

What is Left of Legal Science?

AYA GRUBER*

If there is one word that describes legal analysis, it is diverse. At least this is true of legal scholarship in the United States, which I concentrate on here, making my comments already ‘parochial’. Legal scholarship features clashes of first principles and divergent views of what counts as ‘rigor’. There are also more fundamental questions about what law does: how it affects the real world and who wins and who loses. The discussion of legal methodology and the law’s ontology has never been merely academic but has reflected and reinforced political, social, and cultural conditions in a constantly shifting landscape.

Markus Dubber enters this terrain with *New Legal Science*, an ambitious attempt to prescribe how—and mostly why—scholars should ‘do’ law. He seeks to move beyond the divide between civil-law ‘legal science’ and the unnamed not-legal-science of common law, what I will call ‘legal realism’. His goal is to marshal the collective scholarly brainpower to challenge coercive state authority, particularly in the penal context. It is a noble goal, and one I share—though for different reasons. I have many objections to the American carceral state that do not turn on whether it is sufficiently compatible with the Western, liberal, principle of individual ‘autonomy’. Many contemporary scholars, with different methods, orientations, and ideologies, critique the severity and inhumanity of the modern American penal state.

The name of the article implies that it is an attempt to rehabilitate legal science in the aftermath of the ‘cynical acid’ legal realists poured on it and its subsequent caricaturizing. But, in truth, there is not much defending going on. Rather, at the outset, the paper identifies a failure of both legal science and non-science, namely, that they are ‘parochial’. Parochialism, the essay early implies, is bad regardless of the parochial scholar’s normative enterprise or orientation on the formalism-realism dyad.

* University of Southern California Gould School of Law.

But in a surprising turn, Dubber describes non-parochial new legal science in terms not of method but substance: a ‘central commitment to critiquing the legitimacy of the state’s exercise of coercive power through law,’ the foremost among which is penal power. Finally, the essay sets forth some methodological contours of new legal science intended to move analysts past stalemate and stasis and toward a collective enterprise aimed at shrinking penal authority.

My difficulty with *New Legal Science* lies less in the aim than the frame. Reducing parochialism in scholarship seems a worthwhile endeavor, and reducing carceral coercion is a critical one. But these are two very different projects, each requiring justifications and consideration of alternate viewpoints. Neither has much to do with the tension between legal science and legal realism, and calling the project new legal science leaves those tensions unresolved. I admire the kumbaya impulse to bring everyone together in a shared goal, nevertheless, by combining methodological fights with normative goals, Dubber attempts too much and does too little.

The essay begins with a description of the ‘old’ legal science and how it came into disfavor. Dubber largely adopts, for the American context, Duncan Kennedy’s distinction between classical legal thought, with its closed logic, rigidity, and pretense to universal applicability and predictability, and the legal realism associated with Roscoe Pound but refined through the years as critical takes on the law in action. And yet, the essay also includes in ‘legal science’ analyses that are clearly not classical legal thought, but those that piggyback on the heuristic value of science, for example, law and economics, and those that propose model legal rules, regardless of the nature of the reasoning that produced the rules. As Dubber admits, what allows these all to sit together is not a shared structure but the looseness of the term ‘legal science’ itself.

Rather than referee the debates between these two broad camps, Dubber aims to show that each is ‘parochial.’ The parochialism critique unfolds through an extended catalogue of failings of both legal science and realist alternatives—38 to be exact. Some are familiar: formalism is rigid and insular; realism is undisciplined and unmoored. The criticisms range from the foundational to the mundane, including the gripe, which I share, that scholars are incentivized to write for law students and engage in ‘gap filling.’

‘Parochialism’ is not a common condition, but a collection of arguments from people with differing perspectives commenting on different things. The ‘parochial’ label stretches to include both scholarship that is methodologically rigid and that which is methodologically loose, that which is insulated from experience and that which is insulated from theory. Traits like insularity, lack of interdisciplinarity, rigidity, and looseness do not consistently cluster together. Scholarship may be jurisdictionally bounded and methodologically rigorous, or interdisciplinary and still insular. The category gathers these differences without resolving them, making it difficult to see what, if anything, is to be preserved from legal science or legal realism.

More problematically, the ‘can’t we all get along’ exhortation, although appealing, is definitionally impossible. The realist critique of classical legal thought was not simply that it was too rigid or too insular. It was that its claims to neutrality and objectivity were themselves part of how law justified existing distributions of power. Law could be a process of justifying the unconscionable because it presented decisions as necessary, insulating them from their harmful effects and conflicts with majoritarian intuitions of justice. Classical legal methodology concentrated interpretive power in closed communities of elites and maintained their authority through the language of neutrality. Formalism and realism thus do not easily coexist. If Dubber seeks to preserve some aspect of legal science in revised form, he must defend it against the realist critique that has already transformed how legal analysis can be understood.

Dubber has a surprising proposal for how to transcend the divide and unite everyone in a non-parochial endeavor. It is no less than a universal first principle: the purpose of all legal analysis is the critique of coercive state power. Many scholars of varying methodological orientation, including me, agree that the state’s coercive authority should be subject to constant scrutiny. Still, this normative stance is not obvious, self-evident, or a consensus view. Nor does it travel easily across contexts. Restraining state power may be intuitive in the penal domain, where it involves the intentional infliction of serious pain and restraint. Scholars working on progressive taxation, however, are unlikely to embrace a presumption of illegitimacy when the state’s coercive authority is what ensures that the wealthy contribute a fair share. In that setting, coercion is not the problem—it is the mechanism of egalitarianism.

