

# The Interdisciplinary Party

---

Hanoch Dagan\* & Roy Kreitner\*\*

## Abstract

The inaugural issue of *Critical Analysis of Law* is an opportunity to reflect on the distinctive contribution of legal theory to the interaction between law and its neighboring disciplines. This brief exploratory essay suggests that interrogating the law as a set of coercive normative *institutions* serves as a useful point of orientation for disciplinary interaction. In particular, we suggest that attention to coercive normative institutions can help legal scholars in the tasks of selecting extra-disciplinary materials, integrating those materials into legal analysis, and synthesizing various disciplinary contributions.

“You can’t have everything. Where would you put it?”  
—Steven Wright

## I. Introduction

A manifesto is generally a way of drawing battle lines. Its goal, typically, is to inspire the participants of a movement (or to recruit new backers). Such inspiration often rests on a sharpening of boundaries, a clarification of identities, or reductively, a statement of us versus them. *Critical Analysis of Law* (CAL) introduces itself in a *manifesto*, which we read as a short, friendly and thus somewhat atypical manifesto.<sup>1</sup> True, the images of battle make a few appearances in the form of the “incursions of other disciplines,” “the sparks that fly” when disciplines “collide” and the idea that legal studies cannot reach disciplinary fruition if the field “remains at war with itself.” But the idea of direct conflict is muted, couched behind a cautionary “perhaps.” In fact, the CAL mission statement reads less like a manifesto, and more like an invitation to a conversation, or perhaps even to a party, indeed a party in a very big tent. The big tent swallows a series of binary distinctions that might have suggested battle lines: it is “both disciplinary and interdisciplinary, internal and external, domestic and global, doctrinal and theoretical, descriptive and normative.” It includes the study of facts as well as norms, function as well as legitimacy, social science and

---

\* Stewart and Judy Colton Professor of Legal Theory and Innovation, Tel Aviv University Buchmann Faculty of Law.

\*\* Professor of Law, Tel Aviv University Buchmann Faculty of Law.

<sup>1</sup> Critical Analysis of Law: Interdisciplinarity, Contextuality, and the Future of Legal Studies (<http://cal.library.utoronto.ca/public/journals/99/CAL.pdf>).

normative investigation. In short, it is an open invitation. If you want to think seriously about law, come to the critical analysis of law party;<sup>2</sup> everyone will be there.

The banner of interdisciplinarity is hardly news in the legal academy, so at first glance the party might seem redundant. To the casual observer, the fact of interdisciplinary engagement in the legal academy lies in plain sight: there are conferences, associations of legal scholars devoted to the combination of particular disciplines with law, programs, centers, journals, hosts and hosts of papers, workshops, and all the other trimmings of existing academic activity oriented toward the interaction of disciplines. But CAL offers something different from the familiar (and perhaps by now traditional) application of methodologies from the social sciences and humanities to the raw material of law. In its stead, critical analysis of law promises a distinctive version of interdisciplinarity that aspires to reconceptualize the engagement among disciplines while at the same time recovering the autonomy of law as a discipline. In both external interaction (or what the *manifesto* calls “bilateral interdisciplinarity” or simply “interdisciplinarity”) and internal engagement (“intradisciplinarity”), the distinctive element of CAL lies in contextualizing a phenomenon that is at once fact and norm.<sup>3</sup> Such contextualization already resonates with the work of many contemporary scholars, but it is as yet under-theorized.

Recently, we proposed a topology of discourses about law and attempted to characterize the role of legal theory among various styles and methods of scholarship, suggesting that legal theory could be understood as a natural meeting point of those discourses.<sup>4</sup> CAL’s invitation to the interdisciplinary party calls for a related but somewhat different glance at the field. Compared to our previous take on the topic, the essay at hand is narrower in focus. Instead of mapping the array of discourses about law and accounting for the importance of each of them, our goal here is to articulate one particular vision of a productive engagement between legal analysis and other disciplines.<sup>5</sup> Following the lead provided by the CAL *manifesto*, we divide that vision to touch on interdisciplinarity and intradisciplinarity. But we use both these categories to drive home a single point, which is that it will be easier to make sense of both the fact and the value of interdisciplinarity if we keep one eye trained on a core element of theorizing about law, which we argued is the attention to coercive normative institutions.

