Duke Law Journal

VOLUME 1990 APRIL NUMBER 2

INTRODUCTION

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This collection of articles and essays on the frontiers of legal thought[1] shows the ways in which some aspects of legal thought have developed in the past decade.[2] Building on the insights of the American Legal Realists but rejecting many of their political positions and policy prescriptions as well as their fondness for the "scientification" of law,[3] scholars associated with critical legal studies began a project that continues to evolve—a project which has been transformed by its interaction with the work of minority and feminist scholars. Many of the themes in this new, "critical/feminist/minority/post-modernist" scholarship[4] are found in the articles and essays here.

At the risk of simplification and distortion, I would suggest that a decade or so ago essays of this sort would have exhibited a number of characteristics, only some of which are represented in this collection. First, there would have been some methodological prescriptions. Legal doctrines would have been described in a way that showed how each doctrine represented a logically unstable solution to problems posed by

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1. Or at least on some of the frontiers of legal thought; no one would contend that this collection touches exhaustively on the topics or methods of contemporary legal analysis.

2. Many of these essays, along with others, were presented at a conference at the Duke Law School on January 25-27, 1990, sponsored by Duke's Forum for Legal Alternatives (FLA), the *Duke Law Journal,* and about a dozen other university and law school groups. As a participant in the conference, I would like to note my appreciation to the FLA, Tony Taibi, and Dana Lesemann for putting together an exciting event. *Frontiers of Legal Thought* will appear as three consecutive issues of the *Duke Law Journal. Frontiers of Legal Thought II & III* [hereinafter *Frontiers II* and *Frontiers III*] are forthcoming.

3. Though I note that some residue of that affection can be found in the essay by Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue,* 1990 DUKE L.J. 321, which appears to take some comfort from the fact that "even" some mathematicians have adopted approaches similar to the ones they commend.

4. I use this locution to suggest that, though no single tradition dominates the field, there is an identifiable grouping of legal thought represented here.

the coexistence of competing values all of which deserved protection to the fullest, but none of which could be so protected. In addition, the logical demonstration would have been accompanied by an insistence on the proposition that legal doctrines ought to be understood not as the product of some abstract logic, but rather as a form of life that simultaneously ratified and provided the opportunity for transformation of the status quo.

Second, there would have been a political stance implicit in the topics chosen for analysis, but it would have differed somewhat from the political stance implicit in the selection of topics in this collection. Because critical scholars were attempting to revive the Realist tradition as they understood it, they focused on the terrain most important to the structure of the legal academy—the first-year curriculum. Analyzing the structure of the basic common law subjects and constitutional law was important to establish the significance of the enterprise. Other areas, such as labor law and race discrimination, were addressed because the subjects[5] were thought to be of particular political concern.

The essays in this collection continue along the lines of work I have briefly described above, and they simultaneously shift our attention and deepen our knowledge. All participate in the project of logical deconstruction. Rudolph Peritz's *A Counter-History of Antitrust Law*,[6] as its title indicates, plays competition policy and protection of private property policies against each other in offering an interpretation of the development of antitrust policy that shifts attention from more traditional "consumer welfare vs. populism" analysis. David Millon, in describing *Theories of the Corporation*,[7] examines the history of the ways that corporations have been conceptualized, and he concludes the essay by discussing the Delaware Chancery Court's analysis in the *Time*[8] takeover case. A key to his analysis is the "public/private" distinction in corporation law.

Peritz and Millon continue the project of deconstruction, extending its reach while using now-familiar tools. Yet, their essays and the others in this collection have moved beyond the essential first step of demonstrating the logical inadequacy of the categories typically used to analyze legal problems. If these essays share a single characteristic, I would say it is their insistence that legal doctrines and categories must be histori-

5. In both senses.

6. 1990 DUKE L.J. 263.

7. 1990 DUKE L.J. 201.

8. Paramount Communications, Inc. v. Time, Inc., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514 (Del. Ch.), *aff'd*, Fed. Sec. L. Rep. (CCH) ¶ 94,938 (Del. 1990).

cized.[9] That is, the logical demonstrations are insufficient because, as we all know, at any particular time lawyers are convinced that the structure of legal thought within which they are implicated is just about as logically coherent as anyone could reasonably expect. The incompatibility between the logical analysis and the experience of lawyers itself needs explanation. For the authors of these essays, the primary form of that explanation is the demonstration of the historical circumstances in which lawyers came to believe that there was no tension between their experience and the logic of the law.

