The Varieties of Positivism

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Positivism is an idea that has generated a great deal of confusion, even exasperation. Stumped, especially by these papers, Professor Robert Gordon announced that he had "come to the conclusion that a positivist is someone who sounds very positive." Part of the confusion stems from the fact that positivism is both a theory of ethics and a theory of knowledge and that both versions of positivism are present in the law.

The ethical version, which I will call "ethical positivism," is concerned with the validity of prescriptive norms. It insists on a distinction between the existence of a norm and its moral correctness, and maintains that validity is largely a judgment about the existence of a norm, not its moral correctness. Legal positivism is but one variant of ethical positivism and represents the view that there is no necessary or logical relationship between what the law is and what the law ought to be. Law can be unjust or evil and yet be law, in the sense that citizens have the duty to obey the law and that officials are entitled to punish those who disobey it.

Though ethical positivism celebrates the distinction between "is" and "ought," and demands that we do not confuse the existence of a law with its moral correctness, it in no way favors the "is." The law as it exists must be changed, a positivist might insist, in order to make it more just, to bring it more nearly into conformity with the "ought." Ethical positivism could be the creed of the reformist—Bentham is the example Professor Fletcher mentions—just as easily as it could be the creed of the conservative who seeks to preserve the status quo.

The other form of positivism, which I will call "cognitive positivism," does favor the "is." It is not, however, concerned with the validity of prescriptive norms, such as those that compose the law, but rather with different types of knowledge. Cognitive positivism establishes a priority for a type of study or inquiry, at times more grandly referred to as "scholarship," which is distinguished by two criteria, one going to object, the other to method.

Cognitive positivism claims that the proper object of study is the

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actual behavior of people and institutions. It places a premium on knowledge of what is rather than what ought to be. A positive study is usually contrasted with a normative one: it describes rather than prescribes. A positive study of law describes how the legal system works. In terms of method, cognitive positivism, as most clearly exemplified by the logical positivists of the Vienna Circle or by the economists of today, claims for itself the ethos and method of science Science provides the standards to control the descriptive process and makes empirical verification (or falsification) the ultimate measure of truth.[1] Cognitive positivism aspires to achieve a unity of the natural and social sciences, and views legal scholarship as a branch of the social sciences.

Both ethical and cognitive positivism have a long and complicated history, and we can see in Professor Fletcher's earlier published work and again in his present paper his marked hostility to positivism in all its guises. I do not, however, want to use this occasion to assess the validity of either form of positivism, but rather to see whether there is any relationship or connection between the two. The principal question Professor Fletcher now raises is whether a commitment to ethical positivism also entails a commitment to cognitive positivism. Cast in terms of law, the question is whether there is any connection between one's position on the criteria for determining the validity of legal norms and one's mode for studying the law; that is, whether there is any connection between legal theory and legal scholarship.

I

An account of the relationship between legal theory and legal scholarship must begin with an acknowledgment of the breadth and range of the forces responsible for the shape and scope of American scholarship. Personal ambitions. The historical periods. Politics. The structure and nature of institutional incentives. Developments in related disciplines. The lessons of our predecessors. The list could go on and on, almost without limit, because such a list seeks to ex-

1. In its most striking form, often found in the work of neo-classical economists, cognitive positivism maintains that the validity of any theory depends wholly on its predictive capacity. Such a positivist would believe, for example, that the validity of a theory that declares profit maximization to be the goal of the firm or budget maximization the goal of the government bureau depends not on what people with the firm or bureau say or think is their goal, nor on the completeness or logical consistency of their premises, and so forth, but rather on the capacity of that theory to predict how the firm or the bureau will in fact behave. *See, e.g.*, W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971).

plain nothing less than the shape of a phenomenon that is highly personal, almost idiosyncratic, somewhat mysterious, and yet decisive in determining the scope, style, and nature of scholarship—curiosity. To understand the scholar's curiosity is to understand the nature and scope of his or her work.

Legal theory might play some role in such an explanatory account, but I suspect that its role there is miniscule. Some of us—maybe most of us—have produced substantive legal scholarship first and then reflected in a serious and systematic way on the nature of our theoretical commitments. At most our theoretical commitments were implicit, hazy, inchoate, to be more fully developed and sometimes changed as we began to understand the law. This, I might add, strikes me as an entirely appropriate way of proceeding. More often than not, those who have tried to formulate a general theory of law have had an impoverished conception of law. They were formulating theories about law when they did not truly know what law was.

At one or two points Professor Fletcher lapses into the language of causation, as though we were actually attempting this impossible task of explaining the shape of American legal scholarship. A better reading of his paper would suggest, however, that he seeks to understand the relationship between legal theory and legal scholarship on a wholly different plane. He is interested not in causation, but in meaning. He is interested in conceptual connections, not psychological ones. Professor Fletcher would not, I think, insist that legal theory is the only source of the meaningfulness of legal scholarship —he would, I suppose, acknowledge that political commitments might render one form of scholarship more meaningful than another. His more limited claim is that legal theory is one important source for the meaningfulness of legal scholarship and, furthermore, that from the perspective of ethical positivism, cognitive positivism is the only meaningful scholarly activity.

