2001

Fear and Loathing of Politics in the Legal Academy

William H. Simon

Columbia Law School, wsimon@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Law and Politics Commons, Legal Ethics and Professional Responsibility Commons, and the Legal Writing and Research Commons

Recommended Citation


Available at: https://scholarship.law.columbia.edu/faculty_scholarship/875

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact donnelly@law.columbia.edu.
Fear and Loathing of Politics in the Legal Academy

William H. Simon

In a recent lament about *Bush v. Gore*, Bruce Ackerman feared that the patent groundlessness of the opinion would convince many of a proposition he attributed to critical legal studies: that law is simply a form of politics.¹

This remark reflects two tendencies prominent at the Yale Law School in recent years: first, a preoccupation with a now extinct and never very successful movement of left legal academics, and second, a tendency to conflate this movement with the legal conservatism of Justice Scalia and his collaborators at the University of Chicago and the Rehnquist Court.

These tendencies ride high throughout Anthony Kronman’s brilliant book, *The Lost Lawyer*. The book is a defense of a distinctive style of legal reasoning—prudentialism—that is elaborated through contrasts with critical legal studies on the one hand, and Chicago-style law and economics on the other. A critical point that distinguishes Kronman’s preferred style of legal analysis and rhetoric from the two competitors is that the competitors are self-consciously political. Kronman suggests that the linking of professional discourse and scholarship to politics is a road to “professional suicide.”²

I doubt if Ackerman agrees. His own work is militantly interdisciplinary, and it unabashedly links legal analysis to political vision. Indeed if there were an academic movement of legal liberalism, Ackerman would be its leader. However, there is no academic movement of legal liberalism. There is nothing in centrist or left-of-center legal scholarship with a level of coherence, mutual engagement, and ideological commitment comparable to those of legal conservatism.

This absence reflects an unfortunate anxiety about politics among non-conservative legal academics. Compulsive crit baiting is a symptom of this anxiety. I think this anxiety is pathological in both political and academic senses.

William H. Simon is the Gertrude and William Saunders professor of law at Stanford University and, in 2001-02, the Stephen and Barbara Friedman visiting professor of law at Columbia University.

I am grateful to Anthony Kronman for inviting me to take part in the panel on “The Vocation of the Law Teacher,” and to the participants in the stimulating discussion at the Yale tercentennial.

I want to consider, first, what is at stake in the debate about the political nature of law; second, why conservatives have been so much more successful in escaping the taboo against blurring the line between the two; and third, the influence of the taboo on nonconservative academic work. The taboo is largely tacit and never explicated systematically. So I am necessarily speculating. Nevertheless, I think its influence is real and largely unfortunate.

What Does It Mean to Deny the Separation of Law and Politics, and Why Do People Get So Upset About It?

Since the advent of the modern legal academy, it has been an article of faith among its leaders that law is fundamentally different from politics. At points, a virtual loyalty oath to this effect was required. The denial of this orthodoxy on the part of critical legal studies people was the first charge in the outburst of neo-McCarthyism in the 1980s that sought to purge them from teaching positions, with some success.3

Yale in the 1930s was, of course, an enclave of heresy on this point, but in recent decades, as Ackerman's remark exemplifies, it has remained solidly orthodox. Yale distanced itself from critical legal studies until CLS was extinct as a recognizable movement. Despite student agitation, Yale failed until the 1990s to appoint anyone to its faculty identified with the movement. Bruce Ackerman, Owen Fiss, and others on the faculty spent considerable energy attacking it, especially over the issue of the law/politics distinction. (Unlike the neo-McCarthyite campaign just mentioned, these efforts were entirely honorable and quite fruitful.)

An outsider might wonder what all the fuss is about. An obvious fact about lawyers generally and law professors specifically is that many are actively involved in politics. A majority of state legislators are lawyers, and the legal professoriat is a time-honored route into various forms of politics. If anything, the trend seems to have intensified in recent decades. Given this empirical correlation, it would be odd if law didn't have some strong connection to politics.

So why is the law-is-a-form-of-politics claim so threatening? I think some of those who reel from it misinterpret it, or fail to give it its most plausible interpretation.

