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INTRODUCTION

In his typically clear statement of a provocative thesis, Fred Schauer, along with his co-author, Virginia Wise, ask us to think about positivism in a new way.[1] Their claim has two parts. First, Schauer and Wise redefine legal positivism as an empirical claim about the limited domain of information that legal decisionmakers use to make decisions.[2] Second, they begin testing the extent to which our legal system in fact reflects this limited domain.[3] Ironically, Schauer and Wise believe that positivism, so conceived, is "increasingly false."[4] Thus, their two-part approach is, first, to declare that legal positivism should be conceived of as a claim about law's limited domain; second, that so conceived, our legal system is diminishingly "positivistic."

In this Article, I propose to restate and give a visual depiction of the Schauer/Wise thesis. Then, I will make a few observations on the possibilities and difficulties of testing the extent to which our legal system reflects limited-domain positivism. Finally, I will link this reformulation of legal positivism to social science methodology in general and, more particularly, to its antecedents in logical positivism.

I

WHAT IS LIMITED-DOMAIN LEGAL POSITIVISM?

Schauer and Wise start their investigation with the proposition, familiar to lawyers, that one should not answer a question without knowing why it is important to ask it. In this case, the question is: "What is legal positivism?" As Schauer and Wise emphasize, the definition depends on what the alternatives to legal positivism might be.

Traditionally, legal positivism was set in opposition to natural law.[5] Under the traditional view, the definition of legal positivism de-

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1 Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080 (1997).

2 *Id.* at 1088-93.

3 *Id.* at 1102-08.

4 *Id.* at 1083.

5 *See id.*

nied what natural law asserted was true. The central claim of traditional natural law is that the phrase "immoral law" is an oxymoron.[6] A purported law is not law if it is immoral. *Lex injusta non est lex.* Schauer and Wise trace the roots of this natural law claim to Cicero.[7] Legal positivism rejects the claim. Positivism claims it is false that "morality . . . is one of the truth conditions for legality in all possible legal systems."[8] It is not true that all laws necessarily are moral.

Jumping two thousand years ahead of Cicero, the neo-classical formulation of the legal positivism/natural law debate centers around the exchange between H.L.A. Hart and Lon Fuller.[9] Linking their debate to the events of the day, Hart and Fuller discussed the meaning of the Nuremberg trials. What the trials meant depended on one's view of the relation between morality and law. If the immoral "laws" of the Nazi regime under which the Nuremberg defendants justified their actions were truly law (the Hart position), the Nuremberg defendants were punished because they acted immorally, though not illegally, or they were punished under ex post facto laws.[10] If, on the contrary, the Nazi regime never managed to create law (the Fuller position), then the Nuremberg defendants were justifiably punished under the law of the old Weimar Republic, which continued in force.[11]

Figure 1 visually depicts the classical or neo-classical debate between positivism and natural law. Imagine that each point on the page is a possible argument that affects a legal decision. The circle labeled "morality" encompasses all possible moral considerations that might affect a decision. The circle labeled "law" encompasses all possible legal considerations. The classic natural law claim is that Venn diagrams 1-C or 1-D are the only proper conceptions of law. Legal commands must come from the set of moral commands in order to be valid law. Law may be only a subset of all morality (diagram 1-C rather than 1-D), because traditional natural law recognizes that some moral duties or moral considerations may be distinct from law. But every law must satisfy the demands of morality; otherwise it is not law. Positivism, under the classic conception from which Schauer and Wise try to move away, denies that 1-C or 1-D are the only possible depictions of the law. Law and morality could overlap in part and yet remain dis-

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6 *Id.* at 1084, 1086.

7 *Id.* at 1084.

