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Substantive Legal Theory and Its Audience

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INTRODUCTION

SUBSTANTIVE LEGAL THEORY AND ITS AUDIENCE

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According to an Israeli variation on a well-known theorem of geometry, it is possible to draw a single straight line through any group of points — provided the line is wide enough. In this symposium, the organizers sought to bring together a group of friends; to this end we conceived 'substantive legal theory' as the name of the straight line whose width should allow it to unite the various participants' scholarly interests. Given this history, the most reliable way to tell the reader what 'substantive legal theory' means would be simply to refer him to the papers that follow. It would then be left to the reader to judge whether these papers have anything in common in addition to their authors' amity. But though such an ostensive definition of the symposium's subject matter would be perhaps the most accurate, it is not the most informative one. Luckily we can do better than that.

This good fortune is the product of an important development in legal scholarship that took place in recent years. The development has two aspects. One is the evolution of a new breed of scholarship that has come to occupy an increasingly prominent place at least in American legal academia. The other aspect of the process I have in mind is a good deal of conscious self-examination to which legal scholarship subjected itself of late. Though as we all know persistent efforts at self-awareness are not always the signs of spiritual soundness, such efforts have their undeniable payoffs. For our present purposes they provide us with a store of existing articulations regarding the particular developments in legal scholarship that this symposium reflects. They also help us locate and air differences of opinion

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regarding the exact nature and purposes of the scholarly enterprise that the symposium's title designates.

A good point of departure — that will help introduce both a common ground as well as some disagreements — is Richard Posner's definition of what he calls 'legal theory' as "the study of law... 'from the outside' using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system."[1] This definition captures some of the essentials of the kind of legal scholarship that the following papers either exhibit or discuss. But a terminological difference should be noted at the outset: adding the adjective 'substantive' to the idiom 'legal theory' as defined by Posner, helps mark the distinction between the latter and a very different use to which the term 'legal theory' is often put. On this common usage 'legal theory' is a rough synonym of 'jurisprudence' or 'general jurisprudence' and it concerns questions regarding the nature of law, the meaning of its normativity, its general structure and sources and so on. If 'legal theory' is to apply to the study of questions such as these it would be perhaps advisable to qualify it as 'general,' or 'formal legal theory.' By contrast, 'substantive legal theory,' at which Posner's definition aims (and which his own scholarship exemplifies) concerns substantive, normative legal questions; it seeks to enhance our understanding of them and to improve our capability to cope with them. To this end it uses, self-consciously and systematically, the resources of other disciplines, primarily those of the social sciences and the humanities. In this it differs quite dramatically, as Posner correctly notes, from a more traditional genre of legal scholarship which is concerned predominantly with doctrinal analysis and which in outlook and methodology resembles, and is continuous with, judicial opinions and other pronouncements of legal practitioners.

With the exception of the terminological amendment I have proposed, Posner's conception and advocacy, as well as his own practice of the new brand of legal scholarship understood along the lines I have just described, seem to me on the right track. Still his formulation also indicates some potential disagreement regarding the nature of substantive legal theory and its main tasks.

A clue to an important query, and a possible controversy, is provided by the main theme of Posner's article in which the above definition of legal

1. R. Posner, "The Decline of Law as an Autonomous Discipline: 1962-1987," 100 *Harv. L. Rev.* 761, 779 (1987).

theory appears. As indicated by its title,[2] the article describes, explains and celebrates the decline in law's autonomy, a decline associated with law's increasing dependency on various other disciplines. But the incursions on law by other disciplines that Posner documents concern legal scholarship. They do not touch nearly as obviously or directly the practice of law. Posner simply overlooks the fact that 'law' is both the name of a social institution and of an academic discipline that has the former as its subject matter. Such oversight is perhaps natural (and self-serving) in someone whose career straddles this divide. Still the oversight can only breed a confusion that substantive legal theory, conscious of its academic credentials and clear-headed about its scholarly mission, should be careful to avert. The relationship between a discipline and the area it studies is a difficult matter and one that varies from field to field. But the relationship can be adequately considered only when the relata are kept firmly apart. The application of the word 'law' to both the discipline and to its subject matter is an inconvenience which should not turn into a trap: the study of law, for one, can become interdisciplinary without law losing thereby any of its autonomy.

