Is Law an Academic Discipline?

Finn Makela *

Le droit est-il une discipline scientifique ?

¿Es el derecho una disciplina científica ?

O Direito é uma disciplina científica ?

法律是一门科学性学科吗？

Résumé

Cet article se veut une intervention dans les débats de la littérature scientifique sur la place de la recherche juridique dans les universités. La discussion que nous proposons s'articule autour de la question de la qualification du droit comme discipline scientifique. Sur la base d'une conception sociologique plutôt qu'ontologique de la disciplinarité, nous avançons que le droit n'est pas une discipline scientifique en vertu de sa relation à un objet d'étude ou à une méthodologie mais parce que son aptitude à produire légitimement un discours savant est reconnue institutionnellement. Notre argumentaire se fonde sur la distinction entre les points de vue internes et externes, autant au droit qu'aux disciplines.

Abstract

This article engages with the existing literature on the role of legal research in the University by framing the question as whether law is an academic discipline. I answer in the affirmative but my defense of this position is based on a sociological rather than an ontological conception of disciplinarity. Law is an academic discipline not by virtue of its relationship to a specific object or methodology, but by virtue of the institutional recognition of its legitimacy to produce a scholarly discourse. The argument relies on the distinction between points of view internal and external both to law and to disciplines.

* Professor, Faculty of Law, Université de Sherbrooke. The ideas in this paper were first presented at the "Symposium on the Aspirations and Impact of Scholarly Research in Law" held on the occasion of the McGill Law Journal's 60th anniversary at the Faculty of Law, McGill University, 18 March 2013. I am grateful to the conference participants for their insightful remarks. I also wish to thank Julie Paquin, Mathieu Devinat, Michel Morin and anonymous reviewers for their helpful comments on earlier drafts.

Resumen

Este artículo se une a los debates de la literatura existente sobre el rol de la investigación jurídica en las universidades. Planteamos aquí la cuestión de si el derecho es una disciplina académica y avanzamos una respuesta afirmativa a esta cuestión basada en una concepción sociológica más que ontológica de la disciplinariedad. En realidad, el derecho es considerado una disciplina académica no en virtud de su relación con un determinado objeto de estudio o con una metodología específica, sino en virtud del reconocimiento institucional de su legitimidad para producir un discurso académico. Nuestra argumentación se basa en la distinción entre los puntos de vista internos y externos, tanto del derecho como de otras disciplinas.

Resumo

Este artigo se articula com a literatura sobre o papel da pesquisa jurídica nas universidades colocando a questão se o direito é uma disciplina cientifica. Nós respondemos afirmativamente, mas nossa posição é baseada em uma concepção antes sociológica do que ontológica da disciplinaridade. O direito é uma disciplina cientifica não por virtude de sua relação com um objeto ou metodologia específicos, mas em razão do reconhecimento institucional de sua legitimidade para produzir um discurso cientifico. O argumento se baseia na distinção entre os pontos de vista internos e externo com relação tanto ao direito quanto às disciplinas.

摘要

基于有关法律研究在大学中的地位的现有文献，本文探讨了法律是否是一门科学性学科这一问题。在我看来，问题的答案是肯定的，但是我的理由不是基于学科性的本体概念，而是基于其社会学概念。法律是一门科学学科不是因为其与特定目标或方法的关系，而是因为生产学术话语的正当性受到制度性的认可。本文的论据在于法律与学科内部和外部观点的区分。

Plan de l'article

The role of academic legal research, both inside and outside the University, is the subject of endless debate and a significant body of published scholarship. In North America, the debate is invariably structured around the tension between legal scholarship and legal practice. This tension is lived by many legal academics as an existential malaise and even a crisis of identity. Are we nothing more than academic lawyers; interlopers in the university without a sufficiently rigorous methodology or theoretical basis to justify our membership in the community of scholars? In other words, is law an academic discipline?

In this article, I agree with others who have affirmed that yes, law is an academic discipline. However, I disagree that law's disciplinarity can be established with reference to its object or methodology. Instead, I argue for the advantages of a sociological rather than ontological defence according to which law is a discipline if we understand disciplines as social institutions whose authority to produce a scholarly discourse depends on their legitimacy.

I. Law as an academic discipline

The question of whether law is an academic discipline may be taken as an invitation to jump immediately to the problem of what exactly *law* is. This temptation to move from the question of law's disciplinarity to the question of its nature is predicated on a particular conception of academic disciplines. According to this (often implicit) understanding, the defining characteristic of disciplines is either a discrete object or area of study, a distinct methodology, or some combination of the two. If these are the criteria for authentic disciplinarity, then it behooves us to articulate what our object or area of study is[1]. A better approach, in my view, is to render explicit the concept of discipline prior to asking whether law can legitimately aspire to disciplinarity.

