

Part III: Critiquing Existent Law and Human Rights – *Kritik an bestehendem Recht und Menschenrechten*

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Political Siloization of Legal Critique for Mainstream Academia and the Christian Right:

An Unbridgeable Divide?

As political discourse has grown still more acrimonious in the United States and the Western world, the inclination to affiliate with those of similar political leaning, and to amplify the political arguments with which one agrees, is understandable — and scholars are not immune to this tendency. Over the past decades, studies have shown that most law professors tend to be liberal or progressive, while only a minority of scholars identify as conservative.¹ Conservative scholars and law students have complained of marginalization within the academy.² In the interdisciplinary field of law and humanities, the siloization of mainstream and conservative academics as separate groups is notable. The relatively small numbers of conservatives in academia contrasts with the magnitude of their real-world influence within American politics: the influence of one sector of conservative scholars — the Christian right, and right-wing Catholics in particular — has only grown within the last few years and is reflected at the highest

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- 1 See Bonica et al. (2018), 2: “Five prior of studies of the ideologies of law professors found at least 75 percent of law professors to be liberal.” See also Phillips (2016), 153.
 - 2 See, for example, Phillips (2018), 560. For a representative example of numerous recent op-eds by conservative law students voicing this perspective, see Phelps (2019).

levels in the impact of the Federalist Society and the disproportionate ascendance of right-wing Catholics to the United States Supreme Court.

The insularity of both groups — mainstream and right-wing scholars — is a significant problem: first, it weakens the field of legal critique, limiting the scope of discussion and rendering some topics off-limits. Second, it impairs the ability of scholars to produce work that has an impact in society and to be perceived as trustworthy experts by non-academics.³ Establishing fora for dialogue and exchange of ideas is of paramount importance to alleviate the vitiation of scholarship borne of political polarization.

Separate Spheres

Where is the division between conservative (often right-wing) and mainstream (progressive or liberal) legal critique apparent? First, it can be traced in the curriculum vitae posted in faculty websites, which feature notably different patterns of publication venues depending on political affiliation. Mainstream law journals are edited by law students, who are more likely to be left-leaning; but this pattern does not hold true at conservative institutions. Based on inspection of faculty profiles of academics engaged in legal critique, scholars on the Christian right publish more frequently in law reviews associated with conservative institutions such as Notre Dame and George Mason; compared to mainstream research, their articles are more likely to promote religious freedom for Christians in legal contexts, and to infer support for Christianity in canonical legal texts including the Constitution of the United States. They also are more likely to publish commentary in non-academic religious publications (ranging from journals, magazines, and newspapers to websites)

3 For the loss of public faith in experts, see Nichols (2017).

relative to liberal or progressive academics, who may be more inclined to be secular. To compound this difference, numerous religious publications continue to be well-funded by deep-pocketed donors and not reliant on subscribers or advertisers, as opposed to secular venues that feature opinion pieces — including more accessible versions of legal critique — from both sides of the aisle. Throughout the United States, many local newspapers have shut down, and the surviving periodicals have tended to reduce word count for op-eds.

The leftward orientation of interdisciplinary law and humanities journals can be seen in the proliferation of articles presenting social justice as an important objective in writing on topics including capital punishment, LGBTQ+ rights, racism and racial disparities, reproductive rights, and more. The pattern can be observed across major law and humanities journals including *Law, Culture and the Humanities* and the *Yale Journal of Law and Humanities*.

The siloization of liberal and conservative legal discourse has been intensified by the rise of subscriber-based newsletters from individual scholars or small teams on venues including Substack and Patreon — the ultimate “walled gardens” of legal critique, for the paywall model renders some inaccessible, beyond a few sample posts, to non-subscribers. Subscriber-supported newsletters can have considerable reach: the Substack newsletter of the law professor and CNN commentator Stephen Vladeck has more than 30,000 subscribers.

The political divide in legal critique is exacerbated by the hidebound format of academic journals and monographs. In law reviews and law and humanities journals alike, articles are usually published as stand-alone entities, rather than followed by a sequence of responses. Publications would benefit from more frequently featuring less monologic publication formats: clusters of pieces responding to one another. Furthermore, the pipeline

of traditional academic publications moves too slowly to foster debate. Given journals' time frames and backlogs, it can take years to publish an article challenging a previous article. Special issues, where the articles focus on a shared theme, are not the solution: scholars featured in a special issue often share a general political orientation, even if they disagree on some matters, and so the format as it is currently used is not sufficiently dialogic. Monographs take years to develop, and a decade can pass between the publication of one book on a law and humanities topic and the debut of another featuring a contrasting political view.