Sometimes the claim is interpreted as a form of nihilism, a denial that legal judgments can be grounded in any foundation more solid than the will of the decision-maker. This would be a plausible interpretation of the law-is-politics claim only if the proponents thought of politics as a form of nihilism. But hardly anyone believes this. However much disappointed we are by politics, nearly everyone believes that politics can and should be principled in important respects, and we constantly criticize political decisions as corrupt, unjust, inefficient—which no nihilist could do.

Sometimes the law-is-politics claim has been interpreted to hold that a judge should care only about the substantively appropriate outcome and

---

ignore procedural or institutional norms that limit her authority. The decision-maker assumes a “roving commission” to do justice according to her lights heedless of the authority of coordinate decision-makers, notably legislators. She thus becomes “outcome oriented” and blind to values of process and authority. This reading also squares poorly with some of the most salient articulated premises of critical legal studies. For example, CLS tends to invoke the value of democracy quite insistently. This hardly seems compatible with judicial dictatorship. It is true that some CLS writing objects to the tendency of mainstream scholarship to presume that every legislative product is democratic without any consideration of the actual circumstances and operation of the legislature in question. Such doubts might well pave the way for a revised conception of judicial authority, but they in no way imply disregard for principles of authority.

Yet another understanding of law-is-politics is as a claim that the interpretation of legal authority is unconstrained: you can reach any conclusion from any set of rules or cases. In fact, CLS did emphasize interpretive openness, and it delighted in applying skepticism to established dogmas, but it rarely, if ever, suggested that any answer was as defensible as any other. And some of its best-known tendencies imply the opposite. CLS writers were well known for arguing that legal doctrine often serves to legitimate an unjust status quo. But if doctrinal precepts were equally compatible with any set of circumstances, they would be unable to legitimate anything.

The most plausible interpretation of the law-is-politics claim embraces two points: first, there is no important technique of legal decision that is fundamentally different from techniques of political decision; and second, many particular legal decisions ultimately implicate broader contested social visions and political theories. Any attempt at deep or comprehensive understanding of these doctrines leads to discussion that involves such visions and theories.4

Once the claim is framed this way, I doubt that Ackerman would disagree with it. His own work is a striking exemplification of it. For example, his critique of Bush v. Gore is pure political theory. And his more ambitious works all deal with legal questions in the context of broad social theories.

Although I don’t expect Ackerman to object to the law-is-politics claim as I’ve formulated it, others would, and the tendency to misread the claim that Ackerman exemplifies seems a symptom of some discomfort with it, even among those who don’t object explicitly. There remains a powerful tendency in the legal academy to regard the failure of one’s views on legal controversies to converge consistently with any recognizable political ideology as a hallmark of intellectual integrity. The most comfortable place in the legal academy has usually been in the center, and it is easiest to hold your place there when your legal views are occasionally at odds with your political convictions. When this pressure becomes intense it produces a character type I call the compulsive

centrist, who tends to resolve issues by sensing the polar positions and then situating himself midway between them. Or then there's the type Duncan Kennedy calls bipolar, who veers back and forth between conventional left and right positions before she can be identified with either.

I am not talking here about efforts from within an identifiable political position to question or revise conventional beliefs, but rather about a tendency to move above the terrain of political contest and avoid association with any of the contestants.

In an op-ed column last year, my colleague Kathleen M. Sullivan, warning about the difficulty of using electoral politics to influence the Supreme Court, observed that the current Court and several of its justices do not vote consistently to uphold or reject claims of state governments protesting federal restrictions, or of property owners alleging takings, or of criminal defendants invoking due process, or of the media invoking the First Amendment. The justices, she concluded, resist "efforts to label them as liberal or conservative"; "decline . . . to march in political lock step"; and "do not vote along simple ideological lines." She did not suggest that the justices' various positions were unified by some discernible nonideological perspective. Nor did she try to save them from the inference that they are simply incoherent. Although it seems an odd qualification for political immunity, incoherence has often seemed preferable within the legal academy to ideologically identifiable consistency.

The Heretical Success of Legal Conservatism

The taboo on conflating law and politics was enormously powerful from the 1950s to the 1970s, when it was challenged from the left by critical legal studies and from the right by legal conservatism. I use the term legal conservatism to refer to the overlapping sectors of law and economics, conservative moralism, and libertarianism grounded in institutions such as the University of Chicago, the Federalist Society, and the Olin Foundation.

