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INTRODUCTION

Theory and Practice

The study of law has never been much of a theoretical discipline in this country. Legal studies tend to break up into a number of specific subfields, each defined by subject matter: contracts, public law, procedure. Expertise in each specialty is expressed in the form of proposals for legal reform. The tort professor tells us about tort reform. The professor of constitutional law spends most of her time explaining how the Supreme Court should have ruled, or should rule. Even jurisprudence falls into this pattern of critique and reform. When it is not pursuing the analytic question of the conditions of legal validity, contemporary jurisprudence is telling us how judges should rule or how regulatory regimes should work.[1] There is remarkably little study of the culture of the rule of law itself as a distinct way of understanding and perceiving meaning in the events of our political and social life. To take up such a study requires turning legal scholarship away from the project of law reform.

The culture of law's rule needs to be studied in the same way as other cultures. Each has its founding myths, its necessary beliefs, and its reasons that are internal to its own norms. In this book, I explain the need for this form of legal inquiry, set forth its theoretical ambitions, describe its methodology and sources, and suggest areas for further inquiry.

Of course, there are many different ways of studying a culture. Law has not entirely escaped examination by sociologists, anthropologists, and economists. The rule of law has, however, been peculiarly closed to the inquiries of modern cultural theory. Where such inquiries have appeared, they have all too quickly been turned toward the traditional issues of legal reform—as if innovative forms of study must lead to innovative legal reforms. Consequently, the collapse of left-leaning, radical scholarship seems to have led to an abandonment of these modern forms of inquiry into the rule of law. This is yet another consequence of the failure to separate legal theory from legal practice.

If we approach law's rule as the imaginative construction of a complete worldview, we need to bring to its study those techniques that take as their object the experience of meaning. Inquiry must begin with a thick description of the legal event as it appears to a subject already prepared to recognize the authority of law. That subject brings to the event a unique understanding of time, space, community, and authority. He or she also brings an understanding of the self as a legal subject. These are the constitutive elements of that form of political experience we describe as the rule of law. A cultural study of law advances from thick description to the interpretive elaboration of each of these imaginative structures, all of which together make possible the experience of law's rule.[2] All questions of reform—the traditional end of legal study—are bracketed. They are not abandoned forever, but they are left aside as long as this form of inquiry continues. The object here is not to make us—personally or communally—better, but to understand who we already are.

The situation of contemporary legal scholarship is somewhat ironic. Studying the law, we become a part of it. The consequence is that our deepest cultural commitment—the commitment to the rule of law—remains one of the least explored elements of our common life. We seem to be just as incapable of studying the rule of law as scholars of the eighteenth and nineteenth century were of studying Christianity.

Until the turn of the twentieth century, the study of Christianity was not an intellectual discipline. It was, instead, a part of religious practice. Its aim was the progressive realization of a Christian order in the world—reform within the Christian community, and conversion abroad. Only when the theological project became capable of suspending belief in the object of its study could a real discipline of religious study emerge. The discipline had to give up questions about the truth of Christian beliefs, as well as questions about the correct beliefs of the true Christian. It had to take up, instead, the question of the shape or character that Christian beliefs give to the subject's experience. If we ask the scholar whether he believes in the truth of the object of his study, we are collaborating in an insidious form of censorship. The scholar of religion should not be asked whether Christ is God or what is the correct belief about the Trinity. Similarly, the scholar of law's rule should not be asked whether law is the expression of the will of the popular sovereign and thus a form of self-government. These are propositions internal to the systems of belief. A scholarly discipline of the cultural form approaches these propositions not from the perspective of their validity, but from the

perspective of the meaning they have for the individual within the community of belief.

Distance from one's own beliefs is a necessary condition of such scholarship, yet that distance is not easily obtained. Distance does not mean abandonment. Abandonment can lead to the opposite problem: dismissing as merely false—and therefore not worthy of serious attention—the propositions that characterize a traditional cultural form. Undoubtedly, the possibility of agnosticism—if not atheism—facilitated the study of Christianity as one religion among many, not because the scholar had personally to renounce religious beliefs as a condition of their study, but because a practice of agnosticism made possible the imagining of alternative positions. This act of the imagination allows the distance from one's own beliefs that makes their critical study possible.

This imaginative act of separation, of creating a distance between the subject and his or her beliefs, is the model of understanding that I want to offer in place of the normative, practical reason that has informed both law and legal scholarship.[3] We need not believe that the scholar has access to a true or essential subject, that he can stand stripped bare of all of his surrounding cultural and social constructions at the start of such a study. We need only acknowledge that there are multiple positions from which we can view our experience and that these can be set against each other in order to raise to deliberate self-consciousness any particular set of beliefs.

To see the difficulty for such a cultural study of law—parallel to that which earlier arose in the study of religion—imagine whether suspension of belief in the rule of law is really possible for us. Would a scholar who purports to suspend belief in law's rule—even as a program for reform—be welcome in the nation's law schools? Is the anarchist the legal equivalent of the atheist? Can we take anarchy seriously? Is agnosticism about law's rule the same as an openness to consider nonlegal forms of governance? What might those be, apart from dictatorial regimes? This is a bit like being forced to choose between Christianity and animism. Are we, then, so committed to the rule of law that the very idea of a discipline of study outside of the practice of law is suspect?