In contrast, although many scholars post their work on what was once called "Law Twitter" and other platforms, the speed and brevity of social media is not conducive to nuanced, collegial debate: social media posts responding to legal critique tend to be either "signal boosting" by supporters or facile "hot takes" by those assailing the argument. For scholars without a large following, the response is silence, especially in the fragmented social media environment following the decline of Twitter (now branded as "X"). Although scholars continue to post on X and alternatives including Bluesky, Mastodon, Post, Spoutible, Threads, and others have appeared, readership of any one venue is smaller than Twitter's audience originally was.

II. Responses to the schism: Conservative grievances and progressive accusations of "bad faith"

Conservative law students see themselves as ignored or disregarded by mainstream academic legal discourse; they pit themselves against mainstream academia as one front of a larger culture war.⁴ Whether their perceptions of their specific circumstances are accurate or not, their hostility towards the liberal and pro-

4 See, for example, Ogilvie (2013) and Sloan (2022).

gressive majority in academia is a facet of conservative identity that has downstream effects that imperil the future of academia: mainstream legal scholars' expertise is questioned, and higher education funding has been continually reduced, often at the behest of Republican politicians. Only by engaging seriously and consistently with the research topics and questions that matter to conservative academics, and the larger constituency they represent, can the divide be bridged.

In contrast, some progressive law academics express concerns that conservative donors and activists from outside academia are working in “bad faith” to discredit and “drown out” discussion of legitimate topics relevant to legal critique — such as systemic racism — through disingenuous arguments based on selective definitions of “free speech.”⁵ Their concerns are valid; but is disengagement the best strategy?⁶ They also claim right-wing arguments involving law and matters of race and social justice tend to be either “the equivalent of bathroom graffiti” or have been “conclusively refuted” — thus, they conclude, these right-wing ideas “do not deserve to be dignified among serious academic discourse.”⁷ Yet have right-wing arguments really been thoroughly debunked if — despite the lack of grounding in factual evidence — raising these topics invariably provokes abundant comments and vehement debates in popular discourse? Are scholars abdicating their responsibility to “normie” audiences of traditional and social media beyond academia, who are susceptible to right-wing arguments presented in these less formal contexts? Liberal and progressive scholars need to revisit questions, and promote anew the evidence, involving hot-button topics that have (re)gained traction in the public sphere. In the view of main-

5 Leong/Whitfield (2023), 506.

6 For an example of a conservative scholar's article that gives short shrift to progressive and liberal concerns regarding free speech (but rightly condemns threats of violence and banning books), see Wood (2023), 761–787.

7 Leong/Whitfield (2023), 522.

stream academics, the debates have been exhaustively aired; but for non-academics unfamiliar with the literature, and members of rising generations, specious right-wing arguments, particularly those founded on fallacies that have the potential to harm members of vulnerable demographics, need to be dealt with anew.

At the same time, progressive academics note, donors are pouring ample funds into conservative initiatives involving social media as well as legacy media including newspapers and television. Some progressive scholars have advised not appearing on conservative cable networks lest their message be distorted. Even though it is often the case that these shows are incentivized to generate the opposite of dispassionate consideration, the refusal to engage only reinforces the schism between liberal and conservative legal critique. As the academic publishing industry transforms, there is a prime opportunity to reinvent the apparatus of communicating scholarship and take up the challenge of providing a venue amenable to cross-political exchange.

III. Are mainstream scholars ceding the field? Conservative adaptation of progressive academic platforms and concepts

Despite the schism, a unidirectional cross-pollination is ongoing and ramping up: right-wing scholars are adapting progressive academic concepts and frameworks to position their critique. Their recent writings openly recommend this strategy: In a 2024 op-ed in the *Wall Street Journal* (whose editorial page generally accords with the political bent of its right-wing owner, Rupert Murdoch), scholars from the conservative Civitas Institute at the University of Texas wrote: “[C]onservatives have continued to lose ground on campuses. While considering their next moves, they should ask: Why has the left been so successful at moving the

academy in their direction? [...] The right should learn from their playbook.”⁸ They cite the development of women’s studies and African American studies as examples of taking up “perspectives [that] were neglected”⁹ in an approach that could be emulated by those seeking to amplify voices from the right.

This strategy was being applied before it was explicitly advised. See, for example, a recent right-wing rendition of the concept of “history from below” coined in 1966 by the Marxist eighteenth-century studies scholar, E. P. Thompson, who studied eighteenth-century British laboring classes.¹⁰ The phrase was popularized as the name of a movement that crested in the 1970s and 1980s through the work of left-wing historians including Howard Zinn, who argued for defying a White-centered idea of history, expanding the attention given to the history of people of color, and researching the history of labor movements.¹¹ In the decades since these scholars were working, the idea of “history from below” has become widely known and has gained significant influence. On the blog of the Abbeville Institute, which is run by right-wing academics dedicated to defending “the Southern tradition,” M. Andrew Holowchak — a philosopher and historian who has taught at mainstream universities including the University of Michigan — uses the phrase in a way that inverts the power dynamics it normally conveys:

When historians approach their discipline with integrity and guilelessness, the various narratives on some person or event will allow certain isms as metanarratives and disallow others. This in effect is realist history — what I dub *history from below*.