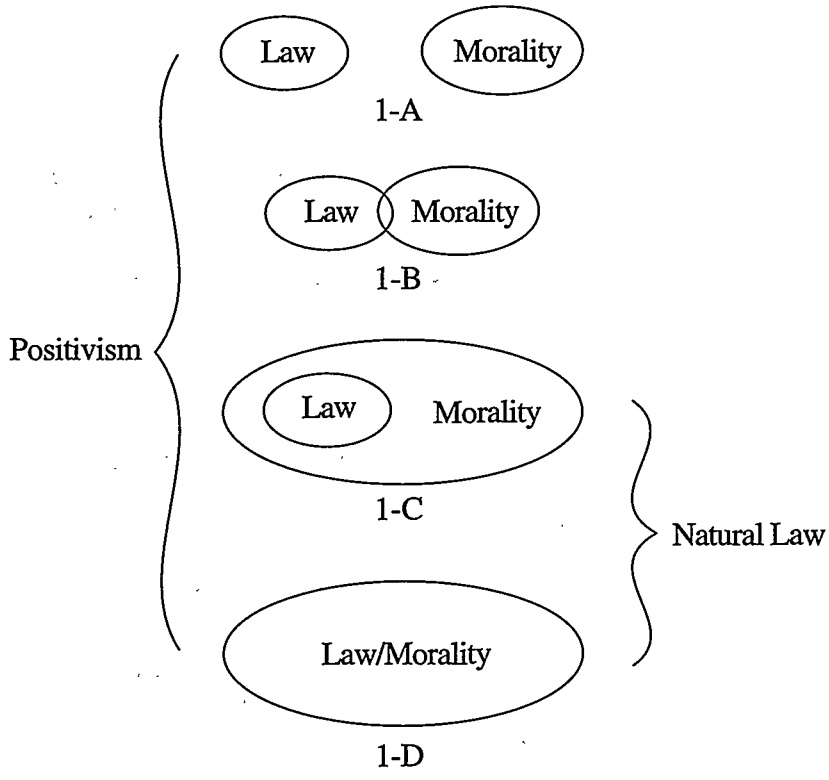
8 *Id.* at 1085.

9 Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

10 *See* Hart, *supra* note 9, at 618-21.

11 *See* Fuller, *supra* note 9, at 646-48, 650-61.

FIGURE 1
THE CLASSICAL POSITIVISM/NATURAL LAW DEBATE



tinct domains (Figure 1-B), and law in a truly horrible state could be entirely distinct from morality (Figure 1-A).

The rival conceptions of law depicted in Figure 1 cannot be tested empirically. Rather, they are definitional. It is impossible to negate by observation the old positivist claim that law might have no, some, or a complete overlap with morality (*i.e.*, that any one of the four Venn diagrams is possible). Since these four possibilities cover all possible logical relationships between the domains of law and morality, and positivism claims that any relationship is possible, no contradictory observation is conceivable. Natural law, on the other hand, claims that Venn diagram 1-C (law is a proper subset of morality) or 1-D (law is coextensive with morality) is the only proper view of law. But natural law does not deny that many systems that claim to be law or have coercive force may look like 1-A or 1-B. Thus, observations of how legal systems operate in practice cannot be used to resolve the old debate between positivism and natural law. The relevant claims are conceptual, not empirical.

Schauer and Wise want to reorient this debate. Their thesis is that the principal positivist claim should be that law is a limited domain.[12] They contrast this position with the claim of others that law, potentially at least, can look at any possible moral reason for a legal decision, and that there is in this sense nothing unique about law or legal reasoning.[13] These others include Ronald Dworkin, legal realists, critical legal scholars, and Posner's version of legal pragmatism.[14] While these others have many disputes between themselves, they all deny that judges actually decide cases on the basis of distinctive, limited legal reasoning.[15] As a group, then, they can be labeled as claiming that law is "non-autonomous."[16]

A comparison of Figures 1 and 2 illustrates how Schauer and Wise have shifted the debate. The individual Venn diagrams, representing the possible relations between law and morality, are identical in the two Figures. Schauer and Wise do not propose a new conception of the possible relation between law and morality. Instead, Schauer and Wise re-label which Venn diagrams depict positivism and which depict non-positivism. Schauer and Wise want each side of the debate to abandon claim to a diagram, thus narrowing their claims.

