

Scandinavian legal realism

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Alice Anon is a young woman who graduated from college not too long ago, with a major in psychology and a minor in philosophy. She isn't very different from most young women, except that she was influenced by her grandmother, the inventor of the Dewey Decimal System, and, to the amusement of her friends, she likes to read. After college, to spend some time in a new place and to contemplate her future, she moved to the town of Carrollwood, named to honor the English poet, Lewis Carroll.

Contrary to fact, Mr. Carroll was alive and the kindly neighbor of Alice, indicating either that facts may be lies or that Alice may be delusional. Mr. Carroll's pet was a huge white rabbit, and, disobeying the laws of physics, not to mention the laws of sanity, the rabbit could move people back and forth in time and space and perform other wondrous feats that defied human understanding. One morning Alice Anon woke up, looked around, and was astonished: The last she remembered was being at her college graduation. Where was she?

At her bedside was a huge white rabbit, who handed her a sheet of paper and some papers headed "Chapter 8" (*need to provide: Author, date), Chapters 9 and 10 (Freeman, 2001), and Chapter 7 (Cotterrell, 2001). He introduced himself to Alice as Socrates Anon, and told her she must answer the question on the sheet of paper and he would be back in a few days to check on her progress. Scandinavian Realism and Psychology Alice began reading a quote from a textbook criticizing Scandinavian legal realism for believing that only "psychological analysis" could explain the law.

Alice tried to read through the dots in the passage and tentatively concluded the reason the view was “highly damaging” was because other disciplines in the social sciences also should be used (McCoubrey & White, 2007, cited in *Provide: Instructor, 2007). She next read that her assignment was first to explore and evaluate the above and other criticisms of Scandinavian Realism, and then reach a conclusion on the theory’s contributions “to our understanding of law” (Instructor, 2007).

Well, thought Alice, reading the chapters must be the way to begin answering the question. Most interesting, she thought, but I can’t find any information relating to a connection between Scandinavian Legal Realism and psychology. However, Chapter 8 (*provide: author, date) did provide a clue to McCoubrey & White’s criticism (1996/cited in Instructor, 2007).

Jerome Frank, an American realist influenced by psychoanalysis, recognized that understanding law required consideration of the “unconscious motivations behind decisions” (p. 12).

Exploring the unconscious was a major contribution of Sigmund Freud, the founder of psychoanalysis (Westen, 1998). Aha, she thought, Scandinavian Realism was being criticized for not also drawing on other disciplines, such as anthropology, linguistics, and sociology. At the time Scandinavian and American legal realists were working, American experimental psychology was itself breaking from the tradition, as in legal theory, that there were phenomena rooted in natural law or human nature (Hunter & Ellis, 2004).

In experimental psychology, the results of attempting to study unobservable mental processes were that findings were consistent with whatever theory

was the rationale for the research (i. e. , “ expectancy effects,” assessed in later research, e. g. , Rosenthal & Jacobson, 1964). Conflicting findings did not result in learning anything about psychology. Watson (1919) led the behaviorist revolution, where experimental psychology was confined to the study of observable behaviors, i. e., examining connections between an observable stimulus and an observable response – and that a belief in the existence of such phenomena as perception and even consciousness was comparable to a belief in “ witchcraft and magic”.

At about the same time, Hagerstrom, who laid the foundation for Scandinavian Realism (Castberg, 1955), also was breaking from theories based on the assumption that there were morals rooted in natural law, i. e. , human nature, and concluded a belief in natural moral rights was dependent upon a belief in “ word magic” (Golding, 2005).

Hagerstrom and Watson, Alice grumbled, had something else in common: Both were violating the scientific method in the name of science! Both failed to acknowledge that in the absence of empirical evidence in support of a phenomenon, only one of two conclusions are warranted, either that there isn't sufficient evidence to support the existence of the phenomenon or, as in the case of Hagerstrom and Watson, their theory was not formulated in a way the scientific method could address (2004). But wait, Alice thought, there's a contradiction.