This claim, it should also be noted, arises in a curious and complicated manner. It takes the form of a plea—an invitation—on behalf of a genre of legal scholarship that Professor Fletcher calls "committed argument." His argument for this mode of scholarship is not direct, but rather proceeds by indirection. It is largely predicated on a supposed connection between certain types of legal theory and certain types of legal scholarship.

The first step of his argument is to divide legal scholarship into two cells: one is "committed argument," and the other is what he calls "detached observation," and which we might recognize as cog-

nitive positivism. Second, Professor Fletcher links each mode of scholarship to a legal theory. "Committed argument" is linked to a transcendentalism (the theory of the Right), and "detached observation" (or cognitive positivism) is linked to legal positivism, which we have seen is an instance of ethical positivism. And, as the final step in his argument, Professor Fletcher explicates and celebrates his brand of transcendentalism (the theory of the Right). The assumption is that once that legal theory is legitimated, the form of legal scholarship supposedly tied to it, namely, "committed argument," will also be legitimated.

Each step in this argument strikes me as problematic, but it is the second that is the principal subject of my concern, though an analysis of that step will call into question the others. It is in this second step that Professor Fletcher links ethical positivism and cognitive positivism and thus makes his most interesting claim about the structure of legal thought. He admits that the transcendentalist could engage in either "committed argument" or "detached observation," but for the ethical positivist there is one and only one form of scholarship —"detached observation." Professor Fletcher writes: "Positivists, therefore, are limited to the mode of detached observation." I am afraid, however, that in the final analysis there is not much to his point. The alleged linkage between cognitive positivism and ethical positivism does not exist.

An argument in the style of Fletcher's cannot be easily refuted by a counter-example, but surely the example of Holmes should have given Professor Fletcher a clue that something was wrong with his thesis. Holmes was not German. He was the author of *The Path of the Law*,[2] the apotheosis of ethical positivism. He was also the author of *The Common Law*. That book is a rich and complicated work of scholarship, as is probably true of any classic. In much of it Holmes presents himself as a "detached observer," "scientifically" describing the evolution of modern law. But the book might also be seen as an exercise in "committed argument." Though it is not a reformist tract, there are prescriptive elements, and it is, most assuredly, a synthesis of disparate sources of law into a system of coherent principle, an elaboration of the substantive law, a "pursuit and articulation of the principles that constitute the law," a "pursuit of immanent principles," or an effort to "refin[e] the basic principles of the [legal] system"—to use a number of the phrases Professor Fletcher has employed at various times to explicate the idea of "committed argument."

2. 10 HARV. L. REV. 457 (1897).

II

I will not pause to explain why a transcendentalist can engage in "detached observation" (or cognitive positivism) because, as I already noted, Professor Fletcher concedes that linkage and because my concern is not with the modes of scholarship possible from the perspective of a transcendental theory, but rather with what is possible from the perspective of legal or ethical positivism—a theory that is, contrary to Fletcher's transcendentalism, widely shared within the American academic community. For me the critical question is whether an ethical positivist can be meaningfully engaged in "committed argument."

A

The answer to this question depends in part on the meaning of the phrase "committed argument." The ordinary meaning of the terms, and the supposed antithesis to "detached observation," suggests to me that "committed argument" is a form of scholarship that is largely prescriptive: the scholar makes an argument for the establishment of certain laws, for example, how certain cases should be decided or whether a particular statute should be enacted. The scholarly statement is prescriptive, in the sense that it states what the law ought to be, but it need not be reduced to a statement of the scholar's preference (as to what he or she likes) or to an exhortation. It can be an argument. The argument might proceed by interpreting recognized legal materials (for example, precedents or authoritative texts), by explicating accepted principles, and by emphasizing certain institutional or social values that would justify the prescribed rule, all in the name of furthering the ends of justice.

This form of scholarship, certainly the predominant mode of constitutional law scholarship today, can be meaningful from the perspective of ethical positivism. We need to make only two further assumptions for this to be so: we need assume, first, that the scholar aspires to make the law more just, to close the gap between "ought" and "is," and second, that the scholar believes that the path of the law—whether it be through judicial construction or statutory enactment—is amenable to reason. Neither of these assumptions is entailed by ethical positivism, but on the other hand, they are entirely compatible with that theory. They address issues that are of no concern to ethical positivism.