Under Schauer and Wise's vision of limited-domain positivism, positivism can no longer claim that all conceivable relationships between law and morality are consistent with positivism.[17] In contrast to the traditional positivist position, limited-domain positivism abandons Figure 2-D. Figure 2-D depicts law as coextensive with morality. This is the non-autonomy family of claims in which Schauer and Wise place Dworkin, Posnerian pragmatism, legal realists and critical legal study theorists.[18]

Schauer and Wise want the other side of the debate to abandon claim to Figure 2-C. In the traditional positivism/natural law debate, natural law lay claim to Figure 2-C, because it depicts law or legal reasoning as imbedded within a larger morality or moral thinking. Schauer and Wise drag Figure 2-C to the positivism camp. Even though all laws are moral in Figure 2-C, which is the traditional criterion of natural law, Figure 2-C shows law as a limited domain. Scholars who reject the autonomous character of law should abandon Figure 2-C.

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12 Schauer & Wise, *supra* note 1, at 1088-93.

13 *Id.* at 1093-96.

14 *See id.* at 1096-99.

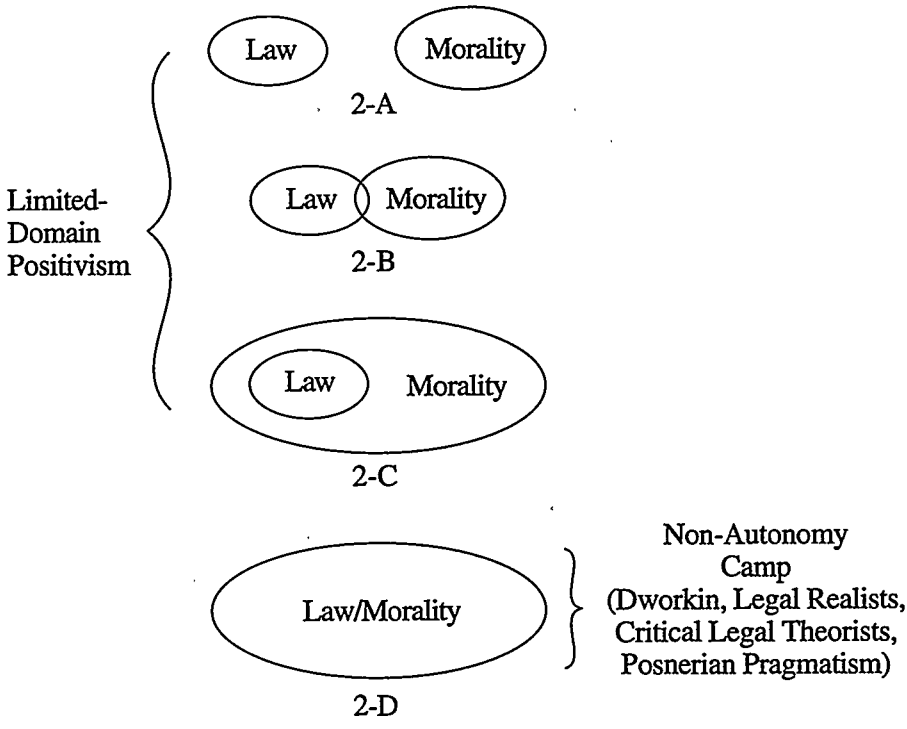
15 *See id.* at 1097-98.

16 *See id.* at 1098.

17 *See id.*

18 *Id.* at 1096-99.

FIGURE 2
SCHAUER/WISE LIMITED-DOMAIN POSITIVISM DEBATE



This repositioning by Schauer and Wise injects fresh vigor into the old "what is positivism" question.[19] They rightly note that few people today worry about the old debate between natural law and morality.[20] Much of the contemporary debate centers instead on whether, and to what extent, law is an autonomous system. Schauer and Wise correctly explain that the negation of this claim is at the heart of much contemporary jurisprudence.[21]

Schauer and Wise's major point is that positivism is more fruitfully understood as an empirical claim that law has a limited domain.[22] The claim is that law or legal decisionmakers, in fact, look to limited sources when making their decisions.[23] Alternatively, the

19 *Id.* at 1087.
20 *Id.* at 1086-87.
21 *Id.* at 1091-93.
22 *Id.* at 1088-93.
23 *See id.* at 1094-95.

claim asserts that not all norms, facts, values, and so forth relevant to policymaking are also relevant to law.