The political success of this academic movement during the Reagan administration was striking and has continued under the subsequent Bush administrations. It captured an elite law school and turned it into a bastion of conservative scholarship. It established contingents at many other law schools. It forged strong ties to the Republican Party that resulted in many high-level appointments in Republican administrations. And its members have been favored with a substantial number of judicial appointments.

There is no counterpart in the center or left of the spectrum that rivals the success of legal conservatism. The Chicago movement is often compared to critical legal studies, probably because it is the only other tendency in the legal academy that seemed recognizable as a comparably coherent movement. But CLS never had anything approaching the success of the Chicago School. It never had any influence outside the academy at all, except as an object of gaping spectacle in the mass media. Within the academy, it had a brief

fashion that resulted in some adherents' getting appointments at a range of law schools, but this period soon ended, and self-identified crits and CLS scholarship virtually disappeared. Mainstream commentators both in and outside the academy, who tended to treat the conservative takeover of Chicago as an instance of the normal ebb and flow of the marketplace of ideas, spoke of the far less ambitious maneuverings of a crit minority at Harvard as a campaign of terrorist subversion.

More important than the fading of CLS, however, is the fact that there is no other comparable example of a self-consciously political intellectual movement among academic lawyers. The void is especially remarkable given the fact that most academics are centrist liberals.

No doubt the political success of legal conservatism is partly attributable to the fact that it has produced a powerful body of scholarly work that links a coherent general understanding of society to a series of elaborately argued policy prescriptions. But other factors in its success are worth noting.

First, its theoretical orientation and policy proposals have had an affinity with the commitments of an increasingly powerful conservative political establishment and three Republican political administrations. There has been, in other words, important demand for its product. One consequence of this advantage is that it is easy for Chicago School scholars to portray themselves as pragmatic and their theoretical orientation as having practical value. When powerful people are interested in your analyses and willing to back your prescriptions, you seem worldly. By contrast, theory disdained by the centers of power seems Utopian and naïve. Moreover, there's very little point in working out the details of policy proposals that have no chance of enactment. So oppositionist work tends to stay at a higher level of generality. As a result, it is often accused of impracticality.

This was a common rhetorical move of crit baiting. Many attacks flayed CLS for not producing detailed policy proposals. According to a recent one, "The Question That Killed Critical Legal Studies" was What should be done? This is nonsense. In fact, CLS produced more than its share of policy proposals, and it would have produced more had political actors been awaiting them. But people tended to ignore the policy proposals. Abstract left theory intrigued and engaged people, but concrete policy proposals tried their patience. (And the criticism was simply a pose; none of the authors of the many articles decrying the absence of CLS program spent any effort to engage with the reform proposals that were advanced.)

Things might have been different, of course, had there been a strong liberal or left political movement open to alternative programmatic thinking. But there hasn't been. The Democratic Party has not been open to daring or unconventional thinking or to any activity that smacks of ideology.


7. For a review with citations of policy-relevant CLS work up to 1984, see Mark G. Kelman, Trashing, 36 Stan. L. Rev. 293, 297–304 (1984).
Crits have a lot of company as victims of this situation. The *New York Times* recently noted that, compared to Europe, America tends to ignore programmatic theorizing by left-of-center thinkers. As an example of an academic who has been unjustly neglected in this situation, it named—Bruce Ackerman. Ackerman’s book with Anne Alstott on “stakeholder grants” is exactly the kind of ideology-linked, theoretically grounded policy work that could fuel a political movement. Indeed, according to the *Times*, it is doing that in Britain. But in the absence of any movement here that might actually embrace the proposal, there is relatively little interest. It is simply too concrete, too worked out to engage left intellectuals in the current mood of disempowerment. They’d rather read Ackerman on the Fourteenth Amendment, just as they’d rather read Duncan Kennedy on “Form and Substance in Private Law” than on when habitability code enforcement is likely to benefit low-income tenants.

Second, academic theory appears to have more glamor for right-wing politicians than it does for liberal ones. Right-wing politicians are less likely to be intellectuals than liberal ones, but they are more likely to be insecure about their social status than liberal ones. Legitimation from the academy seems to be important for many of them. They may not be particularly interested in what academics have to say, but it is important to them to know that there is support in the academy for their views and that they can occasionally command deference from particular academics. So the ornamental and therapeutic dimension of the demand for academic work is stronger on the right than on the left.