[1] This is the approach taken by Hanoch Dagan, "Law as an Academic Discipline", in Helge Dedek and Shauna Van Praagh (eds.), *Stateless Law: Evolving Boundaries of the Discipline*, Surrey, Ashgate, 2015, p. 45. Dagan identifies legal theory as "the core identifier of law as an academic discipline" and defines law as "a set of coercive normative institutions". See also Hanoch Dagan and Roy Kreitner, "The Character of Legal Theory", (2011) 96 *Cornell L. Rev.* 671. Compare Douglas W. Vick, "Interdisciplinarity and the Disciplinarity of Law", (2004) 31 *J. L. and Society* 163.

A. What is a discipline?

The separation of different ways of apprehending the world into disciplines is not the reflection of a primary ontological division. On the contrary, disciplines are social institutions for the symbolic and material organization of intellectual activity and the configuration of their boundaries is historically contingent. Furthermore, in so far as disciplines both constitute and reflect the social order of knowledge, they are also *political* institutions intertwined with the creation and perpetuation of legitimacy and authority.[2]

Thus, although the division of knowledge into different branches can be traced to antiquity,[3] the institutional inscription necessary for these divisions to become disciplines is generally attributed to the arrival of the medieval universities.[4] The current division of intellectual activity in disciplinary fields reflected in the institutional structures not only of teaching,

---

2 This is a paraphrase from Nico Stehr and Peter Weingart, "Introduction", in Nico Stehr and Peter Weingart (eds.), *Practising Interdisciplinarity*, Toronto, University of Toronto Press, 2000, p. xi ("[S]cientific disciplines constitute the modern *social order of knowledge*, and the order is in this sense a political order"). See e.g. Michel Foucault, *Les mots et les choses. Une archéologie des sciences humaines*, Paris, Gallimard, 1966 (tracing the co-evolution of the disciplines of biology, economics and linguistics in the 16th and 17th centuries and relating this evolution to the emergence of a certain conception of the individual susceptible to regulation by the State).

3 Aristotle, for example, deployed a typology that divided knowledge into three "sciences" ("*epistêmai*"): theoretical, practical, and productive. Each of these was in turn divided. The theoretical sciences divided into first philosophy (what we now call metaphysics), mathematics and natural philosophy; natural philosophy was further subdivided into physics, biology, botany and astronomy. See Christopher Shields, "Aristotle", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Winter 2016, online: <http://plato.stanford.edu/archives/win2016/entries/aristotle/>. On the organization of knowledge in antiquity, see generally Robert W. Sharples (ed.), *Philosophy and the Sciences in Antiquity*, Aldershot, Ashgate, 2005.

4 The rediscovery of the works of Aristotle and the adoption of scholasticism by the Catholic Church was certainly important to the curriculum of the "inferior" faculties of medieval universities, which was divided into the *trivium* (grammar, rhetoric and logic) and the *quadrivium* (arithmetic, geometry, astronomy and music). See, Gordon Leff, "The *Trivium* and the Three Philosophies", in Hilde de Ridder-Symoens (ed.), *A History of the University in Europe, vol. 1: Universities in the Middle Ages*, Cambridge, Cambridge University Press, 1992, p. 307 and John North, "The *Quadrivium*", *ibid.*, p. 337. See also Bill Readings, *The University in Ruins*, Cambridge (Mass.), Harvard University Press, 1996.

but also of research and knowledge dissemination is probably most closely associated with educational reforms in Germany in the nineteenth century.[5]

To ask whether a given field counts as an academic discipline can thus not be answered by the enumeration of objects of study and methodologies and the search for unique pairings thereof. Certainly disciplinary discourses may use domains of study (as between, for example, physics and chemistry) or preferred methodologies (as between, for example, anthropology and sociology) as signposts that mark the border between them.[6] But these discursive operations must be understood for what they are : expressions of belonging and mechanisms of inclusion and exclusion. Douglas Vick articulates this as follows :

> [T]he notion of a discipline as a distinct branch of learning necessarily implies inclusion and exclusion… and a power structure through which decisions of inclusion and exclusion are made. Ultimately, then, disciplinarity necessarily concerns the connection between knowledge and power. The discourse of disciplines reinforces power relationships both within and between disciplines.[7]

In asking ourselves whether law is an academic discipline, then, it is of little use to roll out our favourite definition of law and then proceed to differentiate it from the objects of study of other disciplines. On the other hand, this doesn't leave us without tools to think about law's disciplinarity.

---

5 Rudolf Stichweh, "Differentiation of Scientific Disciplines. Causes and Consequences", in Gertrude Hardorn, (ed.), *Unity of Knowledge*, in *Encyclopedia of Life Support Systems*, Oxford, EOLSS Publishers, 2003 ; Judith Thompson Klein, *Interdisciplinarity*, Detroit, Wayne State University Press, 1990, p. 20-22. See also Rudolf Stichweh and Martina Bodé-Pitz, "La structuration des disciplines dans les universités allemandes du XIX^e siècle", (1994) 62 *Histoire de l'éducation* 55.

