2010

The Judiciary and the Academy: A Fraught Relationship

Richard A. Posner

THE JUDICIARY AND THE ACADEMY: A FRAUGHT RELATIONSHIP

RICHARD A. POSNER*

I have been a federal court of appeals judge since 1981, and before that I had been a full-time law professor since 1968. And since becoming a judge I have continued to teach part time and do academic research and writing.

The United States is unusual if not quite unique in the porousness of the membranes that separate the different branches of the legal profession. The judiciary both federal and state is a lateral-entry institution rather than a conventional civil service; and unlike the British system (though that system is loosening up and becoming more like the U.S. system), in which the judges are drawn from a narrow, homogeneous slice of the legal profession – namely, senior barristers – American judges are drawn from all the different branches of the profession, including the academic. Among appellate judges who came to the bench from academia are Oliver Wendell Holmes (although he had joined the Harvard Law School faculty only months before being appointed to the Supreme Judicial Court of Massachusetts, he had been doing academic writing for many years), Harlan Fiske Stone, William O. Douglas, Felix Frankfurter, Antonin Scalia, Ruth Ginsburg, and Stephen Breyer (U.S. Supreme Court); Calvert Magruder, Charles Clark, Jerome Frank, Joseph Sneed, Harry Edwards, Robert Bork, Ralph Winter, Frank Easterbrook, Stephen Williams, J. Harvie Wilkinson, John Noonan, Douglas Ginsburg, S. Jay Plager, Kenneth Ripple, Guido Calabresi, Michael McConnell, William Fletcher, and Diane Wood (U.S. courts of appeals); and Roger Traynor, Hans Linde, Benjamin Kaplan, Robert Braucher, Ellen Peters, and Charles Fried (state supreme courts). (The list is not intended to be exhaustive.) All these are appellate judges but a number of distinguished federal district judges have been appointed from the academy as well, such as Jack Weinstein, Robert Keeton, and Louis Pollak. And these lists are not exhaustive.

One might think that with such a tradition of academics becoming judges, the gap between the academy and the judiciary would be small – and narrowing, because the trend, at least in the federal courts of appeals, has been toward increasing recruitment from academia. Yet actually the gap seems to be widening. The reason is increased specialization.

Suppose there are two adjacent fields, neither highly specialized. It would be easy enough to be conversant with both – even proficient in both – and draw from both no matter which of the two fields one happened to be in. And that was once the case with academic law and judging. I mentioned how Holmes had done academic writing for many years before actually becoming a member of a faculty of law. He continued to do important academic writing after becoming a judge (notably 'The Path of the Law'[1]). Brandeis, never a professor, wrote one of the most important law review articles in history ('The Right of Privacy',[2] nominally co-authored with Samuel Warren – but Brandeis wrote it all). Cardozo, also never an academic (in fact he attended law school for only two years), wrote *The Nature of the Judicial Process* (1921) – a much-celebrated academic book – and other books and articles as well. Learned Hand, and above all other federal court of appeals judges Henry Friendly, neither with an academic background,

---

* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. I thank Sonia Lahr-Pastor for her helpful research assistance and Michael Boudin for insightful comments on a previous draft of this paper.

1 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

2 Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

wrote influential books and articles.[3] This tradition of influential scholarship by judges who had not been law professors has waned, although examples can still be found; I am thinking of recent lectures by federal court of appeals judges Michael Boudin[4] and Pierre Leval[5] (both, incidentally, former law clerks of Judge Friendly).

So judges who had not been academics wrote (and still write, but much less often) influential legal scholarship and, conversely, until relatively recently leading law professors produced down-to-earth scholarship that directly influenced the law – books and articles, legal treatises, restatements of the law and model codes, that decisively influenced American common law and books and articles that influenced the judicial process; in the latter category I have in mind particularly the challenges to legal formalism mounted by the legal realists (though largely echoing Holmes and Cardozo) and by the legal-process school of Hart and Wechsler, although a later effort, by the 'critical legal studies' movement, to influence judicial decision making fizzled.

Of course law professors continue to write books and articles, treatises, and so forth and also to write about the judicial process. In fact the volume of academic writings on law has grown more or less in proportion to the increase in the amount and complexity of American law, the profession, and litigation. But with the exception of the academic subfield of economic analysis of law, the current academic literature – at least the literature that emanates from the elite law schools – is less influential than it once was.

