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JURISPRUDENTIAL RESPONSES TO LEGAL REALISM

Charles Fried †

The topic is jurisprudential responses to legal realism, and I would like to take as my text at least the title of a very interesting essay by Richard Posner,[1] which addressed the decline of law as an autonomous discipline. I would like to propose to you a sketch of what a return to some notion of law as an autonomous discipline might look like and to suggest why that is a hopeful and an appropriate response to legal realism. The contrast to law as an autonomous discipline has been, of course, the uncontrolled eruption into law of at least two disciplines, economics and philosophy. And I am ready to plead guilty, at least in my previous avatar, to being an important culprit with respect to the latter eruption.

First let me say a little bit about why the eruption of these various subjects into law and the taking over of law by nonlegal subjects has had such a bad effect, and then move on to sketch how one might again resurrect law as an autonomous discipline and what that would look like. I think one of the worst effects (because it is so displeasing aesthetically, although perhaps not practically very important) of the huge amount of philosophy and economics and political science and sociology leaking into law is the poor quality of the philosophy and the economics and the sociology which we see there.

What is important because of its practical effect is that each of these subjects, but I think particularly economics and philosophy, address large, global, indeed universalistic pictures of how things ought to go in society.[2] The upshot for the law has been a measure of disorder, amateurism, indiscipline, and, alas, often, sheer incompetence, not just in the occasional divagations in court opinions, but also even in law teaching. And, of course, since generosity and benevolence are appealing motivations, and certainly appealing self-

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1 Posner, *The Decline of Law as an Autonomous Discipline,* 100 HARV. L. REV. 761 (1987).

2 Both of these disciplines also concern themselves with more local and particularistic issues and at their most sophisticated also talk about the connection between the global and the particular, and how to make discriminating use of a powerful tool which purports to give answers to how the whole world should look.

conceptions, it is not surprising that the incompetence and amateurism which come with the eruption of philosophy into law should have caused this indiscipline to take a particular direction both among judges and law professors—that direction is what I would describe as left liberalism.

Now, having sketched the malaise, let me say something about the alternative which, I think, is healthier, though not all that appealing. I give that warning right at the beginning. The alternative is to return to a notion of law as a local discipline. If law is to do its work, which I want to insist is modest work, it must once more be viewed as a local, rather than a grand and global discipline. I think the best examples of that are in areas like contract, commercial law, and bankruptcy, which are replete with technical, picky, often rather disagreeable and unlovely results. Learned Hand once said that in the end—I am not quoting—it is far better for commercial relations that the law not reach out and be generous to protect people who do not protect themselves.[3] That is a correct instinct. It is far better in all of these areas that we live with rather technical, picky, and, in some respects, uninteresting and unlovely rules. Richard Posner refers to something I know nothing about, called the *Enelow-Ettelson* Doctrine. (Is it a doctrine in the law of insurance?) He frequently speaks of it, and I think it must be a wonderful doctrine; indeed, in order to maintain the aura of mystery, I have forsworn actually to learn what it is. But I firmly believe that the *Enelow-Ettelson* Doctrine is the kind of thing which I would like to see the law consist of, more than three-part balancing tests—with two prongs.

Now an important reason for resisting this notion of law as really rather technical and consisting of uninteresting picky little rules, is that it is a conception that seems to freeze out the layman and make laymen feel quite puzzled about the areas they wander into. I am not sure that is such a bad thing, but it is exaggerated as a result. I would bet that if the issue is some technical doctrine say of insurance law, then laymen in the insurance industry, that is to say, those that are not trained as lawyers but who are insurance executives, if it bears on their work, probably, know well enough what the doctrine is. And similarly, let us say, purchasing agents who are not lawyers, know well enough what the rules of offer and acceptance, and of consideration are. So I think that this notion of the layman being frozen out is not as bad as it sounds and not the worry it is supposed to be.

I do think that it is by this return to law as a rather technical subject, somewhat cut off from its ethical, philosophical, and other

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[3] James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933).

heady roots, that we can once more have a measure of order, predictability, discipline, and limitation put into the law, because it is the lack of these which is the great illness from which the law suffers. And what I am talking about therefore is a return to rules, rather than to vague standards—I admit readily that this is a matter of balance, yet I would like to urge that the balance be allowed to tip rather more decisively in the direction of rules. This is true, not only of common law, but of statutory interpretation and indeed, the Constitution. Although there are problems about having constitutional law go in this direction, I think it is a healthy direction there as well.

The great harm that has been done by legal realism and its child of the 60's and 70's, Critical Legal Studies, is to have put abroad the notion that it is not possible to procure definiteness, certainty, discipline, by virtue of rules, and I would add, in order to make common cause in this respect with Richard Epstein, by virtue of texts and doctrines. I think it is all of a piece, because what the legal realists and the Critical Legal Studies scholars say is that rules in general, texts and doctrines in particular, and also precedents, simply cannot introduce, cannot honestly introduce the kind of discipline and order and limitation which I hanker after. And I think that is the great harm which those two seriously mistaken doctrines have wrought upon our legal, intellectual life. I do not think it is in fact true, that it is not possible to work with doctrines and precedent and texts. It is possible. I cannot provide a method for doing so, but I am sure when you are dealing with a text, or when you are dealing with a doctrine, there is what I would call a kind of decent respect for whatever the material offers. And if you have that decent respect, whether that consists of formalistic logic or whether it consists simply of the kind of response that one would have to any statement by another person which you are trying to understand and carry forward in an honest way, I think that there is a quite sufficient measure of definiteness.

Well, let me close, because we have been enjoined to be brief, with a kind of a picture. A picture which is a response to legal realism. And that picture is a picture of law as a far more difficult, but a far more modest, discipline than it has become—than it has become in the opinions of judges and in the work of the law schools. I would like to propose the picture of lawyers, not as the architects of society, but as its janitors. I would like to suggest that we are modest people, laboring in the basement of the building of society, doing really important work, while the great things that happen, happen up above in the upper stories, and that they are done by entrepreneurs, by businessmen, by artists, by painters, by politi-

cians, by poets, and by philosophers and economists, as well. One of the really bad things that has happened is that we have tried to get out of the basement. In an earlier day, a kind of a bargain was struck with lawyers. If they would stay in the basement, doing something rather boring and technical (the picture is of Bartleby, the Scrivener), then we would be partially left alone, honored after a fashion and paid quite well. Now I think we have welshed on the deal. We insist, these days, on being paid well, and running the show too. I think law studies should once more be hard, rigorous, full of memorization and that we should see far fewer citations in law reviews to Derrida and Foucault.

Let me come back for just a moment to economics and philosophy. The fact is, of course, that both economics and philosophy do address the point that I have made and do rather specifically explain why it is that society is better off if there are people laboring in the basement without paying attention to the really grand ideas—they explain why it is a grand idea that not everybody have grand ideas. Both economics and philosophy explain that and I do not say that lawyers should not be aware of this. They should. In fact, lawyers should also enjoy music, but that does not cause me to sing my arguments to the Supreme Court. So let me close here with this picture of law as a far more modest discipline than it has been allowed to become, a more boring, but a more disciplined discipline. That is my suggestion, and the reason I urge it upon you is that there is nothing all that wrong with pretentiousness and amateurism and intellectual indiscipline except when it gets into the hands of people who wield considerable power.