6 Though the metaphors of boundaries or borders between fields or domains of study are standard ways of describing the disciplines, they are certainly not the only ones ; discussions of disciplinarity are rife with metaphors. On the relationship between metaphors and disciplinarity, see Finn Makela, "Des champs et des clôtures : la métaphore et la recherche interdisciplinaire en droit", in Violaine Lemay and Frédéric Darbellay (eds.), *L'interdisciplinarité racontée. Chercher hors frontières, vivre l'interculturalité*, Bern, Peter Lang, 2014, p. 29. See also Judith Thompson Klein, "A Conceptual Vocabulary of Interdisciplinary Science", in N. Stehr and P. Weingart *supra* note 2, 3.

7 *Supra* note 1, p. 169 [references omitted].

B. Is law a discipline?

Law was the very first subject of university study. Indeed, the University at Bologna, which is widely recognized as the first university,[8] began as a series of associations formed by *legum doctores* and their pupils.[9] From the outset, the legitimacy of law as a subject of university study was intertwined with the legitimacy of the law itself. The founding moment of the University at Bologna was the issuance of the famed *Authentica Habita* by Emperor Frederick I Barbarossa in 1155. The *Habita* granted the professors of civil law and their students freedom of movement between seats of learning, provided them with protection against prosecution and gave the masters presumptive and prerogatory jurisdiction *rationæ personem* over their colleagues and students. Giving these powers and immunities to members of the University also served to legitimize the application of the Roman law:

> Frederick I caused the *Habita* to be inserted in Justinian's *Codex*; this clearly showed his wish to revive Roman law and incorporate it in the legal system of the Holy Roman Empire (the *Sacrum Imperium*). His plan exactly suited the masters in Bologna, who as interpreters and teachers of Justinian's laws, had every interest in getting them generally recognized and applied.[10]

From these beginnings, law's place in the universities has varied enormously, both across time and place. The tradition in continental Europe was to give pride of place to the law faculty, alongside the two other "higher" faculties of theology and medicine.[11] As a rule, access to the legal

---

8 See generally, Walter Ruëgg, "Themes", in H. de Ridder-Symoens, *supra* note 4, 3. Ruëgg explains how this foundational moment has served an ideological function and that it is as much a matter of mythology as historiography. He concludes (p. 6) that "Bologna or Paris may be called the oldest university depending on the weight which one attributes to one or the other of the various elements which make up a university".

9 *Ibid.* See also Antonio García y García, "The Faculties of Law", in H. de Ridder-Symoens, *supra* note 4, p. 388. See also Edward H. Levi, "The Place of Professional Education in the Life of the University", (1971) 32 *Ohio State L.J.* 229, 230-231 ("Among the oldest universities there are those which began as law schools and then built around the study of law to become more general academies.")

10 *Ibid.*, p. 78. For an in-depth analysis of the relationship between Church, State and law faculties in medieval Europe, see David S. Clark, "The Medieval Origins of Modern Legal Education: Between Church and State", (1987) 35 *American J. of Comparative L.* 653.

11 D.S. Clark, *ibid.*, p. 653 ("The study of law in continental Europe has been associated for centuries with instruction at the university. To a significant extent this defines *the* salient characteristic of the civil law tradition" (emphasis in original)).

professions (magistrate, advocate and notary)[12] was, and still is, predicated on successful study in a university faculty of law.[13] In England, however, the common law was taught at the Inns of Court and university teaching of law was restricted to Roman and Canon law until the mid-18th century.[14] This initial distinction between law as an academic discipline and law as an object of training for future professionals set the stage for an ongoing struggle for legitimacy between universities and the profession that will sound familiar to North American jurists.[15]

Though the North American experience differs from England in many details and varies widely between jurisdictions, the same theme characterizes both the history and current status of law as a discipline. The place of law within the university is the source of some discomfort, generally described in terms of a tension between two ideal types: "law school" as site of professional training where some research is done incidentally and "faculty of law" as site of academic research and education that incidentally may prepare one for the profession.[16]

In the United States, apprenticeship was still the primary method of preparing for the practice of the legal profession until the late 19th century. Historiographical convention dictates that 1870 – the year that Christopher Columbus Langdell was named dean of Harvard Law School – represents the turning point that led to the decline of apprenticeship and the rise of the university as the sole legitimate site of law teaching in the

12 David S. Clark, "The Role of Legal Education in Defining Modern Legal Professions", (1987) *B.Y.U. L. Rev.* 595, 595 ("A civil law lawyer must be ready at an early age to select his career either in the private sector as an advocate, notary, or with a corporation, or in the public sector as a judge, prosecutor, or government attorney. Subsequent lateral mobility is minimal.").

13 Julian Webb, "Academic Legal Education in Europe: Convergence and Diversity", (2002) 9 *Int'l. J. of the Legal Profession*, 139, 148 ("In most Civil Law systems the right to award law degrees (or their equivalent) is enshrined in the higher education law, and it is common for that right to be reserved to the universities.").

14 D.W. Vick, *supra* note 1, 174.

15 *Ibid.*, 175 [footnotes omitted].