Third, the right-wing academic work derives some political efficacy from the fact that its style is relatively dogmatic. By this, I don’t mean emphatic or conclusory, though legal conservatism does have more than its share of personalities noted for their table-pounding assertiveness. Rather, I mean that conservative work is more likely to take a form that starts with general principles—whether textual or theoretical—and reasons to definite conclusions. This form mimics that of both natural science and fundamentalist moralism, and it gives conservative work more rhetorical power with nonacademic audiences. The conservatives are prepared to show the lay audience that some norm or value that they are prepared to sign on to leads ultimately to some definite policy prescription.

Liberals, on the other hand, are more often condemned by their methods to tentativeness, and to a rhetorical style that, in contemporary political culture, risks sounding mealy-mouthed. For example, the most important current philosophical influence on liberal academics is pragmatism. Pragmatism exhorts provisionality and experimentation. Pragmatists don’t sell their policies by showing how they are compelled by first principles. They say, in effect, “Let’s try it and see if it works.” But this style is less conducive to rhetorical efficacy in a sound-bite political culture.

---

A fourth factor that may bear on the relative failure of critical legal studies is tactical. In its scholarly efforts, legal conservatism rarely explicitly challenges the law/politics taboo. Critical legal studies inveterately and ostentatiously challenged it. Legal conservatism generally portrays itself as less radical than it really is, while critical legal studies tended to do the opposite. That was probably a mistake. By emphasizing and even exaggerating its radicalism, CLS generated expectations among prospective adherents that it was bound to disappoint and aroused anxieties among outsiders that hampered constructive dialog.

These advantages account for the success of legal conservatism in defying the law/politics taboo. Without them, nonconservative academics remain paralyzed by the taboo.

The Costs of the Taboo

From a nonconservative political point of view, the cost of the antipolitical impulse in the liberal academy has been the diminution in the intellectual resources available for nonconservative politics. But there is a further cost from a purely academic point of view. The distaste for engagement and the tendency to shy away from issues and positions with ideological connotations sometimes impoverishes scholarship by making it excessively abstract. Elusive abstractness not only makes it difficult to apply general principles; it inhibits explanation and elaboration of them.

I don't want to exaggerate this problem. Let me reaffirm my concession that there is a lot of important nonconservative scholarship being done at Yale and elsewhere that combines theory with ideologically engaged policy prescriptions. (For example, work by Akhil Amar, Ian Ayres, Harold Koh, Vicki Schultz.) Let me also acknowledge that there are many important subjects of legal scholarship without clear ideological implications. (Is it a right or left position to oppose management discretion to install corporate takeover defenses? I have no idea.)

And, finally, let me concede that the goals of the academy are sometimes necessarily in tension with the goals of politics. Scholarly inquiry sometimes leads to conclusions that undermine our political projects. Academic values require honesty and willingness to confront complexity and ambiguity; politics sometimes requires deception and manipulative oversimplification. And the academy rightly strives for a degree of community across divergent views that is not compatible with the more aggressive forms of political conflict.

Nevertheless, it has always been part of the mission of American universities, and especially law schools, to prepare people for worldly roles. These roles are entrenched in politics. Moreover, the project of purely contemplative understanding of society requires willingness to engage at least intellectually with political phenomena. Thus, aside from its effect on the resources of nonconservative political movements, a tendency to shy away from politics would jeopardize academic values. It seems to me such a tendency now operates in the legal academy.

Consider three examples: first, the Yale moralists—Anthony Kronman and Stephen Carter. Kronman is the champion of classical prudence, the practical
reasoning that combines sympathy with detachment, general principles with particularistic intuition. Carter is the defender of the Protestant ethic—self-restraint, integrity, and piety. Both see themselves as fighting the currents of fashion, and both have shown ingenuity and daring in arguing that these traditions deserve more respect than they have been getting.

Yet both Kronman and Carter are remarkably short on concrete examples of moralism in practice. Kronman’s book is ostensibly a critique of lawyers, but it has nothing to say about any of the current controversies of professional responsibility and does not mention a single specific instance of lawyering. Carter strives to remain aloof from current political controversies.

Neither gives any indication of having noticed that moralistic rhetoric quite close to theirs has been hijacked by the most aggressive and conservative faction of the Republican party and was deployed like artillery in the Clinton impeachment affair and the Florida election controversy. The political practices of Machiavelli were rationalized in the language of moralism.

