

FIRING LEGAL CANONS AND SHOOTING BLANKS: FINDING A NEUTRAL WAY IN THE LAW

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Whether you turn to the right or to the left, your ears will hear a voice behind you, saying, "This is the way; walk in it."

Isaiah 30:21

I. INTRODUCTION

The search in the humanities and history for a canon, a way of instruction and a mode of discourse, has affected the law. There is no single widely accepted canon. Canon has taken on a number of meanings inside academia. The notion of canon initially grew out of the use of a "rule" to decide what ought to be included inside the Bible.¹ In the humanities the battle over canon has three parts—the battle over the books, the battle over the acceptable methods for choice of the books to form that canon or canons, and the battle over what the canon will accomplish. I am using this very broad notion of canon to include not only the subject of our inquiry but a battle over how the inquiry is

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1. Several uses of canon have been made by scholars.

Canon descends from an ancient Greek word, *kanon*, meaning a "reed" or "rod" used as an instrument of measurement. In later times *kanon* developed the secondary sense of "rule" or "law", and this sense descends as its primary meaning into modern European languages. The sense of the word important to literary critics first appeared in the fourth century A.D., when "canon" was used to signify a list of texts or authors, specifically the books of the Bible. In this context "canon" suggested to its users a principle of selection by which some texts or authors, specifically the books of the Bible and the early theologians of Christianity. . . . Hence the "canonizers" of early Christianity were not concerned with how beautiful texts were nor with how universal their appeal might be. They acted with a very clear concept of how texts would "measure up" to the standards of their religious community, or conform to their "rule." They were concerned above all else with distinguishing the orthodox from the heretical.

In recent years many literary critics have become convinced that the selection of literary texts for "canonization" (the selection of what are conventionally call the "classics") operates in a way very like the formation of the biblical canon.

J. GUILLORY, *CRITICAL TERMS FOR LITERARY STUDY* 233 (1990). *See also* H. Gates, *Authority (White) Power, and the (Black) Critic: Its all Greek to me*, in *THE NATURE AND CONTEXT OF MINORITY DISCOURSE* (1990) (The creation of a black canon can be used by critics to explicate black perspectives.)

structured and what the ultimate goal of the inquiry ought to be. Accordingly, when I speak of canons I mean our notion of epistemology in law as well as what is thought important and how we measure importance. Members of the legal academy have begun to discuss what the legal canon should look like even if they do not do so in terms of canons.

Much of the jurisprudential history of the academy over the last 100 years is an effort to define such a canon. The search for such a single perspective for law has been futile for two reasons: 1) Law is profoundly instrumental and practical; and 2) this practical quality forces law to collide with competing paradigmatic constructs. Judges and lawyers are constantly asking how to make law function in an imperfect world. It is not possible for law to completely remove itself from interchange with other related disciplines without quickly losing touch with the real world. If law is not autonomous—and it is not in our post-Realist world—then law must hear and incorporate the notions in other disciplines. Law has adopted a number of these disciplines. Some disciplines, for example, law and literature and law and economics, have become deeply embedded in the legal enterprise by law professors.² Other disciplines bring new approaches to looking at existing legal problems that draw on both familiar and different experiences. Such efforts are often heartily resisted by the existing order. Critical race theory and black legal scholarship are examples of efforts that are not firmly entrenched in the legal academy and which are heartily resisted by the incumbent norm.³ Still other approaches hang on the periphery of the law demanding entrance, with the participants inside the academy unsure of the motives and potential of these approaches. The best example of the last approach is game theory.⁴

2. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986)(Economic analysis applied to an array of legal problems.); WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990)(Literacy criticism applied to a number of legal texts.)

I was reminded how deeply imbedded both disciplines have become in the legal academy when at a conference on the economics of the Constitution in the Fall of 1990 at Stanford Law School, it was clear that the structure of the discussion of statutory and constitutional interpretation cannot take place without some deference being paid to both disciplines.

3. See Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989)(Racial critiques, what I have termed critical race theory or black legal scholarship, have not made an effective and conventional case for their adoption into the legal discourse.) *But see*, Culp, *Toward a Black Legal Scholarship: Race and Original Understandings* DUKE L. J. (in press) (Black authors including Randall Kennedy have started to create a discernible and different critique of legal enterprise.)