Even in the penal context, one does not have to be a tough-on-crime conservative to reject the downward-ratchet mandate. Scholars who are deeply critical of racialized mass incarceration sometimes advocate for greater penal coercion in certain contexts. Race scholars and feminists have argued that state-sanctioned impunity increases racial and gendered violence and is itself discrimination. For many state-skeptical progressives, when it comes to gender and racial violence, the problem is not that the state coerces too much, but too little. Dubber has elsewhere eloquently argued that progressives should regard state carceral power with suspicion, even when it is recruited to liberal ends. But he largely does not do so here, other than repeating familiar libertarian refrains about autonomy. Labeling the normative project ‘new legal science’ is unlikely to move the needle. The divergences run too deep.

In fact, scholars who broadly share a commitment to reducing the carceral footprint are often the most divided. Abolitionists and penal minimalists both question the legitimacy of the carceral state, but they disagree about what change requires—whether institutions can be reformed or must be dismantled, how quickly change should occur, and what risks are acceptable. These are not marginal differences. Some of the most heated debates within criminal law scholarship are between liberals who seek decarceration without abolition and view abolition

as performative politics that maintains the status quo, and abolitionists, who see reformers as akin to Martin Luther King's 'white moderate'—their nonradical designs doing more harm than overt penal enthusiasts.

What would *New Legal Science* tell us to do? On the one hand, abolitionist literature is perhaps most skeptical of penal authority, yet it often resides in the insular world of philosophy and the undisciplined world of political polemic. On the other, reformers are frequently interdisciplinary and international, but they work within the status quo and, according to their critics, offer apologia for an institution rooted more in racial domination and capitalist order than in public safety. Perhaps they are both *New Legal Science*. The only clear criterion that emerges is that the analysis must question the legitimacy of coercive state power.

But what else does *New Legal Science* demand? One is left to wonder about its methodological non-negotiables, to whom its directives apply, and what makes it science. At times, it gestures toward a way of reasoning—a systematic approach organized around a coherent first principle—but does not specify how such reasoning proceeds or how arguments are evaluated. At other points, it reads less as a method than as guidance to individual scholars to do everything at once: doctrinal, comparative, and interdisciplinary analysis. This sits uneasily with the need for specialization. Still elsewhere, *New Legal Science* looks less like a method at all and more like a way of assembling a body of work—a curated 'reader' of different approaches with a shared commitment to critiquing state power.

What it does not look like, at least to me, is science. 'Science' may be slippery, but it is not devoid of meaning. It carries norms of coherence, system, and authority that do not disappear simply because they are disavowed. Dubber acknowledges that labeling analysis 'science' can operate as an unjustified heuristic, which makes one wonder why he retains the term. But the problem with old legal science was not just taxonomic. Its very form rendered legal decisions immanent, insulating them from their predictable, and often unjust, effects. It transformed juridical powerbrokers into mere umpires calling 'balls and strikes,' as Chief Justice Roberts famously put it.

Whatever else *New Legal Science* may be, it is not clear why it should be understood as a continuation of old legal science rather than as one among many post-realist approaches to law. If the goal is to encourage more critical, interdisciplinary, and globally engaged scholarship, it need not be pursued through a half-hearted rehabilitation of a tradition whose central commitments have been fundamentally contested. I do not doubt that Dubber could offer a defense of post-realist formalism, and I would be interested in that. But I need more convincing that legal science, as a method of divining legal 'truth,' should survive in *any* form. Nor is it clear that any of its premises persist in *New Legal Science*. Perhaps the idea is simply that we unite around the critique of the penal state—and together advance our formalist, realist, empirical, and philosophical objections.

If so, the project begins to resemble what Duncan Kennedy has called public-law neoformalism, a form of legal analysis that emerged during the late-twentieth-century ‘third globalization’ of legal thought. In this period, elements of legal realism were absorbed into the background understanding of law and combined with remnants of formalism, redeployed in the service of broadly defined social goals. The result was not a coherent method, but a layered field of competing styles held together by interest groups’ shared aspiration. The appeal is clear: it promised structure and critique. But, as Kennedy observes, progressives’ strategic use of rights and liberalism often lacked the sincerity—perhaps naivete—of formalism’s earlier claims. More importantly, presenting normative aims as formalist reasoning risks reinforcing the very norms that came under attack for crowding out arguments more attentive to the humanness of law.

I find it easy to be impressed by the ambition, creativity, political sympathies, and quick-wittedness of Markus Dubber’s work. There is much to admire in the impulse behind *New Legal Science*. It presses legal scholarship to confront questions it often avoids and to do so with greater seriousness. Legal scholarship should be less insular and more attentive to state power, and we would do well to keep an eye on many of the problems Dubber identifies. But the framework does not explain what the ultimate method should be or why it should bear the imprimatur of science. In the end, the essay offers a set of defensible commitments. But they must be defended, not merely dressed in the language of legal science.