It would be naïve (at best) or disingenuous to conduct a discussion of interdisciplinarity without acknowledging that this kind of discussion has institutional stakes and may open out onto institutional politics. Institutionally, there are times when border polic-

---

<sup>2</sup> Perhaps, to retain at least a connotation that links the *manifesto* with *The Manifesto*, we should not say “come to the party” but rather “join the party.”

<sup>3</sup> The *manifesto* portrays this duality as a key to its mission: “[C]ritical analysis of law reflects the tension between facticity and normativity inherent in—but not unique to—law .... [L]aw ... is not merely fact, but also norm, and legal studies is not merely analytic, but critical.”

<sup>4</sup> Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 *Cornell L. Rev.* 671 (2011).

<sup>5</sup> We think that articulation accords with, and may even be implicit in the CAL *manifesto*. But if not, we are willing to present it independently.

ing cannot be avoided: evaluating candidates for hiring always involves some element of such policing, even if most cases are easy. The same is true when someone in the law school administration has to decide whether to support a particular workshop, or fund a particular conference. If every such experience were to turn into a full-fledged discussion over the limits of interdisciplinarity, interdisciplinary work (and perhaps the life of the law school in general) would grind to a halt; if there were never this kind of discussion, decision-makers would police boundaries unreflectively, perhaps reproducing existing power structures, or perhaps letting chance decide. A coherent strategy of total avoidance is not an option. The aspiration of interdisciplinarity is to create a space of mutual engagement without sacrificing too many of the benefits of expertise, and CAL's inauguration is an opportunity to expand reflection on these challenges.

## II. Interdisciplinarity

As CAL's *manifesto* proclaims, interdisciplinarity requires "the interaction between two disciplines," as opposed to "the use of one discipline as an opportunity for application of another." In other words, in the interdisciplinary work CAL seeks to foster, law is not merely data, so that legal scholars' distinctive contribution as compared with practitioners of philosophy, economics, history and the like cannot be formulated solely in terms of knowledge of legal rules. The discipline of the legal scholar includes such knowledge, but expands beyond it to include both know-how (the almost intuitive grasp of situations as legal problems, or what some call *thinking like a lawyer*) and reflective, or theoretical knowledge. Unlike legal scholars who borrow the methodology of another discipline to be applied to the raw material of law, practitioners of interdisciplinary analysis of law bring to the table some distinctive *theoretical* voice.

We argue that this voice—the theoretical core of law as an academic discipline—is best captured around the central and persistent questions of jurisprudence, interrogating the law as a set of coercive normative institutions. This is obviously a contestable way to characterize that theoretical core. Indeed, a justification of that characterization is in part what we are pursuing in this very essay. The upshot of this approach would be a recognition that interdisciplinary analysis of law must rely on both a theory (explicit or implicit) of the way law's power and its normativity align, and an account of the way in which this discursive cohabitation manifests itself institutionally.

Theories of the relationship between law's coerciveness and its normativity come in many flavors, with Kantian and natural law theories on one end, Marxist theories on the other, and other schools lodged in between. (Recall, for example, how H.L.A. Hart distinguished himself from John Austin by insisting that Austin over-emphasized law's coercive or command dimension at the expense of its normativity.<sup>6</sup>) While the various theories along this spectrum provide different answers to the question of such a relationship, we think that no legal theory could ignore it. So, for example, Kantian legal theories

---

<sup>6</sup> Compare John Austin, *The Province of Jurisprudence Determined* 9-33 (H.L.A. Hart ed., 1954 [1832]) to H.L.A. Hart, *The Concept of Law* 55-59 (1961).