4. Game theory has become increasingly important to economic theory taught in economics departments. See e.g., Fisher, *Games Economists Play: A Noncooperative View*, 20 RAND J. ECON. 113 (1989). "The ascendancy [of game theory] appears fairly complete. Bright young theorists today tend to think of every problem in game-theoretic terms . . ." Shapiro, *The Theory of Business Strategy*, 20 RAND J. ECON. 125

Given this cacophony of approaches is it possible to find a neutral way of treating these different approaches to legal scholarship and legal formation? The response by at least some in the legal academy is to attempt to create a canon with which legal scholarship and formation can be judged. However, some of these efforts have been dismissive of alternative approaches to the scholarship. It is not possible to successfully change canons into cannons that will eliminate alternative approaches to legal formation and scholarship by firing explosive charges. Efforts to establish canons that act like cannons are bound to failure. It is possible to require legal scholars to be consistent but not neutral.

An example of the failure of such approaches to legal scholarship is the claim of originalism. Judge Posner's new book on jurisprudence, and his book review of Judge Bork's book on a similar topic, deal with this issue by someone who cannot be seen as a knee jerk liberal.⁵ Judge Posner demonstrates that the originalist view of the text of the U.S. Constitution is unsatisfactory as a basis for jurisprudence, and he suggests that he is aware of the difficulty of creating neutral norms for legal scholarship in general. Efforts by Judge Bork to use originalism as a judicial canon will not work. Similarly Professor Wechsler's article on neutral principles could not be written in today's legal academy.⁶ Professor Wechsler's notion of neutrality has become outmoded. We cannot completely screen out the important policy choices that we make about the real world. Such policy choices can only be apolitical in a world where there is a broad homogenous consensus about the world. We do not have such a society.

I will briefly survey the various strands of current legal discourse in section II below. I will then return to a brief description of how this modern Babel leaves the legal academy.

II. LEGAL PARADIGMS AND OTHER DISCOURSES

We are all realists now. All legal scholars today research in the aftermath of the profound changes brought about by the legal realist movement. We can describe the existing structure of paradigms in the legal academy (our legal canons) in two fundamental ways. Some legal scholars are direct descendants of the legal realist movements. These

(1989). Industrial organization research is terminated by game-theoretic models. Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1990). Seminars, economic journals and Ph.D. dissertations are *awash* with game theoretic models of economic phenomena. However, game theory has been rejected by many legal scholars. See e.g., Wiley, *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556 (1987).

5. R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

6. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)(Constitutional interpretation ought to be based upon a set of neutral principles, but he could not find a satisfactory set of neutral principles for the *Brown* decision. This troubled him.)

scholarly efforts respond to problems first clarified by legal realism. The rest of legal scholarship is nonrealist-based, but even that scholarship has been altered by the realist movement.

There are three realist-based movements in the legal academy: The Law and Society movement, the Law and Economics movement and part of the Critical Legal Studies movement. Each of these efforts uses theory or empirical evidence to try to examine the world and describe the impact of these facts on legal questions. The Law and Society movement is driven by nontheory-based concerns with factual descriptions of the legal world. It is of course not possible to completely divorce theory from facts, but the concern of the Law and Society movement is more focused on collection and analysis of data than it is with manipulating theory.

The Law and Economics movement is almost the exact opposite of the Law and Society movement. Law and Economics has mainly been focused on discovering the right theory.⁷ This theory-driven response to the realist movement has sought and occasionally persuaded courts and legal commentators of the power of pure theory to describe the world and provide prescriptive answers for legal questions.⁸

The Critical Legal Studies movement has many parts, but one aspect has been very concerned with economic data and is skeptical about the usefulness of either theory or factual information.⁹ This, too, is a response to the realist movement. Those in the Critical Legal Studies movement who adhere to this perspective use their analysis to prove that neither facts nor theory are sufficient to describe the important issues in the law. They reject the usefulness of either approach by demonstrating, with the tools of both, the weaknesses in either.¹⁰

There are also a series of nonrealist-based research programs in the legal academy. Traditional case analysis is one of the most utilized by legal scholars. It is not directly based upon any of the concerns that I have described above, but the impact of the realist movement can be felt here as well. Much of contemporary case analysis is wrought with attempts to weave into that analysis the product of realist-based research programs. Briefs, oral arguments and cases are replete with the results of various research programs. It is in this sense that all of us have become children of the realist movement. Much of the law and other disciplines use, in a similar way, the case method and the other research methods in the law.¹¹

Finally, there are growing efforts to bring feminist and racial cri-

7. See e.g., Easterbrook, *The Supreme Court 1983 Term: Forward: The Court and The Economic System*, 98 HARV. L. REV. 4 (1984).