Unlike Frank, the American realist cited above, why would Scandinavian realists draw on psychoanalysis, based on the premise that unobservable behaviors – the unconscious – could be studied? Why wouldn't they instead

turn to disciplines, such as anthropology, where commonalities across different cultures at different times, i. e. , “ cultural universals,” were interpreted as evidence that the commonalities were rooted in human nature (e. g. , Mead, 1928/2001)? So Alice carefully read article after article in scholarly journals on Scandinavian realism or on comparisons of Scandinavian and American realism (e.

g. , Alexander, 2002; Bjarp, 2005; Casty, 2003; Castberg, 1955; Golding, 2005) until finally she found an article addressing the textbook criticism (Pihlajanaki, 2004). The authors were objecting because “ American realists primarily were interested in finding out ‘ what courts really do,’ while their Scandinavian colleagues concentrated more on understanding law ‘ from a psychological viewpoint’ ” (p. 470). Is this possible, Alice wondered? Well, she certainly could understand why those in other disciplines might not even know what psychologists do.

When people think of psychology, they think of clinical psychology and not even of mainstream clinical psychology. It’s impossible to ignore the public attention given to what real psychologists think of as the lunatic fringe – those who have given us “ rebirthing,” “ past-lives therapy,” our “ inner child,” ad nauseum. Yet, legal realists are scholars who would like to apply the scientific method to legal theory. Shouldn’t they then be looking at disciplines where actual research is conducted? I must be missing something, Alice thought.

In all of the scholarly articles I’ve read about Scandinavian and American legal realism, mention of psychology or the social sciences in general has

been rare, e. g. , Pound recognized that psychological research has provided evidence that “ so-called reasons come after action ...instead of before action” (1953, cited in Bodansky, 2004). Surely, Alice thought, by now the legal theorists would have recognized that some of their questions have been and are being answered by cognitive psychologists, linguists, neuroscientists, and others.

But “ we can observe an ongoing dispute between natural law doctrines on the one hand and various forms of legal positivism on the other” (Koller, 2006, p. 180). To return to the criticism of Scandinavian realism for relying on psychological analysis (McCoubrey & White, 1996, cited in Pihlajamaki, 2004), Alice was forced to conclude that both Scandinavian and American realism might have contributed to our understanding of the law had they drawn more not only from psychology but also from other disciplines in the social sciences.

Besides, neither form of realism spoke with one voice. Indeed, American Legal Realism has been described as “ an intellectual mood ...a set of sometimes contradictory tendencies” (Horowitz, 1992) and Scandinavian realists were not merely disciples of Hagerstrom, but realists who raised questions about Hagerstrom’s work and each other’s (Golding, 2005). But one theme that does run through criticisms of both American and Scandinavian Legal Realism is their rejection of the theory that morals can be found in natural law or in human nature.

The less interesting form of the criticisms, briefly discussed below, involves the consequences of legal theories. Consequences of legal realism – and

natural law With Norway situated between Czarist Russia and Germany, where Nazi rumblings already were heard, Scandinavian realists admittedly were concerned that Scandinavian law was becoming less reflective of social democracy (Alexander, 2002). It's true that it's easier to enact laws permitting social engineering without the restrictions of natural law.

It's also true, however, that natural law allows justifying a legal system that is not responsive to the needs of most of those governed. Similarly, in America, with changes following the Industrial Revolution and waves of immigrants, legal realists were admittedly concerned that the legal system was not responsive to the economic hardship experienced by a large proportion of the population (Alexander, 2002). It's also true that enacting laws permitting social engineering was easier without the restrictions of the natural law.

Again, though, it's also true that natural law provided a rationale for a legal system that prohibits laws threatening the “ natural rights” of the wealthy minority. So, mumbled Alice, how is this related to what's true? Just in time, Socrates Anon appeared to tell Alice that it isn't related to truth, and rudely explained, “ it's the economy, stupid. ” So Alice returned to what she considered the more interesting criticisms, i. e. , related to the role of science vs. deductive reasoning in finding knowledge relating to morals. Legal Reasoning and Morals.