As with the earlier study of Christianity, the emergence of a comparative knowledge of political and social organizations seems a necessary predicate for the emergence of a new discipline of legal study. But again, the analogy both supports and undermines the enterprise. The first knowledge of other religions did not support a move toward self-examination, but rather led to expanded efforts

of proselytization. When the Spanish razed the Aztec temples, they placed icons of the Virgin Mary on the remains of the pyramids. No one observed that both Aztecs and Christians put acts of human sacrifice and rebirth at the center of their religious beliefs. The Mexicans were seen either as completely other, entitled to no respect, or as somehow proto-Christians because their rites anticipated in "primitive" form elements of Christian belief.[4] In either case, the mission of the Europeans was that of conversion. Indeed, it remains difficult to find the religious scholar who will acknowledge the centrality of cannibalism in Christian ritual practice.[5] Partaking of the body of Christ is somehow different from partaking of the body of your neighbor, symbolically or otherwise. But exactly how is it different, unless we accept the truth internal to the religious practice?

The fact that we continue to have on many campuses both a divinity school and a department of religion suggests the unease of allowing a theoretical discipline of religion to extend to Christianity itself. Yet in law, we have only the professional school, without any corresponding academic department. Can we imagine a discipline of law that begins from a position that is neutral as between the victims of the legal order and the victims of other forms of violence? Or does law remain the last area of heresy in the modern academy? Can we even ask who exactly are the victims of the legal order? Does that category include not just the criminal defendant and the propertyless, but also the countless thousands who have willingly sacrificed themselves to the project of maintaining the rule of law?

Our comparative knowledge of other political practices is not weaning us from our belief in the rule of law. When we look, for example, at recent developments in Eastern Europe and Latin America, we speak of the progressive transition from dictatorial systems to the rule of law. We measure their progress—or lack of it—against our end.[6] When we observe Third World countries, we see the absence of law's rule as a pathological condition. We have a missionary zeal, believing our truth to be revealed truth. We cannot imagine valuable alternatives outside of our truth. Not to see the end of social order as the rule of law strikes us as unnatural—the equivalent of imagining a world without gravity. Two hundred years ago, social and political practices were tremendously diverse. Today, respect for that diversity has been suppressed in the same way that the Europeans suppressed the diversity of religious belief and practice in the cultures they colonized. There is just one true way to run a social/political order and it happens to be ours.

Of course, we recognize room for variations within the rule of law.

We can see that some societies might choose a parliamentary over a presidential system of government, or an inquisitorial over a confrontational system of criminal procedure. Tort systems may or may not allow punitive damages, or rely on social insurance systems rather than negligence standards. These variations, however, are analogous to those among different sects of Christianity. Toward such variations—religious and legal—we practice the virtue of toleration. Toleration is made possible by recognition of the fundamental unity of belief beneath these apparent differences. The variations raise issues of institutional design; they do not challenge fundamental norms. We approach these possibilities from the perspective of reform: would we better realize the norm of law's rule by adopting any of these institutional variations? This is the question that motivates much of the scholarship in comparative law.[7]

None of this is to suggest that there is something so deeply wrong with the rule of law that it must be rejected. The point is not to advocate different, extreme notions of reform, but entirely to abandon questions of reform for as long as the inquiry lasts. It may be that any state that wants to participate in the new, international economic regime will have to order itself under this conception of the rule of law. Doing so may very well bring an increase in material benefits to that community. Whether it will produce a life as full of meaning as the alternatives is an open question. Surely, it will bring different meanings to those living under its rule. We should not romanticize the possibility of alternatives—real or imagined—but neither should we assume that the answer is obvious. How would we answer the question of whether conversion to Christianity from a traditional religious practice was a gain or a loss—apart from its accompanying material consequences? We have no way to measure this domain of meaning. Even if we could, we would have no way to balance losses here—if there were any—against increases in material well-being. Furthermore, we should not assume that adoption of legal forms of organization will produce the same culture of legal meanings in societies that lack Western traditions and institutions. Despite the success of the Christian mission, the colonized domains did not simply adopt a Western set of meanings. Adoption always includes adaptation, a mingling of cultural traditions including beliefs and practices.[8]

Without a measure by which to make comparisons, perhaps we should look only to that which we can measure: the health and welfare of individuals or gross domestic product. But the intellectual project of understanding a culture of law should not be held hostage to the question of its practical consequences. To do so is to impress

law's conception of reform upon the theoretical discipline, before the intellectual inquiry even begins. The project of a cultural study of law starts only with the establishment of an imaginative distance that shakes off the scholarly compulsion to point the way toward reform.

We have to remember that the rule of law is neither a matter of revealed truth nor of natural order. It is a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and of its individual members. It is a way of understanding the unity of the community through time and of the self as the bearer of that history. It is both the product of a particular history and constitutive of a certain kind of historical existence. To study the rule of law outside of the practice of law is to elaborate this history and to expose the structure of these beliefs. This project is substantively and methodologically independent of any practical judgments about alternative forms of political order. The issue is not whether law makes us better off, but rather what it is that the law makes us.