8. See generally, R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1978).

9. See M. KELMAN, *GUIDE TO CRITICAL LEGAL STUDIES* (1988).

10. *Id.*

11. Examples include anthropology, psychology, philosophy, and literature.

tique to the law. These efforts are part of a response to legal questions that refuses to accept the world as given. Such approaches to legal analysis and reform seek to remake both the analysis and law into something else. Part of Critical Legal Studies takes this approach.¹² Race and gender-based research programs also reject the structure of the world that much of traditional legal analysis begins with. This rejection of the traditional structure permits these authors to see the world in a different (though not necessarily better) light. They are beginning to bear important fruit in the academy.

The search for an appropriate paradigm is an old one in the sciences yet is a relatively new issue for the legal academy. Legal scholars have begun to think about the issue of the philosophic basis for their work, primarily by bringing questions of paradigmatic structure from other disciplines that they happen to have been educated in. This is profoundly troubling for law because most of the other disciplines have not thought carefully about how their discipline is structured.¹³ Most, or at least very many, law professors believe in what I call "naive scientism." A short version of this view is that science is special and different and that humanities cannot be seen in that light. Ian Hacking has described this view as incorporating nine assumptions about the sciences:

1. *Realism*. Science is an attempt to find out about one real world. Truths about the world are true regardless of what people think, and there is a unique best description of any chosen aspect of the world.
2. *Demarcation*. There is a pretty sharp distinction between scientific theories and other kinds of belief.
3. Science is *cumulative*. Although false starts are common enough, science by and large builds on what is already known. Even Einstein is a generalization Newton.
4. *Observation-theory distinction*. There is a fairly sharp contrast between reports of observations and statements of theory.
5. *Foundations*. Observations and experiment provide the foundations for and justification of hypotheses and theories.
6. Theories have a *deductive structure* and tests of theories proceed by deducing observation-reports from theoretical postulates.
7. Scientific concepts are rather *precise*, and the terms used in science have fixed meanings.
8. There is a *context of justification* and a *context of discovery*. We

12. See R. UNGER, *CRITICAL LEGAL STUDIES* (1987).

13. For example, it is possible to put what the average economist knows about the philosophy of science into a short paragraph. Most economists have not read much more than Milton Friedman's article on positivism. M. FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3 (1953). They often do not know that this is a modified version of Karl Popper. The reason for this lack of knowledge is partially a product of the education we provide economists. Since we do not require economics students to study the history of economic thought, they generally do not have much of a sense of where the theory has come from.

should distinguish (a) the psychological or social circumstances in which a discovery is made from (b) the logical basis for justifying belief in the facts that have been discovered.

9. *The unity of science*. There should be just one science about the one real world. Less profound sciences are *reducible* to more profound ones. Sociology is reducible to psychology, psychology to biology, biology to chemistry, and chemistry to physics.¹⁴

Most law professors are unaware that these nine assumptions, most of which they naively hold, are under attack in the sciences. There is no serious scholar of the philosophy of science who does not reject one or more of these principles. Many of my colleagues would like to apply these assumptions to the legal academy and to canon formation in the law. The most casual reading of Kuhn,¹⁵ Feyerabend¹⁶ and Lakatos¹⁷—leading philosophers of science—will demonstrate that such an exercise is untenable.

To take just one example, the philosophy of many Law and Economics adherents seems to combine the ninth, first and third assumptions. These lawyer-economists seem to believe that if we work hard enough we will find that all of our information becomes a form of economics which will describe reality.¹⁸ Economics may have some usefulness theory, but it is only one of many possible ways of looking at the world. To look at the world exclusively through the lens of Law and Economics is to see the world through a dark glass.

If “naive scientism” is under attack in the sciences, then we in the legal academy ought to be very careful about importing it into our discussions about legal canons. It cannot work. In particular, the notion that we can describe a simple set of principles that will be neutral and universal is a fool’s errand for the legal academy as it has been for those in the sciences. The scientists in physics, chemistry and increasingly the social sciences understand that they are in part involved in a process of formation and description that cannot find ultimate truth. This realization is particularly important in the law where we have a number of disciplines that compete for attention.

14. I. Hacking, *Introduction to SCIENTIFIC REVOLUTIONS* 1-2 (1981) (emphasis in the original text.)

15. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); T. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* (1977).

16. See generally P. FEYERBEND, *AGAINST METHOD: OUTLINE OF AN ANARCHISTIC THEORY OF KNOWLEDGE* (1975); P. FEYERBEND, *PROBLEMS OF EMPIRICISM* (1981).

17. See generally I. LAKATOS AND A. MUSGRAVE, *CRITICISM AND THE GROWTH OF KNOWLEDGE* (1970).

18. There seems to be echoes of this in Posner’s economic analysis. *But see* R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) (Judge Posner argues for a pragmatic view of the process of judging that rejects the simplest form of this economism.).