16 In the Canadian context, see Douglas G. Ferguson, "The Great Disconnect: Reconnecting the Academy to the Profession", (2014) 51 *Alberta L.R.* 819. For a critique, see W. Wesley Pue, "Common Law Legal Education in Canada's Age of Light, Soap and Water", (1995) 23 *Man. L. J.* 654, 657-60. Of course, the tension between the objectives of preparation for professional practice and of fundamental inquiry is not unique to law schools: similar tensions exist in other professional faculties, most notably, medicine.

United States.[17] The standard account has Langdell's introduction of the case-method as a necessary precondition to the development of the discipline of law as a "science", thereby guaranteeing its place in the university. As Alfred Konefksy and John Schlegel put it:

> [I]n the case method is found both the distinctiveness of and protective coloration for the modern American law teacher. It informs his (*sic.*) identity as a teacher and scholar whose method is unique, and at the same time allows him to be just one of the boys at the faculty club.[18]

As Konefsky and Schlegel point out, there was nothing inevitable about the development of the three-year full-time graduate degree as the privileged route to legal practice, nor of the case-method as the pedagogical approach and guide to research.[19] Nevertheless, once it had been established, the law faculty gained the authority characteristic of an academic

---

17 Robert P. Stevens, "Two Cheers for 1870: The American Law School", (1971) 5 *Perspectives on American History* 405. Donna Fossum notes that the "American Bar Association, founded in 1878, hastened the demise of apprenticeship training by initiating an effort to persuade the states to limit admission to their bars to graduates of law schools, in particular ones that had certain features enumerated by the association." (Donna Fossum, "Law Professors: A Profile of the Teaching Branch of the Legal Profession", (1980) 5 *American Bar Foundation Research J.* 501, 502). For a critical evaluation of accounts of Langdell's contribution to law as a discipline, see Bruce A. Kimball, "The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s", (2004) 22 *Law and History Rev.* 277.

18 Alfred S Konefsky and John Henry Schlegel, "Mirror, Mirror on the Wall: Histories of American Law Schools", (1981) *Harvard L. Rev.* 833, 844.

19 *Ibid.*, 844 (citing R.P. Stevens, *supra* note 17 and Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America*, Oxford, Oxford University Press, 1976). Konefsky and Schlegel argue that the legal profession's embrace of the university law school exposed them as "grasping monopoly capitalists". The time and expense required to attain the level of instruction required by the bar acted as a *de facto* barrier to "keep the poor in general and the immigrant poor in particular out of the legal profession." See also, Laura I. Appleman, "The Rise of Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped our System of Legal Education", (2005) 39 *New England L. Rev.* 251. Wesley Pue argues that this view is generally regarded as "wrong-headed" when applied to Canada (see W.W. Pue, *supra* note 16, 654-55). But see John E. C. Brierley, "Quebec Legal Education Since 1945: Cultural Paradoxes and Traditional Ambiguities", (1986) 10 *Dal. L. J.* 5, 8 (hypothesizing that the Quebec legislature's decision to make completion of a three-year university law course a prerequisite to admission to the Bar was "intended to make access to the profession more difficult by containing the number of persons likely to qualify as candidates").

discipline, that is, "a power structure through which decisions of inclusion and exclusion are made".[20]

The history of legal education in Canada is the same myth told through a different story.[21] Rather than the hagiography of a brilliant leader who rendered the discipline scientific and thus secured its rightful place in the university, the Canadian myth is recounted through the struggle between the professors of Osgoode Hall who threw off the yoke of the Law Society of Upper Canada in 1957 and contributed to the foundation of a truly academic discipline "up the street" at the University of Toronto.[22]

Of course, the actual development of the discipline of law and its establishment in different Canadian universities is a story that spans well over two centuries and ten provinces; it certainly cannot be reduced to a singular event.[23] Nevertheless, the "fiercest debate" is synecdochical in that the theme that unites these disparate histories is one of more or less open conflict between provincial law societies and law teachers, with the latter

20 D.W. Vick, *supra* note 1, p. 169.

21 See generally, Social Sciences and Humanities Research Council of Canada, *Law and Learning*: *Report of the Consultative Group on Research and Education in Law*, Ottawa, The Council, 1983, p. 11-22 ("Canadian Legal Education: A Historical Perspective") [*Arthurs Report*]. For overviews of the history of common law legal education in Canada, see John P. S. McLaren, "The History of Legal Education in Common Law Canada", in Roy J. Matas and Deborah J. McCawley (eds.), *Legal Education in Canada*, Montreal: Federation of Law Societies of Canada, 1987, p. 111 and W.W. Pue, *supra* note 16. In what John Brierley called "a major cultural paradox", the development of civil law education in Quebec has also tracked the English and American models, rather than the French model. See Brierley, *supra* note 19, 41-44. See also, Roderick Macdonald, "The National Law Programme at McGill: Origins, Establishment, Prospects", (1990) 13 *Dalhousie L.J.* 211.

22 The classic account of this controversy is C. Ian Kyer and Jerome E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, The Benchers, and Legal Education in Ontario 1923-1957*, Toronto, University of Toronto Press, 1987.