Perhaps Kronman and Carter would be willing to defend these practices as plausible entailments of their positions. Perhaps (more likely, I think) not. But our uncertainty about this means that they haven’t explained their ideas as well as we have a right to expect to them to.

My second example concerns the scholarship associated with law school clinical teaching. This focus is the autonomy of the client. The main preoccupation of recent scholarship by clinical teachers is on the ways in which lawyers for poor people alienate and dominate their clients. The form of these articles often begins as a first-person narrative in which the lawyer, consciously or not, betrays or fails the client in some respect. The article then proceeds to draw on literary or psychological theory to analyze the mechanisms and practices through which this oppression occurs.

The problems with which this literature is concerned are real, but I think we can still question whether they deserve the effort expended on them. The normative premise of this work—client autonomy—is the bedrock premise of the mainstream professionalism. The literature is largely silent on the extent to which this mainstream premise might be inappropriate or dysfunctional for poor clients. (For example, because its individualism impedes the type of collective action that has the greatest promise to address the systemic problems these clients face.)

But the most curious fact about the clinical literature is how relatively little it has to tell us about those aspects of lawyering that occur once the autonomy of the client has been safeguarded. Once you take on a client, successfully discern her goals, and commit yourself to them, what do you do to advance these goals? How does one engage with the welfare system or landlords or

9. This is not a local example; the writing of Yale’s extraordinary clinicians does not have the focus I want to discuss, but the focus is the dominant one in clinical scholarship generally. See, e.g., Gerald Lopez, Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice (Boulder, 1992), and the works cited and criticized in William H. Simon, The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era, 48 U. Miami L. Rev. 1099 (1994).
employers or schools to induce them to yield benefits to these clients? Surely these are not matters that can be taken for granted. By all accounts, this is an era in which it has become increasingly difficult to produce tangible gains through lawyering for poor clients. Yet clinical scholarship remains preoccupied with lawyer-client relations, rather than the potential impact of lawyering on the outside world.

The depoliticization theme seems unmistakable here. Lawyering for poor people was once identified strongly with liberal activism. Intense political controversies have arisen in most substantive areas of practice. By contrast, the lawyering norms that legal services lawyers espouse are indistinguishable from those of the mainstream bar. By focusing on client autonomy issues, clinicians remain safely in the realm of mainstream consensus. But they pay the price of ignoring some of their most pressing and interesting concerns.

My third example concerns the emergence of international human rights as a central focus of activity among left-of-center students and teachers in recent years. Some of the most exciting nonconservative scholarship, teaching, and clinical work has come out of this area. The achievements of law teachers and associated practitioners here are impressive. They have helped clients in desperate situations, they have drawn public attention to important issues, and they have engaged the energies and aspirations of some of the most idealistic law students.

Yet I cannot help but view the growth and success of this field in the light of the simultaneous decline in interest, energy, and morale in the fields that focused on domestic issues of economic justice. Traditional labor law seems to be dying in the law schools at a much faster rate than in the larger society. Social policy issues such as housing and welfare have waned dramatically as subjects of scholarly effort and student interest. Clinics that focus on these and other issues of the domestic poor now often have trouble attracting enrollment.

It is, of course, no discredit to the human rights movement that it has partially displaced the interest in domestic social and economic policy of earlier decades. My point is simply that the shift may be evidence of the antipolitical impulse I'm discussing. Compared to the economic and social policy subjects that were prominent in the past, human rights has two salient characteristics. First, its normative concerns are primarily focused on societies other than the United States. Our society comes in for criticism as an aider and abettor of various foreign violators, but human rights rhetoric does not engage the major domestic axes of political division in America. Second, human rights rhetoric is preoccupied with cruelty, rather than the central ethical preoccupation of domestic policy—injustice. Cruelty is a less controversial topic in the sense that, while no one supports either cruelty or injustice as such, there is much more consensus about what cruelty involves. Human rights rhetoric tends to go back and forth between compelling and normatively uncontroversial depictions of outrageous cruelty and a set of highly technical and narrowly legal questions. It is far less political in the sense I defined the term above: its legal concerns less quickly implicate basic contested visions of social order.
No doubt both historical developments and the importance of the issues are sufficient to account for the growth in interest in human rights. But the relative decline in interest in subjects that implicate distributive issues of domestic politics is harder to explain. The importance of these issues does not seem to have declined in any objective sense. Perhaps then we should see fear and loathing of politics as playing a role.