1998).

8 Paul D. Carrington, "Of Law and the River," 34 *Journal of Legal Education* 222 (1984). Have I now discovered the "fleas" in Professor Carrington's "underwear"? See "Moving," 4 *Green Bag* 2d 451, 452 (2001).

9 For an important, recent treatment, see Lucas A. Powe, Jr., *The Warren Court and American Politics* (Cambridge, Mass.: Harvard University Press, 2000). For a more formal treatment, see Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993).