

Chapter 8

Incompatible Law Jobs

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My claim in this chapter is that the familiar jurisprudential problem of deciding between two incompatible stories about law should be abandoned as misguided and impossible. I will call these two incompatible stories about the nature of law the orthodox and the unorthodox stories. According to the orthodox story, law is rational, coherent, consistent, and predictable. According to the unorthodox story, law is malleable, changeable, inconsistent, and rhetorical. In the West, these two stories have competed since Plato and the sophists, with the contest becoming especially heated in the 20th century, when the unorthodox legal realists and critical legal theorists challenged the orthodox views of legal positivists and legal formalists.

My argument is that law is required to perform inconsistent and incompatible jobs, and that it does not have the option of purifying itself by eliminating some of those jobs. In order to do its incompatible jobs, it has to tell incompatible stories about itself. Those tempted to reject or denigrate one of the two stories do so because they recognise some law jobs as being worthy, but not the others. Accepting my thesis requires accepting: (a) that the law is inconsistent; and (b) that this is functional; and (c) that the ability to cope well with inconsistency constitutes law's major success. This state of affairs does not diminish law; rather, it points to an amazing achievement which should be celebrated. It is no small thing to find ways to tell two incompatible stories plausibly.

This chapter is less interested in the truth of the two stories and more interested in the work they do. It is concerned with the institutional functions which Western societies have assigned to law, and with the important role which each story has in the performance of some of those functions. The

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