It will help in explaining this conclusion if I divide legal scholarship into three types. (I shall intersperse discussion of legal teaching with discussion of scholarship.) The first is traditional doctrinal scholarship, typified by the treatises and the restatements. They continue to be produced in quantity by law professors. But this form of legal scholarship has tended to migrate to the less prestigious law schools. It no longer engages the interest of many academics at the elite schools (say the 20 top-ranked schools), as it once did, even though those schools produce a high fraction of judges (particularly federal judges – 61 percent of federal court of appeals judges[6]) and especially of law clerks (and again, particularly law clerks of federal judges).[7] The turning away from the production of such scholarship is also a turning away from the teaching of legal doctrine. Of course it still is taught and indeed still dominates legal teaching as a whole, but the tendency in many courses in elite law school is to subordinate emphasis on doctrine to emphasis on economic, philosophical, and other non-doctrinal perspectives on law, including perspectives supplied by jurisprudence and by constitutional theory (discussed below). This tendency is found, though to a lesser extent, in law schools generally, not just in the elite ones.

The second type of legal scholarship consists of non-doctrinal scholarship that draws on the social sciences. Only one branch of this scholarship has obtained a secure footing in legal practice and in judging, and that is economic analysis of law. Much of that scholarship, too, is remote from the practical interests that engage judges and practitioners. But in a number of fields of law, such as antitrust, regulated industries, finance, and intellectual property, economic analysis has become widely accepted as an

---

3 See, for example, Learned Hand, *The Bill of Rights* (1958); Henry J. Friendly, *Benchmarks* (1967); Friendly, *Federal Jurisdiction: A General View* (1973).

4 See, for example, Michael Boudin, 'Judge Henry Friendly and the Mirror of Constitutional Law' (2007) 82 *New York University Law Review* 975.

5 See, for example, Pierre Leval, 'Did *Campbell* Repair Fair Use?' (speech delivered at George Washington University Law School, June 2, 2009; brochure available online at <www.csusa.org/chapters/dc/Meyer%20Memorial%20Lecture%202009.pdf>).

6 Computed from Law Clerk Addict, <www.lawclerkaddict.com/appellate/> at 24th May 2010.

7 Roughly 94 percent of Supreme Court law clerks in the 2000 through 2008 terms were graduates of the 8 top-ranked law schools. Computed from Brian Leiter, *Supreme Court Clerkship Placements, 2000 Through 2008 Terms* (2008) Brian Leiter's Law School Rankings <www.leiterrankings.com/jobs/2000_08_scotus_clerks.shtml> at 24th May 2010.

indispensable aspect of legal analysis, though it is still resisted by many judges as an alien intrusion into their mystery.

The third type of modern legal scholarship I'll call 'legal theory'. It deals with rather abstract issues involving the nature of law and justice, and the judicial role, particularly in interpreting the Constitution. One might think of it as jurisprudence crossed with politics. It engages the attention of many very able academic lawyers and is heavily taught. Oddly, though it addresses issues that are certainly very important to judges, especially appellate judges and above all Supreme Court Justices, it does not have much impact on the judicial process. This is partly because the literature is too abstract, borrowing as heavily as it does from philosophy and social theory, and partly because both it *and* adjudication at the highest levels are strongly political and judges are not likely to take their political cues from professors.

The abstract, the esoteric – sometimes the impenetrable – character of this literature (as of much of the social-scientific legal scholarship) reflects the growth in the degree of specialization of legal scholarship. If there is one law professor, he has to know something about all fields of law; and American judges, especially federal judges (because the federal diversity of citizenship and habeas corpus jurisdictions bring a great deal of state law before federal judges) are approximately in that position. If there are 4000 law professors, there can be (at a guess) an average of 100 to 200 professors in each field. At that point, with scholars crowding into every field, each one becomes divided into subfields, placing generalists at a double disadvantage: they do not have time to keep up with so much scholarly writing and they find legal scholarship ever less accessible. The reason for the latter effect of specialization is that specialists develop a specialized vocabulary (much as family members often communicate with each other in a cryptic private language) that creates a barrier to understanding by non-specialists. As subfields expand, moreover, the scholars in each subfield find they have audience enough among their fellow specialists and so feel no need to reach a wider audience, an effort that would require them to retool their vocabulary. So constitutional theorists write for each other and do not bother to make themselves intelligible to other lawyers – or to judges.