If these simple notions of canon structure will not work, what can we require of ourselves in evaluating our own work and the work of others? The answer is quite simple. We have to judge all of these works with respect to the task that each has chosen for itself, and we can ask each to be consistent with the principles associated with that task. All of us can and will find that we are not persuaded by the scholarship of some areas. Some will not be influenced by the efforts of the legal literary critics or Law and Economics. Others will not be persuaded by Law and Society data that they see as too unconnected to theory. There is no neutral or objective way of performing this task; we all engage in a form of politics when we decide what is good and persuasive and what is only bad research. Consistency is the standard, but it is not neutral and neither are we.

III. TRYING TO FIND NEUTRALITY AND NOT FINDING THE WAY

The quotation that I began this article with is illustrative of the claim made by many critics of various new strands in the law. They see a way in the academy that is required for "real" scholarship. This way views the world without much input from women and racial minorities. This fundamentalist view of the canon assumes that it has been chosen by a set of neutral principles. There is a manifest conflict between this view that there is a canon that must be taught and a concern that some of what blacks and women are requiring of the legal academy is not appropriate because it is too political. Politics loses all meaning if the most important issues are beyond discourse. Either canon formation has no importance or it is the most important political act that we perform as legal academicians.¹⁹

An example of the limits of this effort to bind neutral principles is the use of anger in scholarship.²⁰ Anger has no place in traditional le-

19. Historians and English professors sometimes forget this but it is an obvious truth. P. NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 311-314 (1988) (Politics has been a dominant undercurrent in much of the history of the history profession. The movement to adopt Western civilization is a product of the desire to demonstrate the connection of the United States with post-war Europe.)

20. Minority scholars have often written with some anger in their voice. See, e.g., Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, U. MIAMI L. REV. 127 (1987) (Professor Williams writes about the anger associated with being ignored because of her brown face.) There are of course even some exceptions to this rule by white scholars. One can hear the anger in the words of Charles Black in his response to Herbert Wechsler's article on neutral principles. Black *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). However, exceptions like that support my rule. Black's article is less famous than the cool reason of Wechsler's article. My point is that traditional scholarship does not deal much with this question of emotion and that one of the tenets of our scholarship is that we be both neutral and not involved. The more the writers are not involved the more credence we give to their scholarship.

gal scholarship. It distorts the ability of the scholar to be neutral and to find a place outside the battle from which to observe. Unfortunately, for many scholars such a position is not possible. Black and feminist scholars in particular have found it difficult to find a way of separating themselves from at least some of the questions they ask about gender and race.²¹ I have found that I do my best writing when I am in the full heat of anger.²² I find in those moments that I can feel a truth about the law and the world that I am unable to reach in other moments. For many black scholars anger becomes a cleansing force that permits a discourse that does not assume that the process is free of emotion. Truth has emotion.

The example I will use is the role of innocence. Innocence is used in and outside the academy to avoid coming to grips with the racial discrimination that persists in our society.

I am angry because of Marion Barry. I am not angry just because Marion Barry was a bad politician, or because he abused himself with drugs and abused or tried to abuse black women with unwanted attention. I am angry at the United States government for prosecuting Mayor Barry as a black person and at the federal judge who sentenced him for being a black mayor. This is a noncriminal, nonviolent anger not directed at any person or persons in the government nor having any materiality or any hope of oppressing governmental properties. It is a black anger. It is the rage of black people living in a racist world with limited voices and options. I hope my anger about Marion Barry will liberate the inchoate anger of black people about oppression and law and enable it to find a home where such anger is not needed.

Thomas Penfield Jackson is the federal judge who presided at the Barry trial. At various points during the trial he expressed arrogance and annoyance at black spectators, black witnesses who supported Mayor Barry and the black jurors who voted not to convict Mayor Barry of the most important charges. To these charges of discrimination Judge Jackson pleads innocence. He notes correctly that he is not responsible for Mayor Barry being videotaped taking cocaine and propositioning a woman. Judge Jackson points out that Washington, D.C. is being destroyed from the inside by drugs and that the Mayor's complicity in that traffic is an affront to the citizens of Washington who elected him. Mayor Barry is guilty of murdering Washington and I, white federal judge, am innocent. The problem with this definition is

21. See Espinoza, *Labeling Scholarship: Recognition or Barrier To Legitimacy*, (Delivered at the ST. LOUIS U. PUBL. REV. at ____ (1991) (Women, particularly minority women, are leery of efforts to categorize and thus limit their scholarship). See also Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (Essentialism is used by majority of scholars to limit and ignore the roles of black women).