Returning to the example of Holmes, it might be noted that much of his later judicial work was marked by a sense of resignation. Holmes

was largely prepared to accept the "is." He seemed to lack the aspiration so characteristic of much contemporary legal scholarship that might be labeled "committed argument" in the sense of prescription; namely, the desire to close the gap between "is" and "ought." He was, as Yosal Rogat said, a "spectator."[3] But as Professor Rogat also explained, the fatalism of Holmes was not intrinsic to ethical or legal positivism. It was a function of the man and his times—it was the response of the aristocrat who feared he had become redundant or obsolete. And, it must be remembered, for every Holmes, there is a Bentham.

Similarly, there is no inconsistency between ethical positivism and the second assumption needed to make "committed argument" a meaningful scholarly activity—a belief in the rationality of the law. To insist on a distinction between what the law is and what the law ought to be is not in any way to deny that those with the power to declare or to determine the law answer to reason. John Austin, the famous English positivist, spoke of law as the will of the sovereign.[4] Yet I would suggest that such a definition of law is not intrinsic to the theory of ethical positivism (it was part of Austin's attempt to reduce law to commands), and in any event, an account of law wholly cast in terms of will would be an inadequate characterization of American law. It is obviously contradicted by all forms of adjudication. Will rather than reason has its stronghold in statutory law, but even there the emphasis upon will rather than reason, and a belief in the inappropriateness of "committed argument," tends to ignore the role of reason in legislative debate, the continuity between judge-made law and statute, and the role of constitutional adjudication in determining the province of statutory enactment.

To put this point more affirmatively, let me say that what makes "committed argument" meaningful as a genre of legal scholarship is a belief in the rationality of the law. As long as those who have the power to determine what the law is are committed to reason, then it becomes meaningful—indeed vital—for scholars to engage in "committed arguments," and as part of their arguments it would be important, once again to use Fletcher's paraphrases, to pursue and articulate the principles that constitute the law and to refine the basic principles of the legal system. It is a belief in the rationality of the law, not Fletcher's transcendental theory, that transforms a statement about what the law ought to be from an exhortation into an argument, and that intellectually sustains those who engage in that activity.

3. Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).
4. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (London 1832).

B

There is a second way of understanding "committed argument," not as a reason-based prescription but as an "authoritative pronouncement." On this reading "committed argument" is not, I admit, meaningful from the perspective of ethical positivism, but at the same time I doubt whether this is due to any special limitation of ethical positivism or, even if it is, whether that limitation is a source of regret. I doubt whether "authoritative pronouncement" is a desired or even intelligible form of legal scholarship.

Ethical positivism, insisting on the distinction between "ought" and "is," envisions a world in which there are a finite set of criteria for determining what is law and what is not law (but only morals). Otherwise, laws and morals could never be separated, the distinction between the existence and moral correctness of a law could never be made. Hart's rule of recognition[5] and Kelsen's basic norm[6] are but formalizations of the need for such identifying criteria. It is also true that the identifying criteria of law are often cast in procedural terms; for example, a statute is defined as a norm that is passed by the legislature according to certain procedures. This emphasis on proceduralism may be based on the same scientific ethos that underlies cognitive positivism. If the law is identified through exclusively procedural criteria, the positivist might reason, we can more easily verify or falsify claims about the existence of law.

There is, however, another way of understanding ethical positivism and its aims that allows a substantive formulation of the identifying criteria: an ethical positivist might believe that the law includes the norms that can be derived from some substantive text, for example, the Constitution. In this instance, ethical positivism would not readily serve the ends of science, understood in its empirical form, for there is no simple or easy way of verifying whether a norm is derived from the appropriate substantive source. Constitutional norms are not wholly reducible to the limited number of words on a piece of paper called the Constitution or to the pronouncements of a majority of the Supreme Court at any one moment. On the other hand, ethical positivism might serve other ends and thus be compatible with a substantive conception of the criteria for identifying law. It might seek to place a wedge between law and morality, thereby creating the space needed for critical perspectives on the law—another important purpose of ethical and legal positivism, as the example of Bentham reveals. The

5. H.L.A. HART, THE CONCEPT OF LAW 92-93 (1961).
6. H. KELSEN, GENERAL THEORY OF LAW AND STATE 115-22 (1945).

pursuit of this end does not, contrary to Fletcher's suggestion, require complete or full determinacy as to what is law and what is morals, but only a measure of determinacy. It requires criteria for making the distinction between the two domains intelligible and, as can be seen from those standards of the law that place weight on the words of the text, on the intention of framers, or on special institutional values, these criteria need not be wholly procedural.

From the perspective of a substantively based ethical positivism, scholars could state and elucidate the law. They could make statements *of* the law. On the basis of their research into the text, the history, and the entire course of court decisions, and on the basis of an analysis of institutional and social values, and so on, they could say, for example: "The first amendment prohibits any libel suit by a public official," or "The equal protection clause prohibits de facto as well as de jure school desegregation," or "The death penalty is a cruel and unusual form of punishment." But, a question might fairly be asked, what would be the meaning of such statements to an ethical positivist, assuming that the scholar is not simply reading off the precise words of the Constitution or simply summarizing particular decisions of the Supreme Court?