8 Storey/Storey (2024).

9 Ibid.

10 Thompson (1966), 76–106.

11 The concept of “history from below” has permeated into legal critique for at least a generation. For example, forty years ago, a special issue of a law review titled “Legal Histories from Below” appeared (see Forbath et al. (1985)).

When historians politicize their history, they begin with isms qua metanarratives and frame their narratives in pursuance of that ism. This in effect is Postmodernist/Progressive history — *history from above*.

Consider, for illustration, the vogue of “racism” today in American history — especially when considering narratives of the American South. It is a covering term, brought into play from above, and it is seen, at least in American history, to be something that must be invoked in any historical narrative of an American figure or event. Can any historian publish a biography of John Calhoun in a prominent university press without much discussion of his racism? That is not allowed.¹²

Instead of indicating the uplifting of the perspectives of historically marginalized groups — as the term usually implies — the term as used by Holowchak recasts traditionalist academics as the embattled group oppressed by the powerful. His post is followed by approbatory comments stoking racist fear. One comment avows: “Accusations of racism against white people are used to destroy our defenses so that other races can run roughshod over us.”¹³ Another states: “Their plan is fomenting so much hate for whites, that all other peoples kill them off.”¹⁴ The sidebar for further reading offers a teaser for an opinion piece proclaiming that Southern states would benefit from seceding in the present day and could do so “by processes already written into our fundamental law.”¹⁵

For right-wing scholars, there are several benefits to emulating progressive framing: first, their opponents have done the legwork work of testing and implementing these concepts and frameworks over decades, so conservatives know they can be

12 Holowchak (2023).

13 Comment from “Barbara,” 31 Mar. 2023, on Holowchak (2023).

14 Comment from “Baron,” 12 April 2023, on Holowchak (2023).

15 Johnson (2024).

effective. Second, recasting right-wing ideas in terms of social justice can render otherwise unappealing ideas more legible and palatable to members of generations (Millennials and Gen Zers) who are more likely to consider social justice a societal priority. Third — less frequently, but to an extent that cannot be disregarded — there is sometimes a sense of “turnabout is fair play” or “trolling” that can be gratifying to right-wing scholars frustrated with progressives’ success at moving the Overton window in the direction of social justice. See, for example, a note in the right-wing *Civil Rights Law Review* sponsored by Antonin Scalia Law School:

Inspired by the progressive call for ‘eradicating white privilege,’ ‘eradicating rite privilege’ is a phrase I coined to capture in a pithy way the... view that religion is not special and should not be singled out for special legal protections or exemptions. If this is a fallacy, we should call it *guilt by alliteration*.¹⁶

If the reader does not at first perceive the jocular tone of the note, the final sentence makes it clear.

Because mainstream law and humanities scholars largely neglect to — or refrain from — engaging with right-wing law and humanities discourse, they have largely left unanswered the right-wing uptake of progressive frameworks. Yet neither neglect nor dismissal (geared not to dignify with a response offensive arguments) will suffice as right-wing legal ideas continue to gain traction in the public sphere.

IV. Bridging the divide

The format in which legal critique continues to be published — mainstream journal articles and monographs — demurs from fostering discourse and critical engagement between left- and

¹⁶ Beckwith (2023), 3.

right-leaning scholars. Too often, the scholars on editorial boards or published in the same special issue share a worldview, even if they disagree on points of that worldview. Given that most publishing is digital, and adding extra articles poses less of a budgetary constraint than for hardcopy journals, there is more room for dialogue. Why not follow, say, a journal article with a “critical legal studies”-inflected perspective on, say, televised procedurals’ depictions of racial disparities in sentencing, with a response that raises conservative objections to the analysis, followed by rebuttals from both the original article’s author and the respondent? Much more frequently, journal issues should be organized as fora in which a lead article is followed by responses featuring views from across the political spectrum. Alternately, editors should develop special issues that gather an array of perspectives on an issue. It will be necessary to invite scholars who have not usually been part of a journal’s core constituency, because passively awaiting contributions from these scholars is a lower-yield approach.

In addition, progressive scholars serving on editorial boards or who are officers of law and humanities boards for conferences and workshops should organize symposia and invite conservative scholars to participate. Because donor funding is more available for conservative initiatives, mainstream scholars could explore the possibility of co-funding events with conservative organizations.

Finally, mainstream scholars should widen the array of scholarship and media they consume so that they more often consider views from opposing political perspectives. If preventative measures are not taken now, law and humanities scholarship will continue to devolve into an echo chamber.

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