Legrand and Werro on the Doctrine Wars

The following guest post is a contribution to the conversation continued by Rob Howse here earlier.

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When It Would Have Been Better Not To Talk About a Better Model

So, the German Wissenschaftsrat — a government body concerned with the promotion of academic research (broadly understood) — suggests that legal scholarship should become more interdisciplinary and international. And the American Bar Association — a non-government body devoted to the service of the legal profession — opines that legal education should become more practical and experiential. These pro domo pleas featuring their own interesting history and having generated much debate already, we want specifically to address Professor Ralf Michaels’s reaction.

In his post on “Verfassungsblog” dated 19 February 2014, Professor Michaels claims that “the contrast [between the two reports] points to two problems of the US law school model — and thereby highlights two attractive traits of German education”. According to Professor Michaels, the first difficulty faced by US law schools is that “they are largely financed privately”, which means that “it becomes harder and harder to justify spending significant resources on anything other than the recruitment of better students and on their ability to land well-paying jobs”. The second complication for US law schools that Professor Michaels identifies is related. For him, “[t]he consumer model of legal education requires, ultimately, that law students are taught nothing other than skills”. His reasoning is as follows: “[I]nterdisciplinary scholarship may decline, but doctrinal scholarship cannot take its place because academic understanding of doctrine has been thoroughly discarded”, ergo, “scholarship of
any kind may be viewed as useless” and “[l]aw schools may, finally, turn into pure trade schools”. But, in Professor Michaels’s words, “in Germany, this is unlikely to happen”. Professor Michaels's two-prong explanation is that, on the one hand, “[p]ublic financing of law schools guarantees that the public good aspect of legal education can be maintained” and, on the other, that “the continued acceptance of doctrine as a subject worthy of scholarly attention means not only that scholars will continue to be able to produce scholarship; it also means that the quality of this scholarship will remain at its high level”. To emphasize his claim on the subject of legal doctrine, Professor Michaels writes that “German doctrinal scholarship will always be superior to that of other countries”. He also refers to “the historic advantage [that German law schools] have in excelling at legal doctrine”.

After Professor Robert Howse had replied on “PrawfsBlawg”, Professor Michaels wrote a rejoinder, again on “Verfassungsblog”, with a view to clarifying his initial comments though in effect changing his argument. Professor Michaels's revised version of his initial assertion is that “the basic claim that German legal scholarship excels more in doctrine while American legal scholarship excels more in interdisciplinarity […] has become almost a truism in comparative law”. Still in his second post, Professor Michaels notes that there are “real institutional differences that perpetuate cultural differences” and that these “cannot simply be wished away”. He adds that “[t]o recognize such cultural differences is our daily job as comparative lawyers”. With specific reference to the statement in his first post that “German doctrinal scholarship will always be superior to that of other countries”, Professor Michaels writes that his “intent” was “quite the opposite [of] claim[ing] superiority of one tradition over the other”. Rather, he says, “[h]e tried to make a point about relative incommensurability”. Still in his second post, Professor Michaels insists that “[l]egal education and legal scholarship in different countries are not culturally determined. Nor are they immune to change. At the same time, they exist within the constraints of cultural and institutional traditions, and they respond to these constraints in idiosyncratic ways”. He adds as follows: “[T]he idea that excellence will look similar, at some point, in all systems of the world, appears to me not only unrealistic, but also undesirable”. In his own words, Professor Michaels seeks to “encourage German scholars to keep playing to their strength” while “the US should play to [its] strengths” also. The conversation spurred by Professor Michaels's intervention has since continued both on “Verfassungsblog” and on “PrawfsBlawg” — and presumably elsewhere also.

In the way senders of hasty e-mails have been writing to take them back, Professor Michaels has wanted to reclaim his statement that “German doctrinal scholarship will always be superior to that of other countries”. Professor Michaels must, of course, be allowed
his afterthoughts. But there is a clear sense in which once words have been released in writing, whether in a hasty e-mail or otherwise, any attempt at reconsideration can appear unconvincing. To suggest, as Professor Michaels did after Professor Howse’s initial reply, that he was only advocating that both German and US legal scholarship should be “playing to their strength[s]” strikes us as being indeed unconvincing. After all, elsewhere in his two posts Professor Michaels mentions how German legal scholarship is destined to “remain at its high level”, how it enjoys a “historic advantage”, and, in sum, how it “excel[s] at legal doctrine”. While we are not in a position to divine Professor Michaels’s intent, his many iterations seem difficult to reconcile with anything other than a genuine belief in the German scholarly advantage. Needless to say, Professor Michaels is welcome to his faith. But we think it behooves a seasoned comparativist carefully to distinguish between an expression of preference and an allegedly scholarly formulation whose language may fairly be taken to suggest that a model — one’s “home” model, of all models! — can act as some sort of universal referent (in line with a metric which remains unspecified).