Those statements of the law might possibly be understood as attempts to get the Supreme Court to decide certain cases in certain ways. They could thus be viewed as exhortations or prescriptions, disguised as statements of the law in order to enhance their persuasiveness. Or they could be predictions of what the court will decide, once again camouflaged. According to Professor Fletcher, that is all those statements of the law could mean to the ethical positivist. I would resist the reductionism, however, for it seems to me that these statements could be something more. They could be understood as interpretations of the substantive text, in this instance the Constitution. As such, they would be roughly analogous to the interpretations of the Supreme Court, based on comparable sources and methods, but differing from those of the Court in the sense that they are not authoritative—they are interpretations, but not authoritative interpretations. If there were Supreme Court decisions to the contrary, as there are at the moment for each issue, it would be those decisions, not the scholar's statements or interpretations, that would determine the legally enforceable rights and duties of the citizenry. Within the bounds of positivism, the pronouncements of scholars, no matter how wise, no matter how rational, are not as authoritative as those of a lawmaking body such as the Supreme Court. At the same time, ethical

positivism does not deny the meaningfulness of scholarly statements of the law—as interpretations, rather than mere exhortations, prescriptions, or predictions. These interpretations would establish standards by which decisions of the Supreme Court and the lower courts could be evaluated and gaps in the decisional network filled.

From the perspective of ethical positivism, then, I concede that the scholar is not entitled to make "authoritative pronouncements," in the way that the Supreme Court (or any official lawmaking body) could. At best, the scholar's statements of the law are interpretations, not "authoritative pronouncements." In terms of Fletcher's taxonomy, scholars committed to ethical positivism do not have the authority to transform their statements into "declarations" (in the performative sense) as opposed to mere "assertions." I wonder, however, whether this is a special failing of ethical positivism or whether it is a failing at all.

Professor Fletcher tries to cast the inability to make "authoritative pronouncements" as a special limitation of ethical positivism by tying that legal theory to a notion that is analogous to a limited caste of priests—not everyone can authoritatively declare the law. Ethical positivism most assuredly contemplates a limited distribution of legal authority, as Professor Fletcher suggests, but so does every other legal theory. Even natural law theories assume that the authority to determine the content of that law is limited to certain officials. I do not fully understand Fletcher's transcendentalism, but I will say that if it assumes that scholars—and if them, why not everyone?—have authority to declare the law, then I wish to have no part of that theory. A distribution of authority that would virtually transform scholars into judges and thus make their interpretations "authoritative" would politicize the academy, it would paralyze the conscientious scholar, and if pushed to its logical conclusion and thus transformed into a universal distribution of authority, it would render the idea of a legal system incoherent. To confer on all the power to declare the law is to deny the very idea of law.

III

Professor Fletcher's paper sets the proper tone for the symposium. He asks whether there is a relationship between legal theory and legal scholarship, and rightly shifts the focus from the domain of causation to the domain of meaning. He sets our sights high. The ambitiousness and seriousness of the undertaking should be warmly ap-

plauded and should be taken as a standard to which we can aspire. There is also a negative example embedded in his paper.

Professor Fletcher has insisted on a connection between ethical positivism and cognitive positivism. I have argued that in this assertion he is mistaken. I have also wondered what it was that led him to this error and in this spirit wondered whether Professor Fletcher has transformed the special features of his own scholarship into a general analysis of legal scholarship. Professor Fletcher disavows both ethical positivism and cognitive positivism, and from this highly personal fact he may have assumed that there is a more general connection between the two forms of positivism. Such an assumption is, I am convinced, mistaken; but even more to the point now, it embodies a habit of thought that is perfectly understandable and yet wholly objectionable.

The law, as opposed to history, is lacking a literature on its scholarship. This symposium is a step toward the development and creation of that literature and, as such, an important event in the history of the university law school; I question, however, whether we—a group of legal scholars—are the ones that should generate that literature. Part of my point is the familiar skepticism about the claim of lawyers to universal competence. The fact that we do legal scholarship does not necessarily qualify us as scholars of scholarship. We might not be the best. At times, however, my doubts go even deeper: we might be the worst. As practitioners of the art we are aware of the subtleties and the nuances, but we may move too quickly from the quirks of our personal bibliographies to a general statement on the nature and scope of legal scholarship.

The hour is late to summon a sociologist of knowledge or a philosopher of knowledge to this symposium (thank God there is a historian or two). The hour is too late even for us to retool. But perhaps it is not too late to insist on a healthy measure of self-awareness. It is of great importance that we be mindful of our limitations and, even more, avoid the error of confusing the particular for the general.