One wonderful consequence of this reorientation of positivism's central claim is that positivism can be more or less true, rather than necessarily true or necessarily false. The central claim of positivism is thus empirical, rather than conceptual or philosophical. Different legal systems, the same legal system at different times, or indeed different judges in the same legal system at the same time, can be more or less positivist in this limited-domain sense.

II
TESTING THE CLAIM OF POSITIVISM

After reformulating positivism as a claim that law is a limited domain, Schauer and Wise then proceed to test whether the claim is true.[24] In their article, they only sketch the beginning of the empirical test. I likewise will be impressionistic about the empirical evidence, giving general ideas and reactions, rather then rolling up my sleeves and grubbing for evidence myself. Of course, if the question "what is law?" is truly an empirical one, as Schauer and Wise assert,[25] then grubbing for data is what legal philosophers will have to start doing. One might expect some resistance to the Schauer/Wise claim as the consequences of this change in work habits become clearer.

Schauer and Wise correctly emphasize that the central claim of legal positivism is that the criteria for what is law—the practice of recognition—depends not on the content of the law, but on the sources from which it comes.[26] Schauer and Wise concede that even the old conception of positivism has this source-based focus.[27] But as they point out, under the older conception of legal positivism, the source is more fignrative than literal.[28] If a society empowers its judges to make decisions considering all factors, then the law would still be positivistic in the old sense, even though it will incorporate all issues of morality as well. But Schauer and Wise insist that, under their new conception of law as a limited domain, legal positivism makes a narrower, more literal claim.[29] The claim is that legal decisionmaking uses limited sources, and thereby will reach results different from those that would be reached under a general command to make the best decision, all things considered.

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24 *Id.* at 1096-1109.
25 *Id.* at 1096-99.
26 *Id.* at 1093-96.
27 *Id.* at 1093.
28 *Id.*
29 *Id.* at 1093-94.

Under the Schauer/Wise conception of positivism, legal decisionmaking will be distinctive insofar as the information on which legal decisionmakers proceed is limited in some way.[30] Schauer and Wise list four broad factors that may make legal decisions distinctive. First, legal reasoning may differ from general moral or political reasoning.[31] If lawyers are trained to think like lawyers, they will reach different decisions than non-lawyers would reach. Second, the procedures through which judges make their decisions differ from the procedures under which other actors make other political decisions.[32] Procedure can affect outcome. Third, the culture of lawyers differs from general political or intellectual culture, which could affect decisionmaking.[33] Finally, and the focus of the empirical tests of Schauer and Wise, legal decisionmakers could simply look to a more limited set of sources than other decisionmakers do.[34]

One can easily imagine ways of testing whether lawyers approach difficult problems in ways different from non-lawyers. Indeed, such tests have already been done, although admittedly without the goal of testing the "law as a limited domain" hypothesis. A wonderful example comes from Richard Weisberg.[35] He gave law students and others a packet of material explaining the laws about Jews under Nazi-occupied Guernsey, and asked the participants, acting as a British-trained lawyer, to decide whether a particular person should be deported under the laws.[36] Weisberg found that almost all students gave "legal" rather than "moral" responses, with a large number stressing only low-level legal inquiries in a neutral tone.[37] Nonetheless, only one of the seventeen students concluded that the person should be deported.[38] To turn this exercise into a test of Schauer and Wise's limited-domain positivism, one would have to compare the responses and decisions of law students to those of other students. The hypothesis would be that the acculturation of law students would cause them to give more technical responses, and perhaps to reach different results than non-law students.

In their article, however, the main evidence that Schauer and Wise present to test the "law as limited domain" hypothesis is citation patterns in the courts.[39] Schauer and Wise cite many studies and pres-

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30 *Id.* at 1094.

31 *See id.* at 1099-1100.

32 *See id.* at 1100-01.

33 *See id.* at 1101-02.

34 *Id.* at 1102-09.

35 Richard Weisberg, *The Hermeneutic of Acceptance and the Discourse of the Grotesque, with a Classroom Exercise on Vichy Law*, 17 CARDOZO L. REV. 1875 (1996).

36 *Id.* at 1891.

37 *Id.* at 1893-95.

38 *See id.* at 1893.