For example, Millon analyzes the various concepts implicated in the construction of a law of corporations which routinely have been thought to go in lock-step with one another. He shows, however, that the actual practice of the legal theory of the corporation is better described as "mix and match": As we examine the history of theories of the corporation we find that individual lawyers, judges, and scholars essentially endorsed all of the possible arrays of concepts at some point or another, even though adherents of each array contend that substituting even one item in the array would be logically ridiculous. Similarly, in their essay *Efficiency and Image: Advertising as an Antitrust Issue,*[10] Elizabeth Mensch and Alan Freeman relate an episode in the evolution of antitrust policy in which the possibility of imposing antitrust liability for certain types of advertising that foreclosed competition was briefly considered, only to be rejected as incompatible with the true economic foundations of antitrust; they too emphasize the historical nature of the categories of economic analysis that many today take as grounded in the science of economics.

The project of historicizing the categories of legal analysis is not, however, without its pitfalls. We are, after all, trained as lawyers and not as historians, and our ability to pull off the historical project is less well developed than our ability to pull off the project of logical deconstruction. I suspect that much of the persuasiveness of the historicizing project will arise from a sort of allusive "culture critique" of the sort introduced by the Freeman-Mensch story about cereal boxes.[11] More extended analyses are likely to prove more difficult.[12]

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9. I believe that the *program* of treating doctrines and categories historically was both stated in and implied clearly by the critical work of the 1970s to which I have referred, but the essays here are significantly more self-conscious about the necessity of that program.

10. Mensch & Freeman, *supra* note 3.

11. *Id.* at 321-22, 372.

12. For example, I find the Freeman-Mensch discussion of "jeans," *id.* at 365-66, drawing on the work of certain "culture critics," wildly implausible. (I offer this and some other criticisms in this Introduction as a participant in the exploration of the frontiers of legal thought, and to demon-

A second difficulty may reside in the form of the project itself. As Peritz notes in his discussion of the term "genealogy,"[13] these essays deal with structures of legal thought that, for analytic purposes, must in some sense be frozen in time, like the slices of cell tissue preserved for the electron microscope. Two problems, then, are likely to arise. First, if legal thought is dynamic, then constructing structures to analyze the process necessarily distorts the phenomenon even as it allows us to get some grasp on it. Second, and perhaps of greater importance for the historicizing project, by dealing with successive structures—as in Peritz's discussion of "periods"—we may develop a "comparative statics" of legal thought but be unable to develop a truly historieal understanding of the dynamics of transformation.

The historization of legal thought is the first characteristic of these essays. A second characteristic is a shift in the topics addressed. Most dramatically, of course, several of the essays deal not with the topics covered in first-year courses, but rather with the topics covered in second- and third-year courses. And the essays on public law issues do not take the topics covered in introductory courses as their direct focus of concern. I take this shift to be a demonstration of the extension of the frontiers of legal thought: The essays explore new domains without, of course, suggesting that we have completely mapped the areas of law that were the focus of earlier work.[14]

In *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World,*[15] Robert Williams brings to the discussion of rights the perspective of indigenous peoples throughout the world who have attempted to mobilize the human rights community on their own behalf. Gerald Torres and Kathryn Milun offer an American example of the difficulties of the enterprise in their discussion, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case,*[16] which deals with a celebrated lawsuit that raised issues of the "survival" and "continuity" of an indigenous people. In focusing on the problems of "translation," Torres and Milun suggest a new twist on the critical discussion of the language of rights, and thereby complement Williams' essay.

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strate that, like every reader of these essays, I must engage with them and not merely appreciate them.)

13. Peritz, *supra* note 6, at 268, 315.

14. Leslie Bender's essay, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities,* 1990 DUKE L.J. — (forthcoming *Frontiers III*), discussed in more detail later in this Introduction, is a good example of a deepened treatment of a topic covered in first-year courses.

15. 1990 DUKE L.J. — (forthcoming *Frontiers III*).

16. 1990 DUKE L.J. — (forthcoming *Frontiers III*).