23 As Harry Arthurs pointed out, "there is no such thing as a history of Canadian legal education, strictly speaking – only a history of legal education in Quebec, Nova Scotia or Manitoba" but "common themes do recur" and "[t]hese themes converge in the dramatic and well-documented controversy surrounding Osgoode Hall Law School in Ontario.", Harry Arthurs, "The Political Economy of Canadian Legal Education", (1998) 25 *J. of L. and Society* 14, 15. See also, A.S. Konefsky and J.H. Schlegel, *supra* note 18, 844-846 (recounting how the histories of Canadian law schools and American law schools are both written as paeans to the professional law school teacher, with the difference that "in the American version the climax comes too soon, in the Canadian version it is inordinately postponed").

finally triumphing through the establishment of university law faculties recognized as the legitimate sites of law teaching and scholarship.[24]

We can thus answer a provisional "yes" to the question of whether law is a discipline. It is a discipline in that law faculties are taken to have a rightful place in the university. Quite apart from the social power that the legal profession wields, the discipline of law has the institutional recognition and thus the authority to generate a legitimizing discourse about itself that serves both to trace boundaries of inclusion and exclusion and to further reinforce its power.

II. The crisis of identity of university jurists

In the previous section, I argued for law's disciplinarity from two premises: (1) that disciplines rely primarily on the legitimacy they gain from institutional recognition to discursively constitute their boundaries and (2) that the study of law had secured such recognition from and within universities. This doesn't mean, however, that this is how legal academics themselves view their field of study. On the contrary, there is another sense of disciplinarity – which emphasizes the internal coherence and methodological specificity of the discourse rather than its institutional inscription – with which many academic jurists identify. The opposition between these two conceptions poses somewhat of a problem for legal scholars; to the point where we might describe the discipline as being in a state of "intellectual schizophrenia".[25] As with the history of the discipline seen as an institution, this problem of the identity of the discipline seen as a scholarly discourse is linked to its ongoing tension with the legal profession.

---

[24] The pendulum appears to be swinging back towards professional control over curriculum. The Federation of Law Societies of Canada has constituted a "Program Approval Committee" to evaluate whether law faculties' programs are compliant with national requirements that specify "the competencies and skills graduates must have attained and the law school academic program and learning resources law schools must have in place." Graduates from programs that are not approved will not be eligible for admission to the provincial law societies. See Federation of Law Societies of Canada, "National Requirement for Approving Canadian Common Law Degree Programs", online: <http://www.flsc.ca/>. See also, D.G. Ferguson, *supra* note 16.

[25] Clark Byse, "Legal Scholarship, Legal Realism and the Law Teacher's Intellectual Schizophrenia", (1988) 13 *Nova L. Rev.* 9.

Another way of seeing this is using the distinction dear to academic jurists between the internal and external points of view.[26] The "external" observer who describes how law teaching and scholarship came to gain recognition within the university and thus the authority and legitimacy necessary for the elaboration of a disciplinary discourse needn't take a stance on the merits of the discourse.[27] In particular, she need not *accept* the ways in which the discipline traces the boundaries of inclusion and exclusion. By contrast, somebody who defines the discipline in terms drawn from its discourse would be indisposed to describe their field of study as "merely" a contingent construct and insist that there must be "some theoretical and/or methodological core of law as an academic discipline."[28]

My intuition is that the distinction between internal and external points of view is not only useful for understanding law as a concept, but also the ambivalence of law scholars' adherence to law as an academic discipline. On one hand, the insights of various forms of legal realism confront legal academics with the contingency of law's discourse about itself. The absence of a methodological or theoretical "core" incites them to seek out other disciplines as a ground for their research. On the other hand, the legal profession – to which law faculties are still beholden in a variety of ways, despite their hard-won "independence" – is scornful and suspicious of any challenge to the centrality of the internal point of view.

In Canada, this tension between internal and external points of view is illustrated by the *Arthurs Report*[29] and the subsequently published literature on the nature and appropriate role of Canadian legal scholarship that

[26] Herbert L.A. Hart, *The Concept of Law*, 2nd ed., Oxford, Clarendon, 1994, p. 88-92; Scott Shapiro, "What is the Internal Point of View?", (2006) 75 *Fordham L. Rev.* 1157; François Ost and Michel van de Kerchove, "De la scène au balcon. D'où vient la science du droit?", in François Chazel and Jacques Commaille (eds.), *Normes juridiques et régulation sociale*, Paris, LGDJ, 1991, p. 67.

[27] Yet another analogy that captures the internal/external distinction is the distinction between object language and metalanguage (or "use/mention" distinction) in the philosophy of language. See Torben Spaak, "Alf Ross on the Concept of a Legal Right", (2014) 27 *Ratio Juris* 461. Hart appears to have made this connection, at least implicitly, in his use (of the terms "internal statement" and "external statement" (H.L.A. Hart, *ibid.*, p. 102-103)).

[28] H. Dagan *supra* note 1, p. 9-10.