(or natural law theories) take the possibility of coercion as a mandate for reason to be the sole motivator in law (i.e., for there to be law, all power must be subjugated to reason or more specifically, the constitutive possibility of the use of force must be subordinated to legitimating reason); some Marxist theories, on the other hand, maintain that while law exhibits an internally consistent and reasoned framework, the entire mode of reason flows from and is dependent on (economic) power (i.e., in actuality law's reason serves power).<sup>7</sup> Legal theorists taking their inspiration from legal realism, on the other hand, deny the coherence assumed by both Kantians and Marxists, and stake out an alternative position according to which neither element dominates. Reason and coercion (or power) exist as vectors in a field of forces, and the contest among them is never exhausted.<sup>8</sup>

The realist conception of law offers an articulation of the idea that power and reason are both endemic to law, while at the same time appreciating the difficulties of their cohabitation. Legal realism is preoccupied with law's coerciveness not only because judgments prescribed by law's carriers can recruit the state's force to back them, but also because of the institutional and discursive features that disguise or downplay the element of force.<sup>9</sup> Therefore, realism recommends a hermeneutic of suspicion regarding the reasons offered by lawmakers (or those appealing to them); it recognizes these (in part) as instrumental arguments often generated precisely to protect the powerful from claims to substantive justice. But by the same token, legal realism eschews analyzing law *only* in terms of parochial interests or power politics. It recognizes that modes of legal reasoning—substantive and technical, abstract and contextual—often constrain the sense of choice available to legal decision-makers in directions that transcend their self- and group interest. In the best case, legal reasoning must aspire to appeal beyond the parochial, and instances wherein argumentation is exposed as a cover for interest are treated as cases of abuse.

Legal realism is just one perspective, but our sense is that the realist conception of law lays the groundwork for a wide range of familiar current legal theory. We do not claim that the legal voice—the legal scholar's theoretical contribution to the interdisciplinary analysis of law—requires all legal scholars to become legal realists. In fact, we believe that legal academia would be impoverished if we were “all legal realists now.” We have elaborated the realist conception here to note an important distinction between, on the one hand, the use of law as raw material for the application of a non-legal disciplinary methodology or theory, and, on the other hand, an interdisciplinary analysis of law: the latter is

---

<sup>7</sup> See respectively Arthur Ripstein, *Force and Freedom* 4-29 (2009); Evgeny B. Pashukanis, *The General Theory of Law & Marxism* 63-64 (Barbara Einhorn trans., 2002) (1924).

<sup>8</sup> See Hanoeh Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* 28-43 (2013), on which the following paragraph draws.

<sup>9</sup> Here we refer notably to the institutional division of labor between “interpretation specialists” and the actual executors of their judgments, and to our tendency as lawyers and even as citizens, to “thingify” legal constructs and accord them an aura of naturalness and acceptability.

at least informed by or embedded in a particular theoretical approach to the relationship between law's coerciveness and its normativity.<sup>10</sup>

A further distinctive contribution of legal scholars in an interdisciplinary analysis of law relies on the understanding of law as a going *institution*: an enterprise that cannot be reduced to its constituent parts. Some legal theorists focus on certain institutional features of law such as objectivity-enhancing procedures in common-law adjudication and the skill of lawyers in capturing factual subtleties in different types of cases, claiming that these features align with the core of law's legitimacy.<sup>11</sup> Others, of course, disagree with this particularly optimistic view of thinking like a lawyer, insisting that thinking like a lawyer requires initiation into a particular tradition of thinking, and that the tradition places limits on law's democratic aspirations.<sup>12</sup> Our point again is not to adjudicate between these rival views, but rather to show that attention to the institutional setting in which legal questions are analyzed is the kind of distinctive disciplinary element in legal analysis that can make the interdisciplinary game worth the candle.

This institutional analysis is often unwieldy because of the complexities of every legal institution and their multiplicity. Notwithstanding the traditional jurisprudential focus on adjudication, there are of course numerous other arenas replete with lawmaking, law applying, law interpreting, and law developing functions.<sup>13</sup> Some of these institutions actually enforce norms (courts; prosecutors; administrative agencies); some are hierarchical and rule-based with readily identifiable agents involved in norm obedience (corporate counsel; tax advisors; etc.); and some are webs of social norms, including the norm of deference to the symbolic power of law. Legal theorists with an institutional focus bring to the interdisciplinary table a robust non-reductive account of both the discrete parts of this expansive legal universe and of their complicated interactions and possible substitutability. Thus, another potential source of the distinctive added value of an interdisciplinary analysis of law comes from analyzing how the characteristics of the relevant legal institution may shed an explanatory or prescriptive light on a legal topic, which at times may refine, challenge, or even undermine its analysis from the perspective of a neighboring (that is: nonlegal) discipline.