Remembering her undergraduate course in political philosophy, Alice mused aloud about how interesting it was that deductive reasoning resulted in entirely different conclusions – and yet they all seemed true. Humans were

barbarians by nature, according to Hobbes, “ noble savages” corrupted by society, according to Rousseau, stupid and easily manipulated (according to Machiavelli), and, of course, empty vessels ready to be filled through experience, according to Locke (Ebenstein & Ebenstein, 2001). She was surprised to notice that Mr. Carroll’s huge rabbit, Socrates Anon, was beside her.

Close your eyes and hold my hand, he ordered, and we’ll see why these conclusions all seemed true. When Alice opened her eyes, Socrates Anon had disappeared and she was on a cobblestone street, where an elderly gentlemen and some young boys, strangely (very strangely) dressed, were speaking in a foreign language that Alice somehow was able to understand. The elderly gentleman would make a statement that one of the boys would contradict, the gentleman would question the boy, the boy would respond, the gentleman would ask a question about the boy’s response, until eventually it was apparent that the gentleman had been correct.

Then, to Alice’s surprise, the gentleman turned into Socrates Anon. Why do you suppose I always turned out to be correct? I guess, said Alice, you’re very wise. Let’s try again, said Socrates Anon, who again became the elderly gentleman. He stated to the boys that the moon was made of green cheese, a boy disagreed, Socrates asked a question – and eventually it was apparent that the moon was made of green cheese. Turning back into a rabbit, he asked Alice why it seemed so plausible that the moon was made of green cheese. I get it, she said, you were so much better at reasoning than they were.

So much, he responded, that after I was charged with corrupting the youth with my ideas (among other things) and drank Hemlock, a younger philosopher, Plato, developed a philosophy rooted in my ideas, used a technique named after me, the Socratic Method, and wrote dialogues where my lads were replaced with worthier opponents (Ebenstein & Ebenstein, 2001). Yet it still was a stacked deck, no-one would mistake them for rocket scientists. So, said Alice, being extraordinarily skilled at reasoning doesn't mean you've found the truth.

I remember now, said Alice, that as the behaviorists were happily using classical conditioning to make little Albert fear white fuzzy things, such as bunny rabbits (Watson, 1917/2000) and operant conditioning to teach pigeons to peck at a target (Skinner, 1953), events were paving the way for the cognitive revolution. The revolution dramatically changed the focus of experimental psychology because it provided a way to use directly observable behaviors to make inferences about non-observable mental processes (Neisser, 1967). Influences that brought about the cognitive revolution included the work of linguist, Noam Chomsky (1965).

His research quickly (unusual in the social sciences) relegated Skinner's theory of verbal behavior, based on operant conditioning (1957), to a topic in the history of psychology. While Skinner was generalizing that babies learned language the way pigeons learned to peck at a target (first "mama" reinforces sounds resembling words, gradually requires greater resemblances to correct pronunciation, and eventually reinforcing babies

when they repeat word orderings they've previously heard), Chomsky was observing actual people in different cultures using language.

He found such "linguistic universals" as utterances were "novel" (since people rarely repeated identical word orderings, babies could not be repeating them), babies use "words" they've never heard, as, for example, in "we went to the zoo" (so they must be generalizing rules), and, in fact, real mothers do not reinforce correct grammar, but instead reinforce truth. For example (Brown, 1973), after a trip to a farm, mothers would reinforce toddlers who say "we sawed moo-moos," but correct a toddler who may say "it was exciting to see the magnificent skyscrapers."

Thus, there's evidence, based on using the scientific method, that at birth the mind is not a blank slate. Since the cognitive revolution of the sixties, we also have learned from research in cognitive psychology, biogenetics, and neuroscience that the infant brain is equipped with perceptual and cognitive regularities, as well as with genetic predispositions (Damasio, 2002). Recent research (reviewed in Jaffe, 2007) has provided evidence of "mirror neurons" in the brain (neurons that fire when we witness the activities of others), providing evidence that indeed I may "feel your pain."

"Thus it might be possible to phrase questions about morals that are amenable to scientific testing. Conclusion Based on the above criticisms, the contribution of Scandinavian legal realism to our understanding of the law is no more or less than the contribution of legal realism in general and its critics. References Alexander, G. S. (2002). Comparing the two legal realisms – American and Scandinavian. The American Journal of Comparative Law, 50,

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