But whereas one should not confuse 'law' as a field of study with 'law' as a field for study, one should not commit the opposite error, of which Posner is also guilty, of consigning 'legal theory' to an external perspective, by assigning to it the study of law 'from the outside.' To be sure, many important investigations can be said to assume such a posture: a legal historian, for example, trains the instruments of the historian's trade on the law 'from without,' trying to explicate legal phenomena in the same vein as other processes and events. But 'substantive legal law,' as illustrated by the papers in this symposium, and indeed as often practiced to good advantage by Posner himself, takes a different, internal point of view. The questions that legal economists typically ask, and to which they proffer detailed answers — when should tort law impose strict liability and when should it prefer a negligence standard; which contracts should be breached and which enforced; what should be the measure of damages — are distinctively substantive, normative lawyers' questions. What distinguishes these questions is not the perspective from which they are asked — this is as 'internal' as that of any lawyer's or judge's — but rather the methodology with which they are answered.

That legal academics should ask *the same* questions as legal practitioners

2. *Ibid.*

encourages the mistake of confounding, under the single label 'law,' the former's enterprise with the latter's. On the other hand, insisting on the scientific, interdisciplinary nature of legal scholarship naturally leads to assigning to it the task of observing the law from the outside. But substantive legal theory is neither continuous with the practice of law, nor is it a mere external observer of it. In his important meditation on the nature and the mission of legal scholarship Ed Rubin successfully avoids both pitfalls.[3] But though I find his characterization of what I call 'substantive legal theory' eminently illuminating and the case he makes for such scholarship thorough and compelling, I think that he too ultimately fails to relate in a satisfactory way the scholarly enterprise he advocates to the practice of law.

Unlike Posner, Rubin is acutely aware of the gap between the study of law and its practice. Rubin's chief complaint against traditional, 'doctrinal' legal scholarship regards the 'unity of discourse' it maintains with judges, lawyers and other functionaries of the legal system. In this I fully concur. Indeed I can here even indulge the academic's ultimate narcissistic delight by quoting Rubin quoting me on this point. A legal scholar who maintains "unity of discourse" (to use Rubin's happy phrase) with judges and lawyers will find herself acting "as a kind of deputy-judge, presiding over moot courts, or a shadow lawyer writing mock briefs for hypothetical or past disputes."[4] Rubin urges legal scholars to develop their own voice, a voice distinct from that of officials and practitioners, resonant instead with humanistic and social disciplines to which Posner also alludes. With such a distinctive voice, legal academics will be better able to engage in the normative study of legal issues, i.e., issues that are of professional interest to the more practical legal actors such as lawyers and judges. But at this point Rubin's conception of legal scholarship of the kind he advocates falters. The scholarly discourse that Rubin favors "consists largely of prescriptions that scholars address to public decision-makers for the purpose of persuading those decision-makers to adopt specified courses of action."[5] It is to the achievement of this task that according to Rubin the unity of discourse constitutes "the greatest single impediment."[6] But this claim is remarkable: Why should fracturing the

3. E. Rubin, "The Practice and Discourse of Legal Scholarship," 86 *Mich. L. Rev.* 1835 (1988).
4. *See* M. Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (1986) 1–2, quoted in Rubin, *ibid.* at 1879.
5. Rubin, note 3 *supra*, at 1881, f.n. deleted.
6. *Ibid.*

unity of discourse between scholars and practitioners facilitate communication between the two groups and increase — rather than destroy — the scholar's ability "to speak to public decisionmakers in a persuasive manner?"[7]

Rubin may in fact sense the paradox when he points out that "judicial decisionmakers themselves may be developing a style that relies on identified normative positions and empirical elaborations" that resembles the style of scholarly argument that Rubin endorses. "To the extent that this process occurs — argues Rubin — the fit between normatively-based legal scholarship and judicial decisionmaking would become much closer."[8] Indeed so, but only by reestablishing the unity of discourse whose destruction is Rubin's main theme.

