Articles

Sad Stories, Success Stories, and Untold Stories about American Legal Education: A Comment on John Henry Schlegel

By Norbert Reich[*]

A.

Schlegel's paper tells different stories, and as a German researcher who spent some time at American law schools doing research on Legal realism and on regulation I'm interested to relate my experiences to his account. I admit I am somewhat puzzled and confused, and my efforts to unthread these stories may lead to even more confusion.

When I first read the paper I thought Schlegel was telling a *sad story*: the story of an elitist institution called the American law school being shaped according to the ideas of an old man with the name of Christopher "Columbus" Langdell, a somewhat second rate American Savigny, and his ideas of law as a "science", later captured by a bar wanting to keep prices for legal services high and supply of lawyers low, then challenged by an in-group rebellion called "realism" looking not for the law in the books (as Roscoe Pound had already asked in 1910) but for the real motives of judicial decisions, refuted by New-Deal reformism and Nazi terror, in the fifties reinforced by postwar not "Orwellian" but "Rockwellian" suburban "American way of life", coupled with solid anticommunism, at present challenged by a deeper intellectual threat called CLS which it will – if my reading of

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the story is right – again fight back, only to provoke new clashes and class-room revolutions.

On the other hand, this story might ironically also be read as a *success story*: the story of an institution which, in spite of all criticism – including Schlegel's –seems vital enough to afford itself "*isms*" like "real*ism*", "reform*ism*", law and society critic*ism*" and –as a final battle not yet decided – CLS*ism*, basically maintained its identity, even proved tolerance (to varying degrees) toward innovative trends which it quickly absorbed, putting out an ever increasing number of law review articles packed with footnotes on all objects of learning and producing lawyers serving in big corporate "mega-law firms" a country practitioners, doing public interest litigation and working on government agencies to regulate or deregulate economy, society, and education. This "success story" might resemble the German law school which – despite the reform impulse in the twenties and later in the seventies – quietly returns to its traditional form of law teaching from the books, allowing sociological, critical, and interdisciplinary teaching only as part of an individual law teacher's "freedom of research under the constitution".

B.

More important than these stories – be it a success or a "gap" story – are stories about innovation in legal theory and research, and it is on this point that I want to use Schlegel's paper and ask some questions for discussion and learning. Criticizing Langdell – as Schlegel has done in several papers I happen to know, thereby following the realists' attack – from an *ex post* perspective seems too simple for me because it does not explain the ideological and scientific reasons for the success story of the Langdellian reform in law teaching and its almost 100 years of acceptance. I have not done enough research in American legal history and theory to give an answer myself, but it seems to me that Langdell – however primitive – succeeded in describing specificities of legal discourse that were needed in a time of capitalist expansion and exploitation. Evgenij Pasukanis, Petr Stucka, Max Weber and Hans Kelsen, though arguing from opposite theoretical views, have furnished too a surprising degree basically identical explanations of this process of bourgeois rule shaping insisting on the impersonal, formal, goal-avoiding character of law which was to be administered by the legal staff (judges, lawyers, government officials) without passion and outside of politics.

Couldn't it be argued that – similar to the creation of a "scientific jurisprudence" in Germany with its insistence on dogmatic, rule-orientated work from whatever sources (Roman law, German law, acts of the German territories of the 19th century before the unification under Bismarck) – Langdell provided for a genuine innovation in law teaching and legal thinking by putting some order into the chaos of case law and by adapting it to the exchange rationality of bourgeois society? If you look at his theory of consideration (which reveals surprising similarities to German contract theory of his time) you find the

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analysis of the formal network of the bourgeois exchange act which Marx had described as the grammar of capitalist society. I don't think that it is an argument against Langdell that his method was full of fallacies, deficits, that law consists of more than rules and cases in books (it would be surprising if lawyers at this time had not known it, just like in Germany judges and law professors had much more realistic views about the principle of "governance of law and not of men", as Regina Ogorek has shown). The realists' as well as Schlegel's critique might be said to be too simple because we are not told just why the Langdellian method was a success story *in spite of* its flaws.

C.

One might go on asking Schlegel additional questions about his analysis. If I got his point right, there is a certain market interest of the profession in elite legal education by using the Langdellian case method. Thus we would witness an early example of the "capture" theory. But this analysis might be flawed because the (American) bar does not only have interests of its own as a semi-autonomous "autopoietic system" but also to some extent represents the ruling elite of business and (to a lesser degree before World War I) government. Therefore, elite education need not adhere to a certain method of teaching the law (be it the Langdellian case or the German systematic method), and a profession merely trying to restrict entry might well be satisfied with stiff recruitment and/or exam requirements without taking much interest in the way law is taught and research is promoted. I would like to know more about legal ideology in a certain stage of American capitalist society leading to a widespread acceptance of the Langdellian concept of law and his method of law teaching. Is there, as I have hinted in referring to Max Weber, a corresponding rationality of bourgeois markets and bourgeois law felt by the legal professions which led to a reductionist form of law teaching? Are we facing a theory/praxis dialectics well known in the relationship between education and work in capitalist societies? How does the *Verwissenschaftlichung* of law teaching relate to specific interests of the ruling class in maintaining power and domination?

D.

Schlegel's remarks about the upcoming and eventual failure of realism are not meant to give rise to an in-depth-discussion, and I know from other papers of the author's profound knowledge of the realist impulse. For my own thinking about law, an analysis of the failure of realism would be important in understanding the possibilities and limits of innovations in reform of law teaching and legal research in American – and maybe in German – law. Is it true that the failure of realism was not so much caused by the extremely diffuse picture that realists themselves have painted, by the unfulfilled promise of a true integration of social sciences into law, by their absorption by Roosevelt's New Deal policy, and by the challenges brought about by Nazi law "theory" but rather by their one-dimensional assault

on the "rule-theory of law"? Haven't the realists been taking the "rule-theory of law" somewhat too lightly by simply proving that judges (and lawyers, law professors etc.) don't behave the way the law says they should behave?

How are we to use an in-depth criticism of realism for the project of *Ideologiekritik* trying to understand law as a normative order at the same time petrifying dominance and enabling change and evolution? How do we use the experience of the past that norms as core of the legal order describe the power patterns as well as the aspirations of society? Realism would then not so much be a critique of the normative character of law but an analysis of frustrations that petrified norm governance has provoked. "Gap"-theories like those advanced by realists concerning the judges' behavior or by legal sociologists observing implementation practices cannot refute the observation that, in employing norms as emanations of – in the words of U. K. Preuß – a "body politic", a certain society defines standards and behaviors it wants to promote or to restrict. The project of *Ideologiekritik* which has been left unfinished and uncompleted by the legal realists has to be continued by modern critical legal studies. Schlegel is right in saying that "Realism moved outside the box of doctrine and looked in". But legal voyeurism does not suffice to explain the ongoing importance of doctrine and rules in the heads of law professors and actions of practitioners. It is here where success and failure stories must be fitted in a novel of legal innovation.

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