---

<sup>10</sup> Interdisciplinary analyses of law can obviously be much more elaborate on this front: they can defend their position or, alternatively, make it explicit and analyze the way it affects the study of law, or of the particular legal phenomenon under investigation; they can also elucidate its added value to—or sheer distinction from—the other discipline with which they interact.

<sup>11</sup> See Dagan & Kreitner, *supra* note 4, at 677-80.

<sup>12</sup> See Elizabeth Mertz, *The Language of the Law: Learning to Think Like a Lawyer* 4-11, 207-23 (2007); see also Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* 8-44 (2005).

<sup>13</sup> See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 3-13 (1991).

### III. Intradisciplinarity

The reference to intradisciplinarity in CAL's *manifesto* calls for legal scholarship that uses insights of other disciplines as context for its analysis. On this view, intradisciplinary analysis of the law is something like the mirror-image of the application of the methodology of another discipline to the raw material of law. Rather than engaging a full-blown disciplinary counterpart (in cases of interdisciplinary teamwork) or of commanding it (if one scholar does it all), the challenges of intradisciplinary analysis of law are ones of selection, integration, and synthesis.

While the *manifesto*'s description tells us something about what intradisciplinarity is, it says little if anything about its justification. We think that the contextualization enabled by looking at other disciplines is warranted and perhaps even necessary because of the consequential urgency of law. If legal analysis could simply ignore the impact of legal arrangements on real world actors, contextualization through the insights of other disciplines might remain unnecessary.<sup>14</sup> But once an analyst adopts a functionalist or purposive perspective on law, reliance on other disciplines to supply knowledge about the effects of existing or prospective legal arrangements becomes nearly unavoidable. Perhaps it is too obvious to mention, but the world is a complicated place, and legal materials without the aid of other disciplines are too limited to do the explanatory or justificatory work on their own. If our normative horizon is broadly speaking consequentialist, that is, if law is a means to human ends,<sup>15</sup> then there is always reason to look to additional disciplines to understand how law will advance or impede (or has advanced or impeded) those ends.<sup>16</sup>

At first glance, the *manifesto*'s description of intradisciplinary analysis of law as drawing "on the general approach that motivates another discipline without ... bringing to bear that discipline's fully developed methodological apparatus" can be read as an apologetic gesture towards critics from the other discipline who view such an analysis as an amateurish application of their methodology. Whether such critique is justified from the perspective of the external discipline is not crucial in and of itself. After all, this critique may be based on the fact that such scholarship does not stand at the theoretical or

---

<sup>14</sup> This seems to be the position of scholars committed to a view of disciplinary isolation in legal analysis, for whom, for example, the study of incentive effects of legal rules would be irrelevant (at least in private law). In other words, the idea that law should be analyzed without regard to other disciplines is tightly linked to a conception of (private) law according to which there is no "purpose" to private law except to be private law. Ernest J. Weinrib, *The Idea of Private Law* 1-6 (1995); see generally Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 *Vand. L. Rev.* 401 (2007); contra Hanoch Dagan, *Law as an Academic Discipline*, in *Stateless Law* (Shauna Van Praagh & Helge Dedek eds., 2014).

<sup>15</sup> As the text implies, our reference to law's consequentialism should not be read as limited to law's welfarist effects, because law may, and often does, affect other values (such as autonomy, community, or equality) and may, and often does, entail expressive, and not merely material, consequences.