[29] *Supra* note 21.

takes the *Report* as its starting point and occasional foil.[30] These debates illustrate the problem of attempting to define the discipline of law in reference to either a core object of study or a core methodology.

A. Difficulties with the disciplinarity of law

Though the terminology of "internal" and "external" points of view is generally attributed to Hart, the idea that law can be taken either as a phenomenon to be observed empirically or as a normatively binding guide to conduct, and that this distinction poses a particular problem for the *study* of law, is hardly new. The problem is described by Claude Lévi-Strauss, who as an anthropologist was in the "external" position relative to the cultures he studied, but as a former student of law, was familiar with academic discourse speaking from the "internal" position :

> A strange fatality hangs over the teaching of law. It is caught between theology… and journalism… and so it seems unable to find any basis for itself that is at once solid and objective ; it loses one of these virtues in trying to gain or retain the other.[31]

For much of its history in North America, law scholarship has been solidly anchored in the internal point of view. It was thus very much like theology, in that it was concerned with the scholarly elucidation of texts and doctrines accepted by the scholar as authoritative.[32]

However, as Lévi-Strauss pointed out, the solidity that comes from working within a tradition comes at a steep price. Scholarship from the

---

30 See Innis Christie, Janice D. McGinnis and David Fraser, "Reaction to the Arthurs Report", (1985) 65 *Dalhousie Review* 5 ; Arthurs report, *supra* note 21 ; Mark Weisberg, "On the Relationship of *Law and Learning* to Law and Learning", (1983) 29 *McGill L.J.* 155 ; J.D. McCamus, "After Arthurs – A Preface to the Symposium on Canadian Legal Scholarship", (1985) 23 *Osgoode Hall L.J.* 395 ; Constance Backhouse, "Revisiting the *Arthurs Report* Twenty Years Later", (2003) 18 *C.J.L.S.* 33 ; Roderick Macdonald, "Still 'Law' and Still 'Learning'? Quel « droit » et quel « savoir ? »", (2003) 18 *C.J.L.S.* 5 ; Julian Webb, "The 'Ambitious Modesty' of Harry Arthurs' Humane Professionalism". (2006) 44 *Osgoode L. J.* 119. Robert W. Gordon, "The Law School, The Profession, and Arthurs' Humane Professionalism", (2006) 44 *Osgoode L. J.* 157.

31 Claude Lévi-Strauss, *Tristes tropiques*, translated by John Weightman and Doreen Weightman, London, Penguin Classics, 2012, p. 53-54.

32 On this analogy, see Uberto Scarpelli, *Qu'est-ce que le positivisme juridique ?*, Brussels/Paris, Bruylant/LGDJ, 1996, p. 13-22.

internal point of view – often described as formalist[33] – is necessarily bereft of a certain kind of objectivity that is generally valued in other disciplines, in the sense that it doesn't make, *can't make*, empirical truth claims about law. Furthermore, in so far as such scholarship characterizes legal reasoning as essentially deductive and the most important premises are taken as given (since the law is accepted as authoritative by the scholar), it is essentially conservative; dependent for its legitimacy on the maintenance of the authority of the system of which it is a part and disinclined to advance positions that call it seriously into question. In other words, like theology, scholarship from the internal point of view is open to charges of being both dogmatic and doctrinal.[34]

There are many alternatives to the internal point of view. For instance, legal realism, marxism, critical legal studies, and the law and economics approach all deny (in sometimes mutually exclusive ways) that law can be exhaustively – or even adequately – described from an internal standpoint. Anti-formalists may describe law as a predictive hypothesis about the use of force by the state,[35] an ideological veil for class exploitation,[36] an open-ended terrain of discursive struggle,[37] or an evolving process for the

[33] On the connection between formalism and the internal point of view, see Ernest J. Weinrib, "Legal Formalism: On the Immanent Rationality of Law", (1988) 97 *Yale L. J.* 949. I discuss different varieties of formalism in Finn Makela, "The Surprising Formalist: Justice Gonthier's Contribution to Labour Law", (2012) 56 *S.C.L.R.* (2d) 173, from which the following paragraph is adapted. Not all scholars who adopt the internal point of view would accept the moniker of "formalist" insofar as they reject the "model of rules" as providing an adequate basis for a concept of law (see, *e.g.* Ronald Dworkin, "The Model of Rules", (1967) 35 *U. Chicago L. Rev.* 14). My view is that supplementing rules with principles (or other normative entities such as policies or standards) does not exempt one from formalism but simply adds entities to one's catalogue of forms. I will not pursue this line further here: for present purposes, it is sufficient to acknowledge that the relationship between the internal point of view and formalism is not uncontested.

[34] See *e.g.* David Fraser, "Harry Arthurs and the Temple of Doom – A Comment", in I. Christie, J. McGinnis and D. Fraser, *supra* note 30 (using an extended metaphor of a dogmatic priesthood to describe the legal profession and legal academics).

[35] See *e.g.* Oliver W. Holmes, "The Path of the Law", (1897) 10 *Harvard L. Rev.* 457; Karl N. Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School*, New York, Oxford University Press, 2008.