Taking the two essays together, I am led to think that I would now augment my presentation of the critique of rights.[17] I would now suggest that the language of rights, as it is used by the international human rights community and by the domestic legal community, is part of the legacy of Eurocentric domination of legal discourse. To the extent that indigenous peoples appeal to the legal system—as they often must—or to principles of legality—as they often will choose to—they may be faced repeatedly with the problem that the language in which they are asked to speak is unsuitable for the topics they wish to address. In a sense, indigenous peoples often will be attempting to translate their experiences into a language constructed by, and out of the experiences of, the Western cultures that were in part the agents causing their difficulties. Translation is not impossible, of course, but it almost certainly distorts the underlying experience, as Torres and Milun show. And to the extent that even successful translations are distortions, appeals by indigenous peoples—and perhaps by peoples whose cultures are not as completely Eurocentric as that of the dominant majority in the United States, as Gary Peller's essay *Race Consciousness*[18] suggests—may perhaps have a self-limiting quality.

The amount of limitation, though, itself can be changed. I am hesitant to believe that people, or cultures, can be truly "bilingual" in a way that makes translation unnecessary. At the same time, however, I do not doubt that people and cultures can influence each other, thus increasing the degree to which each is partially bilingual, and thereby reducing the amount of inaccuracy in translation. Notice, though, that my claim here is about *mutual* influence; neither indigenous people nor invaders will be the same after the contact. Peller's essay suggests that at least as a strategic matter, it might make sense for the black community in the United States to promote a form of internal development that historically has been criticized by many whites and blacks as a bad form of race consciousness.[19] Yet, because of the inevitability of mutual influence, I remain skeptical about the permanent utility of the program suggested in Peller's essay, though less skeptical about its temporary pragmatic political utility.

What is at stake, I think, is the possibility of the transformation of and within the legal tradition of rights. I believe that Peller's essay contains more than a little of what Duncan Kennedy refers to in passing as the sentimentalizing of African-American culture. Yet, Peller's essay provides an appropriate context for Kennedy's discussion, in *A Cultural*

17. For my most recent foray, see Tushnet, *Rights: An Essay in Informal Political Theory,* 17 POL. & SOC'Y 403 (1989).

18. 1990 DUKE L.J. — (forthcoming *Frontiers III).*

19. *Id.*

Pluralist Case for Affirmative Action in Legal Academia,[20] of the ideology of colorblind meritocracy. Much of what Kennedy says is an entirely sensible and quite moderate argument that the legal academy's standards of merit are strikingly narrow, and that much would be gained if the academy adopted a more sensible standard of merit. Kennedy also argues that the reasons for the narrowness of the existing standards are cultural and ideological, and necessarily so. This argument, too, is hardly extreme. One of the many contributions of minority scholars to the legal academy has been to allow these arguments to be made in this form.

Another contribution, this one made by feminist scholars as well, has been to open up discussion of some issues that had been taken as closed by many liberals. The dialogue between Charles Lawrence, in his article *If He Hollers Let Him Go: Regulating Racist Speech on Campus,*[21] and Nadine Strossen in *Regulating Racist Speech on Campus: A Modest Proposal?,*[22] deepens the understanding of the first amendment as it operates in contemporary society. Jack Balkin, in *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment,*[23] provides the jurisprudential and historical context in which current controversies among liberals over the proper interpretation of the first amendment have arisen. Balkin argues that the analytic techniques that liberals have inherited from the Legal Realists make it quite difficult to sustain the kind of first amendment fundamentalism that most of us associate with Justices Hugo Black and William Douglas.

Lawrence's essay works out, in a particularly important practical and doctrinal context, the maneuvers that Balkin identifies in the more abstract context of jurisprudence. This combination of doctrinal and theoretical analysis places much of what Strossen says under rather severe stress—with one, for me, decisive exception. Strossen emphasizes, in a way that Lawrence does not, that regulations of racist speech on campus are to be administered by the very authorities who, if such regulations are adopted, will have been dragged into the regulations kicking and screaming. She is in my view rightly skeptical about the proposition that these people would administer the regulations in a way that Lawrence would find satisfying. I concede that the political struggle that would lead to the adoption of the regulations might transform the sensibilities and inclinations of campus administrators. But, in that political process concessions will inevitably be made to what opponents of regula-

20. 1990 DUKE L.J. — (forthcoming *Frontiers III*).
21. 1990 DUKE L.J. — (forthcoming *Frontiers II*).
22. 1990 DUKE L.J. — (forthcoming *Frontiers II*).
23. 1990 DUKE L.J. — (forthcoming *Frontiers II*).

tion will characterize as first amendment values, as Lawrence himself indicates. Those concessions, I believe, are likely both to limit the impact of the regulations, as Katharine Bartlett and Jean O'Barr suggest in *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate,*[24] and to reduce the transformative impact of the political struggle on campus administrators.