39 Schauer & Wise, *supra* note 1, at 1108, app.

ent new data of their own which strongly suggest that American judges in recent decades are increasingly likely to cite non-legal sources in their opinions.[40] Schauer and Wise realize that a full empirical test of their positivism claim would require additional data that would attempt more carefully to eliminate alternative hypotheses for the greater citations of non-legal materials.[41] For now, I will accept as proven, as Schauer and Wise think they will be able to prove, the argument that judges and lawyers are increasingly less limited in the range of sources that they are willing to cite or use, and turn to explanations.[42]

Schauer and Wise explain the greater citation of non-legal materials as a function of the explosion of legal information technology.[43] Today, it is far easier than in the past for a judge, or for the lawyers arguing before a judge, to obtain non-legal materials. With the advent of NEXIS as well as LEXIS, lawyers, with a few keystrokes, can obtain a whole host of non-legal information. This explosion, suggest Schauer and Wise, accounts for the increased use by judges of non-legal materials, thereby accounting for the erosion of law as a limited domain.[44]

Using this change in technology as an explanation for the increasing citation of non-legal sources is essentially a supply-side explanation. (Or, as I teased them at the conference, it indicates that Schauer and Wise are really economists rather then philosophers.) As it becomes cheaper to supply non-legal information, holding the demand for such information constant, one would expect more non-legal information to be used. Conceiving the law in this way suggests that the extent to which law is a limited domain is itself an instrumental decision—a decision based on the costs and benefits of access to non-legal information. A major cost of a "consider all sources" approach to law (and thus a major benefit of limited-domain positivism) is that processing information and learning how to process information are costly. Basing a decision on a limited domain is easier than basing it on all the potentially relevant moral and political reasons. To put it crassly, getting a J.D. degree is difficult enough, without having to get a Ph.D. in political or moral philosophy as well. Law as a limited domain thus economizes on decisionmaking. On the other side of the ledger, the benefit of the "consider all sources" approach (or a cost of limited-domain positivism) is that decisions in hard cases might be better or wiser if judges, especially those with herculean powers, can go beyond traditional legal information. Now that the tech-

40 *Id.* at 1108 n.89, app.
41 *Id.* at 1109.
42 *Id.* at 1105-08.
43 *Id.* at 1106-08.
44 *Id.*

nology revolution has reduced the cost of considering all sources, Schauer and Wise expect a shift in the equilibrium amount of non-legal sources used by judges.[45]

In effect, Schauer and Wise see a shift in the supply curve of non-legal information. Before a supply-side explanation can be convincing, however, one must rule out possible shifts in demand. Perhaps during this period of increasing citations to non-legal sources, for example, judges have felt an increasing need to justify their decisions with reference to political or moral information, rather than traditional legal information. Perhaps one way of empirically parsing out these alternative hypotheses is to look more closely at the types of non-legal sources which judges and lawyers are citing. If they cover a range of types, all of which have become more available through the technology explosion, then the supply-side explanation may be convincing. If, on the other hand, the increased sources seem to come from more narrowly moral sources, it may be that judges and lawyers feel an increased need to explain their decisions and arguments in moral, non-legal terms. In either event, however, the fact of increased citation of non-legal sources would cast doubt on the concept of law as a limited domain.

Another problem with such an empirical test concerns weight. It may be that any moral or political view is potentially available for a judge in justifying his or her decision, and data may show that judges increasingly resort to a wide range of materials. One might expect, however, that the weight placed on non-legal sources would be less than the weight a non-judicial decisionmaker would place on those sources. This issue of weight will be more difficult to measure.

III

LEGAL, LOGICAL, AND EMPIRICAL POSITIVISM

Let me now step back and make some more general observations or speculations about this very interesting recasting by Schauer and Wise of legal positivism's primary claim. I applaud their efforts to shift the questions in an empirical direction. Interestingly, this very move towards empiricism is itself a positivistic move. Logical positivism emphasizes empirical knowledge, falsifiable knowledge, and the distinction between "is" and "ought." Schauer and Wise, as they turn toward empiricism in order to test the extent to which our legal system reflects limited-domain positivism, ask what *is* the current practice of judges.[46] This question says little, of course, about what information judges *ought* to rely on. Merely setting up an empirical test is a positiv-

45 *Id.* at 1107-08.
46 *Id.* at 1108.

istic/scientific way of thinking about the issue. Once we accept the idea that positivism's main claim is (or should be) that law is a limited domain, it is a morally simple matter (although certainly a contested matter in fact) to go out and find the evidence necessary to determine the extent to which our law (or any system's law) is in fact a limited domain.