The fundamental point here is that it cannot do to defend the idea that German legal scholarship would be excellent as such. Indeed, Professor Michaels’s assertion is as implausible as if he maintained that “French literary criticism will always be superior to that of other countries” or that “Japanese aesthetics will always be superior to that of other countries” or for that matter that “the Spanish language will always be superior to that of other countries”. The ascertainable fact is that German legal scholarship, French literary criticism, Japanese aesthetics, or the Spanish language — to the extent that such entities can be persuasively delineated — are cultural formations. They are made, fabricated, constructed by women and men interacting in a certain place and at a certain time. They are artefacts. It is not then that there would be something like “cultural excellence” an sich, for all to see. Rather, the quality of excellence is ascribed by an ascertainable constituency of individuals who appreciate “excellence” according to local criteria. For example, the matter of “excellence” in legal scholarship will be attributed by a group of jurists who have been trained to deem certain scholarly forms to be “excellent”, that is, who have been inducted into appreciating certain scholarly practices and socialized into favoring certain scholarly values. To be sure, German scholarly undertakings will often, perhaps typically, adopt a conceptual form and eschew the candid policy concerns that are familiar to US academics. And the reader of German legal scholarship can therefore expect more on systemics and less on patriarchy, more on categories and less on externalities, more on subsumption and less on critical race theory. But none of these German predilections is intrinsically “excellent” or “superior” to prevailing perspectives in other countries. In other words, scholarly excellence very much lies in...
the eye of the beholder. In the end, there is neither more nor less to be said for or against the “excellence” of German legal scholarship — which, if we are willing to assume such a configuration, illustrates but one way among others to approach the study of law, no matter how influential. Lest influence be confused with rightness or truthfulness, let us emphasize that it is not because German legal scholarship enjoys a substantial and longstanding following that it can claim any particular entitlement to being right or true. Nor is it the case that the tiresome repetition on the part of so many German jurists that their scholarly model is best can, in time, somehow elevate it to the exalted status of universal yardstick by which other forms of scholarship would be assessed. Needless to add, precisely the same reservations must be entered as regards United States legal scholarship, which must also confine any claim to excellence it may wish to hold to a specifiable horizon.

As regards scholarship “US style”, Professor Michaels, while asserting its successful approach to interdisciplinarity, claims to be in a position to identify various and serious deficits. In this respect, we are moved to make two points and two points only (there would be more to say, for instance as regards the distinction Professor Michaels appears to be drawing between what he calls “the public good aspect of legal education” and the teaching of “skills” or with respect to his assumption that doctrinal writing would have fallen into discredit in the United States after US academics had realized that it could not be “sufficiently exact” or indeed as concerns his basic postulate about the absence of doctrinal work on the US academic scene).

First, even if Professor Michaels’s *argumentum in terrorem* were to be vindicated and even if at some point in future US “law students [were to be] taught nothing other than skills”, it would not follow that US law schools would “turn into pure trade schools”. There is at least one reason why Professor Michaels’s conclusion comes across as a *non sequitur*, and it is that for the most part scholars in US law schools do not pursue their scholarship to fit their teaching. It is not, of course, that scholarship does not inform teaching. It does, and it must. But scholarship is not beholden to teaching such that whatever happens to make teaching more practical or experiential will *ipso facto* disincentivize scholarship. (In fact, one can imagine that a number of law teachers being invited to teach more practically or experientially would take to scholarship with renewed vigour.) In other words, even if Professor Michaels is right and, *concessio non dato*, the class on anticipatory breach of contract were somehow to become strictly doctrinal or skills-oriented, there is nothing in this development that would inevitably discourage contract law professors from continuing to research Max Weber’s sociological understanding of contractual relationships or to pursue an investigation into the economics of early termination of contracts.
To suggest, as Professor Michaels does, that “legal scholarship ends up as subordinate to legal teaching” is an overstatement. Rather, US legal scholarship can be expected to resist the commodification of teaching in significant ways — as, indeed, it demonstrably does at present. If anything, the key issue lies elsewhere — and it is one that Professor Michaels apparently misses although it is currently being fiercely debated in the United States. What if law teachers in US law schools were made to teach more than they is the case at present and found themselves having less time to research and write as a result? Arguably, scholarship would then be detrimentally affected, at least quantitatively (though one could claim that such a market correction is long overdue).

Secondly, Professor Michaels’s assumption that students are narrowly focused on obtaining gainful employment and that they will therefore enrol only in courses featuring strictly practical and measurable benefits strikes us as painting an unduly philistine picture of the student body (not to mention the law school’s curriculum committee). We both regularly teach comparative law in US law schools, and we both find that despite real financial pressures and legitimate concerns with life after law school, a significant group of law students — often some of the best ones — remains interested in “enrichment” courses ranging beyond the bar examination. Year after year, our offerings on comparative law continue to attract a critical mass of students, a number of those being sincerely committed to the issues and genuinely interested in the materials. We do not doubt that our experience is also that of many of our colleagues teaching, let us say, “non-mainstream” subjects — and we suspect our experience may well tally with that of Professor Michaels himself. In sum, we take the view that the US law school runs little risk of being visited by Professor Michaels’s dire predictions.

It remains for us to salute how in the two posts of his that we have addressed, though mostly in his second one, Professor Michaels emphasizes the cultural character of legal scholarship (and how he mentions that culture is neither immutable nor determined), how he insists that scholarly cultural response is singular (he calls it “idiosyncratic”), how he argues that the matter of cultural difference cannot be eliminated at will, and how he indicates that the idea that legal scholarship would be the same across legal traditions “appears […] not only unrealistic, but also undesirable”. As Professor Michaels insightfully articulates the matter, in the end variations in legal scholarship pertain to “incommensurability”. In our view, Professor Michaels does well to contend that given incommensurability, “[t]o recognize […] cultural differences is our daily job as comparative lawyers”. We can only hope that this heterodox claim will find a devoted following — not least in Germany where, as all comparativists know, comparative research, largely made in Hamburg, has sought
to implement an alternative set of assumptions focusing at once on the ascertainment of similarities across laws and on the identification of the better law.

Posted by Dan Markel on March 2, 2014 at 09:56 PM in Article Spotlight, Legal Theory | Permalink

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