The debate over regulation of racist speech on campus may not yet have produced dramatic changes in the regulations in place or the atmosphere on campuses, but it has already transformed the academic discussion of the first amendment. Leslie Bender's article, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities,*[25] offers another perspective on the possibility of change within, and therefore change *of,* the legal tradition of rights. Beginning with the insight that much of the discussion of the so-called tort liability "crisis" has a tone reminiscent of some discussions of rape in which the focus becomes whether the victim should be blamed, Bender expands our understanding of the "crisis" by drawing on feminist theory. A critique of rights, or of what she calls the "ethic of rights," is at the heart of her essay. She contributes to the historicizing project through her analysis of the way the "public/private" distinction works in discussions of the "crisis" of the tort system. In addition, she sketches a program of transformation, based on feminist thought, that would supplement, or perhaps ultimately displace, the tort system's reliance on an ethic of rights and monetary compensation.

From one perspective,[26] the feminist theories on which Bender relies have provided new metaphors, made vital by their connection to a substantial political movement, for ideas about empowerment once associated with movements that have lost vitality.[27] From a more traditional perspective, some of her suggestions may disturb—which is as it should be. Bender's attention to the possibility that tortfeasors should engage in personal service to the injured—or, as has been suggested, that the chairman of the board of Exxon should join the people attempting to cleanse the shoreline of the oil discharged by the *Exxon Valdez*—forces on us a reconsideration of notions of liberty that ignore the connections between

24. 1990 DUKE L.J. — (forthcoming *Frontiers II).*

25. Bender, *supra* note 14.

26. Which, as feminists have shown, may itself be limited.

27. Bender's notion of empowerment is, it seems to me, not all that different from "Power to the People" or even "All Power to the Soviets" (where, as was meant in the initial formulation, "soviet" referred to a collective form of social organization rather than to the Union of Soviet Socialist Republics).

the exercise's of one person's liberty (to dump oil and the like) and the protections others have of their forms of life.[28]

Whether that reconsideration would lead us to adopt a new form of responsibility, however, might be questioned. The situation in Japan is suggestive. There, anecdote has it, officials high in the hierarchy of corporations that damage the environment apologize personally to the individual victims of their companies' torts. Even so, one would not want to offer Japan as an exemplar of a legal system truly committed to protection of the environment or of workers from injuries due to a corporation's pursuit of profit. Bender's suggestion, that is, may not be the best remedy for the difficulties she identifies in our present tort system.

Yet, to conclude in that way would be misleading. For as I have tried to suggest throughout this Introduction, one characteristic of these essays and articles on the frontiers of legal thought is that they all participate in on-going political projects of transformation. By calling them "projects," I mean to point out that they are implicated in a dynamic process of social change, and the dynamics of the process may give meaning (as yet incompletely understood) to the particular suggestions for reform that the authors have devised. That is, we would go wrong if we simply thought about what the tort system would look like if Bender's suggestions about allocation of burdens and personal service were simply inserted into a scheme that was otherwise unchanged. For those suggestions to be adopted, much would already have to have changed in the way we think about torts, and the conceptual changes we would already have undergone would themselves change the way in which we would relate Bender's suggestions to, for example, ideas about liberty.

I conclude by returning to American Legal Realism. After completing their task of logical deconstruction, the initial Realists turned to a sort of common sense social theory, under the label of policy analysis, to replace the logical formalism they had abandoned. The revival of Realism has shown, I think, that small scale or common sense social theory does not offer a satisfactory solution to the intellectual problems Realism posed. As I have tried to suggest, in the end we are driven to large scale social theories that deal with overall social transformation. That, of course, may be the largest frontier of all, and the essays here move us deeper into that territory.

28. Bender, *supra* note 14.