22. I do not mean to suggest that all black or feminist scholars should write as angry young people. Many feminist and black scholars do not.

that Judge Jackson ignores the important fact that there is another evil gnawing at the entrails of a still living Washington. This is an even older evil called racism.

Judge Jackson is not innocent of that evil and he perpetuates both the evil he sees and does something about and the evil he ignores and is part of. Judge Jackson is a member of the Chevy Chase Country Club. The Chevy Chase Country Club has no black members (at least as far as the president of the club, Brainard H. Warner, knows).²³ The issue of Judge Jackson's participation in racial discrimination was brought up as part of his confirmation to the federal bench. When interviewed by the judicial commission for nominations to the federal bench, candidate Jackson said (according to the *Washington Post*) that "he didn't know, and hadn't checked, the club's membership—a response that apparently concerned some commission members."²⁴ Candidate Jackson became Judge Jackson despite the opposition that his membership in this racially exclusive club generated. He claims he is innocent of the racism that exists in the American society. He has done all the right things and is entitled to his position as federal judge. Judge Jackson went to Dartmouth and Harvard when they were racially exclusionary. His membership in the country club is evidence of his participation in a system of racial exclusion that burdens every black person in Washington, D.C. Black Americans cannot live everywhere they want, workout wherever they want, and certainly cannot get any job that they want. Judge Jackson's participation in that oppression as federal judge and as citizen is innocent because society defines it that way. It is not very different from the participation by Mayor Barry in the drug culture populated by a number of black and white citizens of Washington.

When Judge Jackson sentenced Mayor Barry to prison for six months, it was inconsistent with the sentencing of others convicted of similar crimes. More importantly Judge Jackson, in his failure to sentence Michael Deaver to prison for a criminal charge associated with drug abuse and uses of improper favors, demonstrated that he is not always hard on white collar criminals who subvert the laws.

What do we mean by innocence in the law? The law takes as a given the participation of people in the current system. An individual who takes advantage of racial differences is innocent. This is true even when someone with knowledge participates in the racial oppression by the clubs they join and in the world as constructed. Judges who acquiesce in the racist structure of the world and contribute to it are adding to the racism that prevents black youths from becoming useful employed participants in the system. Judge Jackson sees the black Mayor of Washington and sentences him to prison. This is a continuation of the notion of innocence that lets black interests disappear. Any black

23. *Washington Post*, Mar. 8, 1982 at 11.

24. *Id.*

man, even a black mayor, who is sentenced to prison for his blackness diminishes all black people. All black people become guilty and all white people innocent when we permit white judges to be innocent of their racism and black mayors to be guilty of being black.

One of my colleagues objected to my use of the Barry example. He suggested that Mayor Barry was guilty and had been acquitted of charges that he was guilty of. This is almost certainly true. Oliver North, "North American Hero," is also almost certainly guilty, of perjury (his claim that he kept in cash enough money to purchase an automobile is laughable) and fraud but people were not disturbed that a federal judge in Washington, D.C. refused to sentence hero North to prison. It is more plausible to send a black mayor to prison than a white public official.

Why are we as a society able to see the innocence of Oliver North and Michael Deaver and lose all sense of proportion about Marion Barry? Marion Barry is not innocent of being black, but neither is Thomas Penfield Jackson innocent of being a white participant in the current racial system. The fact that we cannot see the extent to which Judge Jackson uses his whiteness to claim privilege and participate in oppression makes intrinsically racist the notion of innocent parties so favored by our current Supreme Court. White employees who participate directly in the thwarting of the employment opportunities of black workers are seen as innocent parties to a dispute between bad black employees and occasionally bad employers.²⁵ White contractors who have participated directly in a system of racial oppression are seen as innocent participants in a process that may affect black people but not unfairly.²⁶ Under this world view all white people are innocent and all black people are subject to special scrutiny.

My white colleagues in the legal academy also claim innocence. They do not believe in suppressing calls for the inclusion of racial perspectives in law, and they are not opposed to feminist concerns in the academy. They are innocent of any suppression of ideas by people of color and women. However, they often give aid and comfort to those who cannot permit changing the legal canon. It is that aid and comfort that is both dangerous and inconsistent with a canon that represents the result of a useful debate about its creation. If there is a way in the legal academy, it is a way characterized by the ability of all to provide answers and questions. Fundamentalists claim that look to a simple neutral standard are more akin to the Ayatollah and the Inquisition than they are to any true discourse in the academy. The legal academy

25. See *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (Rehnquist dissenting); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987) (Scalia dissenting).

26. *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

needs to develop a way, but it has to be a way that does not stifle the ability of people to get angry sometimes when there is much to be angry about.