That judges, or any other public decisionmakers, should become practitioners of substantive legal theory is neither particularly likely nor clearly desirable. But the fact that Rubin makes such a prognosis is itself symptomatic of the paradox at the heart of his position. The paradox however is the sign of a real dilemma: it is born of the academic lawyer's desire "to have it both ways," to hold the stick at both ends: he wants to forge a distinctive identity as a scholar who practices the academic discipline of law while maintaining his identity as a lawyer who contributes to legal practice. Rubin tries to cater to both desires. To satisfy the first, Rubin proposes the disruption of the unity of discourse; he accommodates the second wish by the suggestion that legal scholars' task is to address their more practically oriented colleagues and to persuade them as to how they should act. But the latter suggestion is at odds with the first: creating a discourse of their own hardly equips legal scholars for persuasive communication with those not privy to that discourse.

When engaged in substantive legal theory, legal scholars do develop a distinctive discourse of their own. It is a discourse in which simplification and idealization of human reality are used as heuristic devices to attain

7. *Ibid.* at 1900.
8. *Ibid.* at 1901. The main theme of Bruce Ackerman's *Reconstructing American Law* (1984) is the transformation of lawyers' discourse along similar lines to those described by Rubin. I cannot take up Ackerman's views here, and shall only remark that even if the same discursive modes were to appear in practitioners' talk as in scholars' talk, their meanings (a deliberately vague term) could still remain distinct, and genuine unity of discourse between the two groups need not thereby be reinstated. But the resulting increased surface resemblance between the two discourses could induce error and encourage abuse.

insight and illumination; it is a discourse marked by a deliberate effort at rigor and precision, in which systematically selected data is related to explicitly stated normative premises; it is a discourse self-consciously enriched by the methodologies of the various human and social disciplines; it is also a discourse characterized by flights of imagination as well as the strictures of logic rather than by the more practical virtues of good judgment and common-sense. Like all theoretical discourse this one too is answerable to norms of harmony, elegance and economy; this discourse can be exploratory, tentative, adventurous and playful. It is in short the discourse of ideas rather than the discourse of action. Such discourse is ill-suited to engage, let alone persuade and guide public decisionmakers.

To whom then is substantive legal theory addressed? Does it have an audience at all? The obvious answer seems to me to follow directly from Rubin's suggestion that legal scholars disrupt the unity of discourse with practitioners: to take seriously the idea of an independent, distinctive discourse implies that legal scholars who engage in this enterprise simply talk to one another. *A domain of discourse defines and circumscribes its own audience.* Are then academic lawyers who subscribe to substantive legal theory doomed to practical irrelevance? Are they fated to remain enclosed within their own discursive circle, unheard and ignored by the legal profession and the rest of the world? The key to a negative answer can be found in an important ambiguity in the concept of an *audience.*

Consider the role of the audience in two common kinds of events: a lecture and a play. In a lecture the audience has the discursive role of the *listener*: the speaker actually addresses the audience, and to that end she must strive for discursive unity with her audience. Communicating to and with the audience is what the lecture is all about, and any discursive discrepancy between speaker and listener will be an impediment to the communicative success of this venture. The situation in the theater is radically different. Here the actors communicate with one another, not with the audience. To secure such communication the language of each speaker must be suited to the discursive aptitude of his listeners — i.e., the other protagonists in the play to whom he speaks — not to that of the audience in the auditorium. Relative to the discourse that takes place on the stage the people in the audience are *eavesdroppers* who listen in unnoticed on other people's conversations.