'Jargon' has a bad name but really all it means is the adaptation of ordinary language to communication within a group having special interests most efficiently discussed within that in-group in a special, a tailored, vocabulary. American judges, with few exceptions (the most important probably is the bankruptcy bench), are generalists rather than specialists; we do not have a tradition of specialized courts, as the Continental European court systems do. That makes American judges outsiders to the jargon of law's subfields.

The trend toward ever greater specialization in legal scholarship affects the selection of persons into a career in academic law in a way that drives a further wedge between the academy and the judiciary. It used to be that most law professors, even the most distinguished, did not have advanced degrees and only became academics after several – and sometimes a good many – years in the practice of law (whether private or government practice). In these respects they were much like judges; they came from the same pool; they identified with judges and other legal practitioners (as opposed to academics in other fields), and all this facilitated intercommunication. Although they usually became academics at a much younger age than judges typically are appointed, they would often continue to be involved in practice as a consultant or part-time practitioner, and their scholarship would be oriented toward service to bench and bar. Nowadays the legal academy is increasingly peopled by refugees from fields such as economics and philosophy that are at once more competitive and less well remunerated than legal teaching. These refugees have the tastes and background that augur a productive career in specialized, interdisciplinary legal research. They constitute a very different pool from the one from which judges are drawn.

These economists, philosophers, etc. *manqué* identify with the academy rather than the legal profession, unlike earlier generations of law professors. (You even see this in the way they dress.) There is much greater interest in the acquisition of specialized knowledge in non-legal degree programs (many law professors now have advanced degrees in non-legal fields) and much greater emphasis on writing for publication in scholarly journals. Quantity of publication has become a major criterion of success in academic law and a condition of advancement – as used *not* to be the case in law. Legal academics have less and less interest in service to the practical side of the profession, as Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit – a former academic – has complained.[8] Law schools, moreover, have moved to restrict law practice by their professors.

At the same time that legal scholarship has become more specialized, the judiciary has become more professionalized, and this has further operated to drive the two branches of the legal profession apart. By 'professionalization' I refer to the aim and outcome of measures believed to improve the quality of the judiciary, though some of these measures actually are responses to the political environment and some are designed merely to reduce workload pressures and thus give the judges an easier life. The measures include more thorough screening of candidates for federal judgeships (in part to deflect politically motivated criticisms of judicial candidates), the gradual emergence of a judicial career track in which, increasingly, the basis of selection for judicial positions is promotion from a lower tier of the judiciary (all the current Supreme Court Justices are former federal court of appeals judges), the rise of online legal research, and the expansion in the number and quality of law clerks. Nowadays, for example, almost all Supreme Court law clerks have clerked for at least a year on a lower court and applicants for Supreme Court clerkships (indeed for all judicial clerkships) are much more carefully evaluated than used to be the case. (I was appointed a law clerk to Justice Brennan in 1962 by a law professor to whom Brennan had delegated the appointing authority; I was not interviewed by Brennan.)

Even if the recent 'improvements' are largely political, workload-related, or even just cosmetic, they are significant to my analysis because they have reduced the judges' dependence on academic literature. A traditional form of legal scholarship – the treatise – was valuable in part because it aggregated the cases relating to a particular field of law. But now very bright law clerks (or for that matter the judge himself), using electronic research tools, can find all the cases pertinent to an issue without consulting a treatise.

We may say then that American judges are more self-sufficient than they used to be, and likewise the professoriate is more self-sufficient than it used to be; increasingly the professoriate has neither the experience nor the inclination to try to influence judges by writing books or articles, restatements or model codes, which might be interesting or accessible to them. The law schools continue to grind out such materials, but because these materials have lost much of their former prestige in the legal academy, they tend to be produced as I said by faculty at the less prestigious law schools. The gap between the professoriate and the judiciary is greatest at the higher levels (measured by prestige or influence) of both branches of the legal profession. The gap has been widened by a perception that elite law schools, having become havens in the 1960s and 1970s for smart 1960s radicals, remain far to the left of a judiciary that has been swinging right since Nixon's Supreme Court appointments.

---

[8] See, for example, Harry T. Edwards, 'A New Vision for the Legal Profession' (1997) 72 *New York University Law Review* 567; Edwards, 'Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater)' (2002) 100 *Michigan Law Review* 1999.

