

PROFESSORIAL ACTIVISM

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I

Legal positivists have always reminded us of the distinction between "what law is" and "what law ought to be". The realm of law, they insist, is clearly separable from the realm of morality. "What law is" is a legal fact; "what law ought to be" is a moral belief. Because the members of a pluralistic society have diverse moral aspirations, we are told, the realm of law is correctly separated from the chaotic domain of moral controversies.¹

Inspired by legal positivism, one may argue that law professors should teach law in a morally neutral way, and should refrain from criticizing law on grounds of morality. After all, they are hired to teach law, not morality.

This article does not attack the theory of legal positivism, but argues that even if the theory is philosophically defensible and empirically sound, law professors should actively participate in shaping the existing law by providing novel arguments as well as new analytical models. They should teach not only "what law is", but also "what law ought to be". And if in their view "what law is" is in harmony with "what law ought to be", they should still critically examine the justificatory assumptions underlying the existing law.

II

Professorial activism is not a new idea. In civil law countries, law professors have always played an active role in the development of law. For example, Professor Irnerius's lectures on Roman Law, given in the late 11th Century at the University of Bologna, remain a milestone in European legal history.² These lectures detonated enormous intellectual activity that later lit the dark ages of European primitive law. By converting an ancient Roman text into living law, the succeeding generations of law professors and scholars developed legal concepts and analytical tools suitable to a new age. Code Napoleon, a complex product of Roman tradition and the French Revolution of 1789, drew its nectar from the neatly stacked professorial works. In the late 19th century, Professors Windscheid and Planck drafted the German Civil code, a marvel of conceptual excellence and legal architecture.

Even in Common Law, primarily a law of the judges, law professors are in the process of playing a more creative role. Law reviews written by law professors indicate their commitment to participate in the shaping of existing law. In 1956, Mr. Chief Justice Warren acknowledged that law reviews not only "perform the indispensable function of criticism", but also "help make the future path of the law". A new understanding between

judges and professors has emerged on the legal scene. Twentieth century judges have begun to cite professorial works in their opinions.

In **Li v. Yellow Cab**,³ for example, the Supreme Court of California decided that the codified "all-or-nothing" doctrine of contributory negligence ought to be replaced by a more equitable doctrine of comparative negligence. To bring about this dramatic change, the court drew its supportive arguments from the works of Professors Prosser and Keeton. The court also cited with approval the argument that even codified law ought to evolve to respond to the equities of modern times an argument advanced by Professor Van Alstyne.

Cases like Li represent the judicial approval of professorial activism. They also challenge the law professor to teach, think and write not only about what law is, but also about what law ought to be.

III

Law professors cannot teach law with moral neutrality, even if they believe they can, because law itself is not morally neutral.

Each legal system is unique, in part because it mirrors the distinctive socio-political forces of the time. For example, Czarist laws were rooted in Czarist morality, Czarist socio-political forces, and Czarist times. The twentieth century American legal system reflects capitalism, individual freedom, and a struggle to eliminate and remedy past injustices against racial minorities and women. Stated differently, the current American legal system represents the current moral vision of American people as to how life ought to be lived.

Even in non-democratic societies, laws reflect legislators' moral values. The Chinese laws are rooted in socialist morality of the ruling communist party. Similarly, the current legal system in Chile reflects Pinochet's "moral dreams" regarding how Chileans ought to build their society. Even in South Africa, the apartheid legal system mirrors moral vision of the white minority. Although we may disapprove of the moral foundation of domestic or foreign legal systems, we would fail to show that these systems are morally empty.

It makes little sense to argue that law professors who teach apartheid laws in South Africa or Pinochet's laws in Chile are morally neutral. Their so-called neutrality is, at best, their quiet approval of the existing legal system; at worst, it is inexcusable moral apathy.

Even Legal Positivists who insist that law is separable from morality do not contend that law is morally neutral. Nor do they assert that legislators make laws in a moral void. This separability thesis simply states that once a law has been validly enacted under the given legal procedures, judges would enforce it even if it contravenes the norms of existing social morality. But even judges A clarification is called for. Even though natural laws do not dispute that a proper understanding of law requires that legislators' moral motivation be critically examined.

IV

The so-called morally neutral pedagogy in law breeds rule-fixation. The study of law is reduced to the study of legal rules; legal rules are taught in a detached, dispassionate manner, in part to underscore legal objectivity. Legal implications of legal rules are carefully distinguished from moral aspirations, emotional responses, and demands of social justice. Law professors who characterize law as science, idealize their role as that of Mr. Spock. The warmth of teaching law is cooled off in the cerebral icebox of legal rules.

Teaching law as science is a pedagogical mistake. Law is not science. Justice Holmes correctly remarked: "The life of law has not been logic: it has been experience. . . .The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become."⁴

The distinction between science and law is vivid. Science studies natural cosmos; law studies human cosmos. Natural laws are discovered; human laws are made. We don't know who created laws of nature, perhaps God did. We know who created legal systems, clearly human beings did. Natural laws are universal; human laws are parochial - always entrapped in time and geography. For instance, the law of gravitation is still in force, but the Slave Acts have vanished. The sun still rises under the same natural laws, but not over the same legal empires.

Another distinction between science and law is crucial. Since human beings have not authored natural laws, they are not responsible for earthquakes, storms, lightning - the doings of nature. But because human beings make legal systems, they are responsible for slavery, discrimination, genocide - the doings of human beings.

A clarification is called for. Even though natural laws are not human creation, human beings are morally responsible when they use these laws to invent human artifacts. The laws of cosmic physics exist independent of human species, but the creation of nuclear weapons is a human act. Human beings are not only responsible for the laws of their own making, but also for their interaction with the laws of nature.

Teaching law as science is morally confusing, if not dangerous. Victorian physicians, for example, supported the laws against the use of contraceptives by invoking pseudo-scientific conjectures: They insisted that the use of contraceptives produced scrofulous children.⁵ Aristotle justified the degraded Greek conception of women by a "scientific argument" that women had a nature inferior to men. Homosexuality has been historically condemned as against the laws of nature, i.e. procreation: Some have argued that homosexuality is a degenerative nervous disorder.⁶ Supporting human laws on "scientific grounds" remains a popular, self-serving means to stunt a vigorous moral dialogue; it is a convenient route to escape an otherwise difficult moral terrain.

Law is a human creature, created by human beings, for human beings. It is neither scientific, nor divine: it is human. Any attempt to reduce it to divine commandments or scientific precepts is to distort a human reality. Any attempt to teach law only in terms of legal rules is like teaching the directions written on a Coke machine without telling anything about the machine itself. A push-button pedagogy creates among students an urge for instant gratification. An over-emphasis on mechanical skills and legal rules retards their creative thinking. Even good students who understand rules do not understand law. In practice, they view the client as a legal problem to be resolved by disinterring rules buried in cases and statutes.

V

This article does not suggest that law professors should abandon teaching legal rules. Nor does it imply that a law professor is a professional failure unless he or she has written a masterpiece as impressive as Prosser's Torts. Further, it is not recommended that law professors should become moral missionaries, proselytizing students and judges.

The point is rather simple: Even if judicial restraint makes sense, professorial restraint does not. Law professors are free to question, explore, and criticize. In their scholarly works, they must offer novel arguments and new analytical strategies to help judges achieve faire results. In teaching, they are under a social obligation to prepare lawyers who are not only well-informed about the superstructure of legal rules, but also understand the moral and socio-political foundation of law. Professorial activism does not simply hone students' analytical abilities, but also sensitizes their moral reflexes.