On Rubin's view the task of legal scholarship is to address and persuade public decisionmakers. He applies, in other words, the lecture conception of an audience to those decisionmakers: they are the intended listeners to

whom scholarly speech is directed. I have pointed out the incongruity between this conception of an audience and Rubin's advocacy of breaching the unity of discourse between scholars and lawyers. But the alternative to Rubin's conception of the communicative goal of scholarly discourse is not a kind of collective scholarly solipsism that excludes practitioners altogether from its ambit. Instead lawyers, judges and other decisionmakers can still perform in regard to the newly constituted scholarly discourse the role of audience, though in the sense suggested by the theater analogy.

Every analogy has its perils, and the one I just drew is no exception. Nonetheless, it seems to me that without overdrawing the analogy we can derive from it some additional instruction. One point is this: as the theater example suggests, assigning to decisionmakers the discursive role of eavesdroppers rather than listeners to substantive legal theory by no means demotes them to a secondary or inferior status relative to that enterprise. After all the primary goal of the actors' play acting is the edification and entertainment of the *audience*. If it weren't for the audience the theatrical enterprise would lose most of its point. Still the theater's mission is best served when the actors ignore the audience and concentrate instead on creating and inhabiting the make-believe world within which their fictional discourse is conducted. So also in the case of law. Much of the point of substantive legal theory derives from the realization that it is conducted in the presence of a large audience consisting of practitioners and decisionmakers. But it doesn't follow that the legal theoretician's task is to address this audience and treat it as her listeners, let alone that she must convey to them persuasive communications which presume to prescribe the decisions they should reach and the actions they should take. To be sure, the goals of legal scholarship are not quite those of the theater. Though the audience's edification and entertainment do apply here as well, the more prominent tasks that it would be natural to ascribe to substantive legal theory are the audience's enlightment and education. These are of course vague goals, and I cannot even begin here to spell out their more precise meaning or the ways in which legal theory can be thought to serve them. Even so, I hope it is clear that it might be in principle possible to serve such goals, unlike the ones favored by Rubin, by espousing the theater's strategy: i.e., by having legal scholars engage in their own discourse and talk to each other *as if* no one else were listening.

The second moral that we can draw from the comparison between lectures and plays concerns the audience's discursive activity in the former and its

passivity in the latter. It is altogether appropriate — i.e., consistent with our conception of a lecture — for the audience to speak to the lecturer either by disputing with him or at least by posing questions to him. This is a mark of the fact that lecturer and audience form a single discursive community or inhabit the same universe of discourse. By contrast, any similar interventions by the theater audience would be perceived as brute disruptions of the play. Here again the theater analogy seems to me to apply to the legal situation. The suggestion that legal scholars sever the unity of discourse with practicing lawyers and create a discourse of their own has the further implication that practitioners and decisionmakers as such are excluded from active participation in that discourse. This seems to me a sound implication of Rubin's view, though perhaps not one that he himself anticipates. I cannot here fully defend this position, but I can briefly state why I welcome it. It comports with my belief that there can be no discursive community — no genuine dialogue — between seekers after truth and illumination and result-oriented wielders of power.[9] The most important methodological significance of this position is that substantive legal theory decidedly does not participate in a dialogue in which judicial opinions or other official pronouncements count as interlocutors.[10]

With these preliminaries the reader is now invited to the symposium. I hope that my comments will be of some help in orienting the reader toward the symposium's main theme as well as toward some of the controversies that surround it. My comments should have done even more to fix the terms of the invitation, in the way I understand it. I hope therefore that it is now clear that the invitation should seem by no means less enticing just because it may call upon the reader to be an eavesdropper to the discourse that follows.

9. For some further elaboration of this view, see M. Dan-Cohen, "Law, Community and Communication," 1989 *Duke L.J.* 1654.
10. Which is of course not to deny that they define, in various ways that I need not here explore, part of the subject matter of scholars' discourse.