

Against Dichotomy

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I want to object to a growing tendency, evident at this symposium, to recognize and to applaud a division of legal scholarship into two branches. Professor Fletcher distinguishes “committed argument” from “detached observation.” Professor Posner distinguishes doctrinal analysis from analysis by the methods of social science. Professor Kronman distinguishes lawyerly advocacy from the scholarly pursuit of truth. These several dichotomies are not identical, but they seem to have a common theme—the idea that some legal scholarship resembles the work of lawyers and judges, and some more closely resembles the work of other academics.

There is no doubt a tension in law schools between our ties to the legal profession and our scholarly aspirations. The tension affects every choice an academic lawyer makes about work: what courses to teach, and how to organize them; what questions to ask in research; what is interesting, what is worth doing. Those who choose lawyerly argument question the value of the flight to other disciplines. Those who choose economic or philosophical or historical studies question the value of “mere” doctrinal analysis. Each group damns the other by praising technical competence, by implication competence at a task barely worth doing.

It seems to me unacceptable to let this tension bifurcate the law school. For me the special character of the law school, its unique power, is its location in the middle ground. We train lawyers, but the same people who train lawyers also think and write about law. In both parts of our work, we are trying to improve the rules and the machinery and the operation of law. Of course, we don’t all agree on what counts as an improvement. Law might be improved if it is more intelligible, more easily administered, more internally consistent, more efficient in the pursuit of its stated goals, more efficient in the pursuit of some specified goals, more consistent with tradition, or with specified principles of justice or morality. But I think we all share the aspiration to improve law as one result of our scholarship. And that aspiration, that real possibility, is, or should be, an

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important and energizing feature of our work.

Professor Fletcher seems to share my concern for integrating lawyerly argument and academic inquiry. His scholar engaged in "committed argument" is engaged in precisely that integrating activity, attempting to discern sound principles of law and to assist the community of lawyers and judges in that task. But he insists on reserving that sort of scholarship for people with what he calls a "transcendental" view of the nature and sources of law. For a scholar with a positivist view of law, he suggests that the principal legitimate activity is "detached observation." Professor Fletcher concedes that a positivist legal scholar might argue, as law reformer, about what the law ought to be, but he insists that only a transcendentalist can engage in "committed argument" about what the law is, and that there is a significant difference between the two activities.

I think it plain that committed participation in the legal process is open to all legal scholars, and I cannot understand why Professor Fletcher would limit it to scholars of his particular persuasion. He explains by pointing to two ways in which the transcendental view of law offers scholars a more substantial role than does the positivist view of law. Transcendentalist scholars, he claims, have a broad range of permissible sources for argument about law, including appeals to the structure of law, to principles of justice, and to history; by contrast, positivist reformers are limited to utilitarian considerations as the sole source of argument. Furthermore, he claims, the transcendental view gives the arguments of scholars a more authoritative role in the legal process than does the positivist view. But neither point, if true, would exclude the positivist from participation in the legal process. More fundamentally, neither point is correct.

Arguments from history, from the internal structure of the legal system, and from conceptions of justice are not reserved for transcendental scholars who argue about what law is. Such arguments are equally available, and obviously useful, to positivist scholars who argue about how law should be interpreted, or what law should be. A positivist view of law does not limit scholars, either in principle or in practice, to utilitarian arguments.

As for the authoritative role of the scholar, it is equally limited on either conception of law. Judges are no more bound by scholarly claims about what the law is than by scholarly claims about what the law ought to be. But judges who must decide questions of law, whether on one theory or the other, invite scholars to assist them. I share with Professor Fletcher the view that legal scholars ought to accept the invitation.

Legal scholars, of course, are not the only people who aspire to improve law. Many practicing lawyers and government officials share that aspiration, but they are constrained by obligations to other clients or to the institutions they serve. And many academics in other fields aspire to improve law, but they have less opportunity to do so, because they lack the authority that the law schools command in the world of lawyers, and perhaps more important, they lack the armies of students who will move from their classrooms into the operating positions in the legal system. We in the law schools are uniquely situated: we are informed by the concerns of the profession, and our voices carry some authority in the world of lawyers, but we are free of obligations to clients or institutions. That distinctive situation, which is a source of energy and power for most of us, requires for its survival that we maintain the tension between law and academic inquiry, and refuse to let it split us apart.

That tension comes partly from the nature of our task. But it is strongly reinforced by the biography of most legal academics. Almost all of us once made a decision against the academy. We decided to go to law school and become lawyers, instead of going to graduate school and becoming professors. At some later time, we reversed that decision and became academics after all. Unlike academics in other fields, almost all of us came late to the decision, after having earlier decisively rejected it. That biographical fact about law teachers, I think, has reinforced the identity of the law school as an institution uniquely situated between the world of lawyers and the other academic departments. The tension between law and academic inquiry exists not only in the institution, but in the lives of each of us.

The prevalence of people with that distinctive history may be declining. More people may now enter law school intending to make a career in the academy. As such people enter law teaching, free of the pull toward the world of the practicing lawyer, they may be inclined to mark off a split between the academic and the lawyerly wings of the faculty, rather than incorporating both parts in themselves. That would change the nature of legal scholarship, and in my view for the worse. Extreme professionalism can find a home in the law firms. Scholarship in economics, philosophy, or other disciplines can fit comfortably in other academic departments. But only a law school can house and encourage people whose central concern is to think about law with the hope of improving it, attentive to the concerns of the profession, and without obligation to any client or any institution.