The principal exception to these generalizations is, as I have suggested, economic analysis of law, an interdisciplinary, highly 'academified' subfield of law (and also of economics) that has nevertheless had a significant impact on legal doctrine, as reflected in the citations in and even the vocabulary of numerous judicial opinions in a variety of economically oriented fields of law. Not that judges are big readers of books and articles that expound economic analysis of law; but economic analysis is taught in law schools, and the students graduate and become law clerks and later become practicing lawyers, and the law clerks and the practitioners, with assistance from expert witnesses, mediate as it were between the professors and the judges.

No other 'alien' approach has been able to colonize law as administered by judges. There is a reason. Economics helps to clarify economic issues, and economic issues are inescapable in law because economic regulation is an important task of law – think of contract and property law, bankruptcy and secured transactions, taxation, corporate governance, consumer protection, regulation of interstate and foreign commerce, securities and telecommunications regulation, insurance law, pension and investment law, and antitrust law.

Moreover, modern economics has had some success in demonstrating that many 'noneconomic' issues can fruitfully be recast in economic terms; and so there are now thriving subfields of economic analysis of law dealing with accidents, marriage, crime, conservation, intellectual property, and even adjudication and judicial behaviour. 'Nonmarket economics' does not have as much appeal to judges as the market economics that illuminates areas in which the law regulates or reflects market transactions, because non-economists resist redescriptions of nonmarket phenomena as economic phenomena. But the nonmarket areas of law are of course very important, and at least some judges are receptive to the help that economics can provide them in those areas. This receptivity will grow as more judges are appointed who were exposed to economic analysis of law in law school or law practice.

The judiciary's acceptance (though incomplete) of an economic perspective on law, or at least on economic law, reflects a consensus in the judiciary as in the nation as a whole concerning the commercial character of American society and the resulting salience of commercial values. Although there is still fierce controversy over particular economic issues, as we're seeing now in debates over financial practices and regulation, the primacy of commercial values in American culture and ideology is largely unchallenged. Debates within and about economics reflect a narrow band of disagreement within a broad commitment to a post-socialist, free-market economy. That commitment provides the basis for judicial receptivity to market economics.

The legal debates that are not constrained by a national consensus concern matters in which commercial values play little role: such matters as abortion, homosexual marriage, the role of religion in public life, capital punishment, the regulation of elections and of political campaigning, privacy, the rights of criminals, affirmative action, gun control, substance abuse, assisted suicide, international law, terrorism, and immigrants' rights. (Eminent domain and environmental regulation are among the relatively few *economic* domains that stir passionate disagreement among judges, and some environmentalists deny the relevance of economics to environmental protection.) These are highly politicized issues, both for judges and for legal academics. And as I said earlier, judges are not likely to take their political views from legal academics. Some of the issues might benefit from an economic perspective, but they will not be debated in primarily economic terms.

Judges are also unlikely to be persuaded to adopt law professors' conceptions of the judicial role. Not only because they don't think that the modern law professor understands that role, but also because the conceptions are contested and politicized. Academics like to tell the judiciary that it should be more restrained or more free-wheeling – more deferential to other branches of government or less so; that it should

cling to the 'original meaning' of the Constitution or adopt the concept of a 'living,' evolving, Constitution; that it should be left activist or right activist, Brennan activist or Roberts activist. The judges have their own, strongly held views on such matters. They do not want their job description written by law professors. They find it helpful in deciding an antitrust case to learn the economic motivation and consequences of an economic practice, but unhelpful to be told that they should conform their judicial decisions to this or that concept of judicial legitimacy.

There is a prevalent view among judges – I share it – that someone who has never been a judge can't really understand the nature of the job and therefore can't advise helpfully on how to do it better. The more remote a law professor is from the judiciary – if he not only has never been a judge but has never practiced law, and has little interest in legal doctrine and is really a philosopher or a critical theorist or a historian rather than a lawyer – the less likely the judge is to be persuaded by the professor's conception of the judicial process.

I do not consider what I have described as the increased distance between the academy and the judiciary to be any kind of disaster. There is much first-rate scholarship and teaching at American law schools, and the best of that scholarship should eventually seep into the judicial process, via law clerks, the bar, and the increasing number of academics being appointed to the judiciary. But I think the law schools, as well as the judiciary, would benefit if more space in academic law were allowed for teaching and scholarship oriented toward practice and judging.