Of course, jurisprudes should be skeptical of the idea that evidence can be gathered in such a detached, neutral manner. Logical positivism is as much on the defensive as its legal cousin. Philosophers of science or social science recognize that background assumptions, or the paradigm within which the evidence is gathered, influence the way one interprets data. More crassly, the implications of the experiment may affect how the experimenter gathers and interprets the evidence.

Legal professionals may well want law to be a limited domain. Suppose it turns out that legal decisionmaking in America or Germany or Macedonia relies on a limited domain of information, meaning that legal decisions are based on distinctively legal information, and manipulated in a way that requires distinctive training and a distinctive "cultural" outlook. This distinctiveness would justify separate law faculties in those societies. To the extent limited-domain positivism is correct, law faculties should not simply comprise a department of a broader philosophy college, but indeed should be a school in their own right. The role of lawyers is special, and requires special training and acculturation. If limited-domain positivism justifies a special status for lawyers and legal academics, one should be suspicious of experiments conducted by such professionals that "find" our legal system to be a limited domain.

Finally, I want to speculate briefly on the similarity in roles of professional economists and professional lawyers. As Avery Katz has explained recently in an insightful essay, economists by professional training view themselves as having a limited role—a limited domain.[47] As Jeffrey Harrison nicely put it at the conference, economists speaking in their professional role typically limit their comments to questions of efficiency.[48] To repeat Harrison's example, an economist may feel professionally constrained to say that it is efficient to have third world children making brand name shoes.[49] Only when stepping out of this professional role, admitting that one would be defrocked for claiming special expertise in the matter, can an economist deplore the

47 Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229 (1996).

48 Jeffrey L. Harrison, *Order, Efficiency and the State: A Commentary*, 82 CORNELL L. REV. 980, 981-84 (1997).

49 *Id.* at 987.

exploitation of child labor. This self-enforced limited role of economists is one that most professional economists share.

Under limited-domain positivism, lawyers have a similarly constrained view of their role. As a trained professional, the lawyer will declare that he or she can reach decisions only from a limited domain of information. Only after stepping outside of the professional role, under this view of the law, can the lawyer deplore and denounce the law.

Critics of limited-domain positivism chafe at constraining lawyers and judges in this way. Dworkin's approach (at least as Schauer and Wise understand it), for example, lets the herculean judge look to all available information, both narrow legal rules and broader moral principles, to critique or move the law toward the morally best state of affairs.[50] Legal realists laugh at the deluded professional who claims his or her decisions are based on a limited domain of legal information. Critical legal theorists mock the professional who emphasizes a rigid is/ought distinction. Posner's pragmatism likewise rejects the existence or wisdom of narrow legal reasoning. In a well known article, Posner claims that law is decreasingly an autonomous discipline.[51] The trend toward broader sources that Posner detects is similar to the tentative empirical conclusions of Schauer and Wise in their article. But Posner, although the prime example of a law and economics scholar, is not behaving here in the standard economic vision of the economist's role. Economists, law and economics scholars, and lawyers generally accept the vision of law as a limited domain, with its implication that professionals should play a limited role in moral or policy debates. But, as Schauer and Wise suggest, this vision is eroding before our eyes.

CONCLUSION

Schauer & Wise make an important move in reinterpreting positivism as a claim about the limited domain of law. It blows the dust off the old positivism/natural law debate. Positivism is now linked to the vision of lawyers as technically trained but narrow professionals.

Such a vision of narrow professionalism is jarring to many. Like a Picasso portrait, it reveals a fearsome side of the profession, but it does not present a rounded portrait. Lawyers are technically trained, but the good lawyer tries not to be narrow. To the extent the good lawyer incorporates the full range of philosophical and social science think-

50 *Cf.* Schauer & Wise, *supra* note 1, at 1091-92.

51 Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

ing into his or her craft, the good lawyer can reject the claim of limited-domain positivism as empirically false.