[36] See *e.g.* Evgeny Pashukanis, *Law and Marxism: A General Theory*, translated by Barbara Einhorn, London, Pluto Press, 1989, especially chapter 2.

[37] See *e.g.* Duncan Kennedy, *A Critique of Adjudication (fin de siècle)*, Cambridge (Mass.), Harvard University Press, 1997.

efficient allocation of risk.[38] However, each of these alternatives puts the legal scholar squarely on the other horn of Lévi-Strauss's dilemma: objectivity is bought at the price of undermining law's traditional disciplinary foundations. Indeed, just as many faculties of theology have abandoned dogmatism and doctrinalism in favour of "religious studies"[39] (an enterprise that is necessarily multidisciplinary),[40] jettisoning the internal point of view leads law scholars directly to interdisciplinarity.[41]

B. The turn to interdisciplinarity

Scepticism, if not outright rejection, of the internal point of view appears necessary to many academic jurists if their work is to meet the scholarly standards of the academy. This turning away from the traditional ground of their discipline leads them to embrace methods and theoretical approaches borrowed from other disciplines.[42] Consequently, published legal scholarship appears to be increasingly interdisciplinary and some

38 See *e.g.* Michael J. Trebilcock, *The Limits of Freedom of Contract*, Cambridge (Mass.), Harvard University Press, 1993; Paul H. Rubin, "Why Is the Common Law Efficient?", (1977) 6 *J. of Legal Studies* 51. For a more recent overview, see Francesco Parisi, "The Efficiency of the Common Law Hypothesis", in Charles K. Rowley and Friedrich Schneider (eds.), *The Encylopedia of Public Choice*, 2nd ed., New York, Kluwer Academic, 2004, p. 519.

39 See generally Linell E. Cady and Delwin Brown, *Religious Studies, Theology and the University: Conflicting Maps, Changing Terrain*, Albany, SUNY Press, 2002. See also Elizabeth Isichei, "Some Ambiguities in the Academic Study of Religion", (1993) 23 *Religion* 379; Gregory W. Dawes, "Theology and Religious Studies in the University: 'Some Ambiguities' Revisited", (1996) 26 *Religion* 49.

40 E. Isichei, *ibid.*, 379 ("[I]s Religious Studies a discipline with a distinctive methodology and intellectual heritage, or is it multidisciplinary, like American Studies, or Women's Studies? It seems to me self-evident that it is the latter…").

41 In Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession", (1992) 91 *Michigan L. Rev.* 34, 36 an anonymous law professor is quoted as saying: "I view my task as a legal academic as similar more to the member of a university department of religion, somewhat detached from the practices he/she is studying… One need not be a devotee of a particular religion in order to find its practices or doctrines fascinating…"

42 See *e.g.* George L. Priest, "The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards", (1993) 91 *Michigan L. Rev.* 1929, 1931-1936 (arguing that realism's understanding of law as an instrument of social policy leads directly to greater interdisciplinary study of law).

even go so far as to make the surprising claim that "*most* legal scholarship today is… interdisciplinary".[43]

In Canada, the turn towards interdisciplinarity was called for by the *Arthurs Report*, which sought to "examine and advise" on the state of legal scholarship in Canada.[44] One of the *Report*'s diagnoses was that Canadian legal scholarship was overwhelmingly "internal", that is, research that "leads to the production of articles and treatises that identify, analyze, organize and synthesize statutes, judicial decisions and commentary".[45] Conversely, the *Report* found that "there is not much fundamental scholarship undertaken in Canada by legal academics", where "fundamental" means "interdisciplinary".[46] Unsurprisingly, many of the *Report*'s recommendations are specifically designed to foster an increase in the amount of interdisciplinary research engaged in by legal academics.[47]

This call for interdisciplinarity is not unproblematic. I do not wish to reproduce all of the debates that the *Arthurs Report* generated. Instead, I will point out three problems that have been raised in response to the *Report*, for illustrative purposes.

The first problem is that it does not follow from the fact that internal legal scholarship has blind spots that can lead it to be doctrinal and dogmatic that the adoption of theoretical approaches or methodological techniques from other disciplines will generate anything other than different blind spots. David Fraser uses the analogy of the relationship between christian doctrine and "creation science" to describe this:

43 D.W. Vick, *supra* note 1, 184. I am not prepared to subscribe to this claim for two different reasons: (1) I haven't seen any data to this effect and I'm not even sure how we would go about generating it; and (2) anecdotal experience makes the claim sound implausible to me; there is a *lot* of doctrinal scholarship out there.

44 "Terms of Reference of the Consultative Group on Research and Education in Law", in *Arthurs Report*, *supra* note 21, p. 165. Recall that Consultative Group on Research and Education in Law that authored the Report was struck by the Social Sciences and Humanities Research Council of Canada as a response to the extremely low number of applications for research funding that the council received from legal academics. See C. Backhouse, *supra* note 30, 34.

45 *Arthurs Report*, *supra* note 21, p. 66.