<sup>16</sup> For early articulations of the purposive view, and, eventually, its relationship to recourse to external disciplines, see Rudolf von Ihering, *Law as a Means to an End* (Isaac Husik trans., 1913) (1877); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457 (1897); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 *Green Bag* 607 (1907). For our account of the different ways legal theorists have used other disciplines in their analyses, see Dagan & Kreitner, *supra* note 4, at 685-87.

methodological frontier of the external discipline; but that is not its goal.<sup>17</sup> The test of intradisciplinary analysis is not whether it moves sociology or economics or history forward as disciplines, but rather whether it makes good use of their disciplinary tools in supplying the needed context to develop understanding of legal phenomena.<sup>18</sup> So what would qualify as good use? We do not purport to supply a general answer, but we believe that one ingredient for the success of intradisciplinary analysis flows from the use of contextual material to illuminate the relationship between law's coerciveness and its normativity, and the implications of its institutional features. Legal language and typical legal pronouncements tend toward abstraction: extra-legal material is enriching when it does not simply offer background information, but rather supplies the particular kind of context necessary for a fuller understanding of the keys to law's operations.

And yet, if there are compelling reasons to look to other disciplines, the questions of when to stop and then how to proceed become acute. A successful intradisciplinary legal analysis is one whose choice of materials and mode of integration generate added value to our understanding of the legal phenomenon at hand. And because we think that understanding law through coercive normative institutions is helpful in the first place (in other words, regardless of contact with additional disciplines), we believe that this lens may also be helpful for the intradisciplinary tasks of selection, integration, and synthesis. All three skills—selection, integration, and synthesis—are by now part of the toolkit of many legal scholars, but legal theory has not sufficiently reflected on the criteria of selection, the mode of integration, or the ways in which other-disciplinary insights should be synthesized into legal analysis.

The intradisciplinary analyst is always face to face with the challenge of overabundance: there are numerous nonlegal perspectives on any given legal topic, each with its own potential contribution, and the analyst needs to be able to select the disciplinary lens that seems most promising for the task at hand and to integrate it into the legal analysis. We note, however painfully, that selection is not only about what to include, but also what to exclude. The call to include the relevant is easy: we would all like to be as inclusive as possible regarding interdisciplinarity not simply because other disciplines “contribute” to legal discourse, but because we think interdisciplinarity has become a defining feature of much (including much of the best) legal scholarship. But we think there are (contingent, problematic, and arguable) limits to interdisciplinarity. Acknowledging practical limits, such as accessibility, is a simple first step. Slightly more difficult is the recognition that intradisciplinary legal analysis should *not* incorporate pieces of ostensibly relevant materi-

---

<sup>17</sup> Indeed, the lack of any pretense to contribute to that other discipline distinguishes legal intradisciplinary analysis from an interdisciplinary analysis of the law.

<sup>18</sup> There are good (and, we think, obvious) reasons that legal scholars will have an advantage over scholars from other disciplines in analyzing legal phenomena (and the same is true, vice versa). The outsider's perspective is liable to be partial or unsophisticated, and at times distortive. This is one of the inherent dangers in the movement among disciplines and it argues caution in translating from one to the other.

als or conclusions of neighboring disciplines, or that it should modify these inputs to allow for digestion in the metabolism of legal scholarship.

It seems to us that an important challenge of reflective intradisciplinary legal analysis is to identify these filters and explore their implications. At this stage we can only tentatively point to two possible filters—directed mostly at evaluative and reformist analyses—that dovetail with the perspective on law as coercive normative institutions:

1. Appreciating the institutional capacity of pertinent legal actors may suggest that scientifically accurate, but overly complicated, formulae may in fact be counterproductive if translated too readily into the normative realm of prescription. Highly technical analyses may be essential for generating insights unavailable to the naked eye. At the same time, they often require the kinds of idealizations that counsel extreme caution when shifting gears from penetrating insight to broad-based normative conclusions.
2. Respecting law's normativity and recognizing the potential threats of its coerciveness imply that legal prescriptions must meet the demanding justificatory constraints of both the rule of law and of public reason. The concern here is not with the use of other disciplines to expand our view of the legal phenomena in question, but rather with the pitfalls of generating normative conclusions from scholarly methods or forms of analysis too distant from normative inquiry.

We believe that the occasional unease of legal scholars regarding importations of other-disciplinary analysis of law into legal discourse implicitly reflects these filters. And we think of this as an ongoing challenge: intradisciplinary analysis must come to terms with the concerns underlying these filters and thus refine the scope of extra-legal imports. We do not believe there will ever be a technical formula for selection. At the same time, reasoned reflection on how intradisciplinarity should proceed seems like a necessary, if in-terminable task.