46 *Ibid.*, p. 69.

47 *Ibid.*, p. 157-159 (recommendations 18, 19, 20 and 34).

> [I]nterdisciplinary study for lawyers […] is used in the Arthurs Report to instil a sense of scientific certainty. This sense of certainty is perhaps more accurately described as "scientism". Having recognized that the Law, as traditionally viewed in Canadian law schools, cannot provide the *right* answer by itself, we must now seek truth in economics, literature, sociology, *etc.* Interdisciplinary study becomes the Creation Science of the Law. The Report fails to realize that these fields are, of course, as political, as subjective, as prone to ideology, indeed as "unscientific" as the Law.[48]

The second problem is that the internal point of view that is rejected in the call to interdisciplinarity may be a straw person. There are intellectually defensible ways of engaging with legal doctrine that don't require unqualified acceptance of its normative pull. Hart himself recognized that legal academics often adopt a middle position ; indeed it would be hard to make sense of law if we didn't take into account the interpretation given to it by those who take it to be binding upon them.[49] Thus, although there may be good reasons for interdisciplinarity, the simple rejection of the internal point of view is not one of them. Mark Weisberg makes this point, also using the helpful analogy to theology :

> The value of exegesis as research doesn't depend upon belief in the authority of a text such as the Bible. We can accept ultimate scepticism toward any legal text, case or statute, and understand as fundamental the effort to comprehend it, to justify it, to provide it structure. […] One need not be committed to the view that law embodies truth simply because it is law or because it issues from an authoritative source to see the value of the effort to construct the truth embedded in a series of decisions, a statute, a constitution...[50]

A related point is, of course, that interdisciplinarity needn't be related to a (radical) external point of view. Several disciplines deploy methodologies and theoretical approaches that are primarily concerned with close textual analysis. In addition to theology, Weisberg mentioned literary criticism,[51] to which we can add much of philosophy. We should be careful then, not to conflate "interdisciplinary" and "empirical".

---

48 D. Fraser, *supra* note 34, p. 23.

49 H.L.A. Hart, *supra* note 26, p. 91 ("One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence."). See also S. Shapiro, *supra* note 26.

50 M. Weisberg, *supra* note 30, 160.

51 Obliquely, by referencing Northrop Frye (*ibid.*, 159).

The third and final problem that I will mention here is the risk that interdisciplinary approaches to legal scholarship will continue to reproduce the more tenacious dogmas of doctrinal scholarship generally and, in particular, the tendency to identify law with the institutions and explicit rules generated by the political state. Economic, sociological, historical, *etc.* analyses of law that attend only to such institutions and rules reproduce the most fundamental dogma of the internal point of view.[52] In fact, such analyses may be even more conservative in that they naturalize inherently normative claims about what law *is*, thereby erasing the relationship between authority and the definition of law.

The objective of this section was not to argue for a traditional doctrinal conception of legal scholarship, nor to validate or negate the turn towards interdisciplinarity as an alternative. Rather, what I hope to have illustrated is that attempts to understand the nature of the discipline from the internal (to the discipline) point of view exacerbate a tendency towards intellectual schizophrenia to which legal academics are already predisposed due to the particularities of their historical relationship between the profession and universities.

Admittedly, the argument is somewhat complicated by the fact that I have been using "internal" and "external" points of view in two different ways and playing on the relationship between them. The first is the distinction internal/external *to the discourse of law as an academic discipline*, the second is to the more traditional distinction between perspectives that are internal/external to the *law per se*. This leaves us with four different points of view: (1) a description of the discipline of law that is external, *i.e.* one that describes it in terms of the legitimacy and authority that it gets from its institutional inscription, regardless of its object of study or methodology; (2) a description of the discipline of law that is internal, in that it relies on the specification of a "core" methodology or object of study to differentiate it from other disciplines; (3) an approach to law that is internal, *i.e.* that accepts that the legal doctrines and texts with which it engages are authoritative and in principle binding; (4) an approach to law that is external, *i.e.* that purports to describe law empirically as a social practice.

[52] This argument is taken from R. Macdonald, *supra* note 30, especially 11-12.

My conclusion is that if we are going to adopt the perspective of (2) – which I think most legal academics do – then we are condemned to suffer the malaise caused by the unresolvable tension between (3) and (4), which I described as Lévi-Strauss's dilemma. We are therefore better off adopting the perspective of (1) in answering the question of what place legal scholarship has in the university.

*
* *

I have offered a descriptive answer to what might be characterized as a normative question. Law is an academic discipline because it enjoys institutional recognition. The answer has many advantages, not the least of which is the resolution of what I described as existential malaise on the part of academic jurists that has led to a somewhat uncritical flight to interdisciplinarity.

Of course, tensions over methods and objects of study as well as the relationship between theoretical understanding and professional practice are occasions for the discipline to advance. I do not take myself to have banished such tensions. It is more productive, however, to develop reasoned opinions about these tensions within the discipline, rather than to take them as occasions to affirm or deny a reified disciplinarity.