Selection, then, is a necessary first step in intradisciplinary analysis, but only a first step. Next, intradisciplinary legal analysis must integrate the extralegal insight into legal discourse, which requires its translation into the legal-conceptual or methodological apparatus.<sup>19</sup> This is often challenging, given the different criteria of validity and weight of the different disciplines (including law, of course).<sup>20</sup> At times this means a revision of the non-legal insight that may be problematic from the extralegal perspective. At other times, arguments which were initially alien to legal discourse (and thus require translation) become part and parcel of the legal—or, more likely, the legal-theoretical—language (think about the status of the cheapest cost-avoider in tort theory). Indeed, one of the strengths of le-

---

<sup>19</sup> For the various positions on the possibility of integration and a typology of interdisciplinary work in law based on differing levels of integrating additional disciplines, see Bart van Klink & Sanne Taekema, *A Dynamic Model of Interdisciplinarity: Limits and Possibilities of Interdisciplinary Research into Law*, Tilburg Working Paper Series on Jurisprudence and Legal History No. 08-02 (<http://ssrn.com/abstract=1142847>).

<sup>20</sup> This difficulty increases as the appeal to additional disciplines becomes more technically nuanced, and thus requires more effort for integration or even communication to the uninitiated.

gal intradisciplinarity lies in its potential to challenge—and at times even transform—our understanding of the core of the legal discipline.<sup>21</sup>

Beyond selection and integration lies the possibility, and at times the imperative, of synthesis. The scope of extra-legal importation is a function of the type of task at hand. Many types of intradisciplinary legal analyses incorporate a subset of the universe of extra-legal, potentially pertinent insights, typically ones that derive from a single neighboring discipline. But as an intradisciplinary project shifts towards the evaluative (justificatory or reformist) type, the pressure to incorporate and synthesize the lessons of *all* the other disciplines that claim to have a significant implication strengthens because the responsibility of potentially affecting people's lives forces upon the analyst a duty to doubt as well as a duty to decide, obligations one cannot discharge by endorsing any single perspective on law. Every additional extralegal perspective adds, of course, a significant measure of complexity because in addition to the translation to the legal language, the analysis requires a synthesis between two (or more) qualitatively nonlegal perspectives. The ubiquity of evaluative intradisciplinary legal analyses makes, in our view, the reflective analysis of these methodological challenges particularly urgent.

#### IV. Concluding Remarks

CAL's inauguration is a welcome opportunity to reflect upon the core of our vocation as legal academics, and to do so in congenial surroundings, distanced from what may eventually be the contentious stakes of the endeavor. We have attempted to put a bit more meat on the bones of interdisciplinarity and intradisciplinarity, in the hope that such reflection on what one does as a matter of course potentially improves one's performance.<sup>22</sup> We realize, though, that there is no way to read this intervention without seeing in it an element of policing necessarily vague and contested boundaries. We can allow ourselves to hope that the forum encourages evaluating our proposal rather abstractly, judging whether it might be useful when orienting our own work and its negotiations with neighboring disciplines. After all, an essay in an inaugural issue of a journal is a comfort zone: we do not have to decide whether to hire a high-tech empiricist rather than a criminal law doctrinalist with a philosophical bent, a poststructuralist literary critic or a game theorist with a specialty in financial institutions; nobody is up for tenure; we do not have to decide whether to require courses in economic analysis or in research methods or in jurisprudence; we are not in the position to fund research, conferences, or workshops. That is work for another day. For now, we can get into the tent and join the party.

---

<sup>21</sup> Cf. Stanley Fish, *Being Interdisciplinary Is So Very Hard to Do*, *Profession* 15, 19-20 (1989) (arguing that “[b]eing interdisciplinary is more than hard to do; it is impossible to do,” because “the core of the discipline is a historical achievement,” and while for a time “it exerts ... a force that cannot be ignored or wished away,” it is “capable of alteration.”).

<sup>22</sup> Cf. Owen M. Fiss, *Conventionalism*, 58 *S. Cal. L. Rev.* 177, 196-97 (1985).