

Reflections After Teaching Anglo-American Legal Theory*

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These reflections concern limitations upon prevalent modes of formulating and using legal theories. The analysis is predominantly contextual, focusing on the impact of legal "future shock." Other limitations stem from the author's reflections on "living" theories, the linkage between theory and ideology, and the need for humanistic legal theory.

PROLOGUE

Scene:

Law School Commencement Exercises

Actors:

The High Priest (Dean)

The Guest Preacher (Jurist)

The Grateful Graduates (Students)

The Chorus (Lawyers, including Law Professors)

The Proud Parents (People)

* The late Maitre Pierre Azard, to whom this volume is dedicated, was a man of high ideals and worldly outlook. My considerable contact with him enriched me with cross-cultural understanding and aspirations. I am honored to dedicate those reflections to his memory.

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The Guest Preacher:

“. . . and so my friends, it is an appropriate moment to recall and close with the guiding words of Mr. Justice Holmes: ‘The life of the law has not been logic but experience.’”

The High Priest:

“Thank you Guest Preacher. Let us now award the diplomas On each Grateful Graduate I hereby confer the degree of ‘Juris Doctor.’”

The Chorus (enlarged):

More applause.

The Proud Parents:

Aside quietly to the Grateful Graduates: “What does ‘juris’ mean?”

Grateful Graduates:

“Oh, maybe it has something to do with jurisprudence—you know, legal theory and all that ‘academic stuff.’”

Proud Parents:

“We see. Just thought it might have something to do with the law of life being experience as the Guest Preacher said.”

Chorus:

“.....”

From 1973 to 1975, Professor William Twining of the University of Warwick Law School in Coventry, England and I co-taught a comparative course in Anglo-American legal theory. The course sought to introduce students to main currents of Anglo-American jurisprudence through the writings of Bentham, Austin, Hart, Pound, Fuller, Llewellyn, Lasswell, McDougal and others. These reflections are the product of that teaching experience.¹

The purpose of these reflections is to present an intentionally argumentative “position paper” which in its broadest scope is about the limits of theory. More particularly, these reflections focus on some limits on legal theory caused by the fact of significant and swift cultural and societal change. In a sense, this is an

1. See generally Folsom & Roberts, *The Warwick Story: Being Led Down the Contextual Path of the Law*, 30 J. LEGAL EDUC. 166 (1979).

exploratory environmental impact statement. As the intellectual observer or reporter, I do not claim to be either comprehensive (for legal theory covers vast fields of learning) or authoritative (because, as a matter of faith, I don't believe there is a final word on anything, except possibly death). I do claim to discern in some legal theorists a certain absence of sensitivity to or awareness of the twentieth-century environment in which they work and the relevance of that environment to their studies. I also think that all who deal with the law, especially law professors, are theorists at one point or another.

Let's start with the word "theory." I perceive theory to be the articulation of general or abstract principles, concepts or analyses which are the product of contemplation or speculation about a given or assumed set of "facts." Facts, as observational categories, are "theories" in their own right. Put crudely, then, theory is most often a by-product of the collision of intellect and life. What results is a model or hypothesis offered by theorists as a rational, simplifying explanation of a pre-selected "factual" reality. Theories come in all sizes, shapes and packages. Some are grand theories purporting to explain vastly complex human or natural phenomena. Others are finite with narrow areas of concern and objectives. Still others are middling or second order theories, neither grand or finite. But no matter how you subdivide or otherwise label theories, they remain articulated by-products of intellect and pre-selected "realities." Whether you consider legal theory to be a branch of social theory or a branch of "natural" theory, or whether you consider theories of law to be distinguishable from theories about law, is immaterial to this conclusion. In this fundamental regard, legal theory is no different from theory in general.

I am concerned about limitations upon prevalent modes of formulating and using legal theories. My line of analysis is predominantly contextual. Legal thinkers sometimes fail to acknowledge and account for "future shock" and other important considerations in the formulation and use of legal theory. By "future shock" I mean the acceleration in the rate of cultural and societal change (including legal change) which we are all experiencing and which has been so well described and publicized by Alvin Toffler.²

2. See A. TOFFLER, *FUTURE SHOCK* (1970).

Future shock has a number of effects on theory in general and legal theory in particular which are often overlooked:

- (1) Future shock undermines the rational process of theory formulation by rendering "facts" exceedingly transient;
- (2) Future shock shortens the useful life-span of a well articulated theory; and
- (3) Future shock increases the inherent tendencies of theorists to "build castles in the sky" instead of on earth.³

Take, for example, theories of marketplace competition that abound in the field of antitrust, which happens to be my specialization. There are extensively developed theories of "perfect" competition,⁴ "monopolistic" competition,⁵ "destructive" competition,⁶ "workable" or "effective" competition⁷ and "non-distorted" competition,⁸ to name the most familiar. All of these theories represent intellectual efforts to grapple with economic and legal "realities" in the field of antitrust. As simplifying concepts in a complex area of human behavior, they have subjective value as intellectual exercises for theorists. They also have practical, more objectively measurable social utility. These theories demonstrate visible utility when and if, for example, they (1) impart direction, clarity and understanding to immediate participants in legal processes, including students, practitioners and law professors in search of road maps through the maze called law, or (2) assist in communication about legal affairs, or (3) enable laypeople to identify with and understand the law and legal processes.

I would argue, however, that the utility of these theories and all legal theory is both easily overestimated and deceptive. Why? In part because future shock has not been given its due. In all of these theories I see a search for lasting absolutes in a world of change; I see decay in intellectual castles from the bottom up. Viewed collectively, I see a plurality of theories which more closely resemble the economic, legal and human realities of antitrust. This plurality thus has greater utility than any individual

3. See generally L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1953).

4. I am referring to the economists' dream model of marketplace competition found in any standard text. *E.g.*, P. SAMUELSON, *ECONOMICS* (10th ed. 1976).

5. See, *e.g.*, Mueller, *Antitrust and Economics: A Look at "Competition,"* 10 ST. LOUIS U.L.J. 482 (1966).

6. See, *e.g.*, D. BOIES & P. VERKUIL, *PUBLIC CONTROL OF BUSINESS* 373-76 (1977).

7. See, *e.g.*, the summary presented in U.S. DEP'T OF JUSTICE, *REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS* 315-42 (1955).

8. Non-distorted competition is the theoretical heart of European communities competition law. See R. FOLSOM, *CORPORATE COMPETITION LAW IN THE EUROPEAN COMMUNITIES* 31-52 (1978).

theory. But pluralities change and decay rapidly too. If Toffler and others are correct in their observations, are the benefits of building and adding to such theories outweighed by their costs? I invite replies. Would a disposal service for dated legal theories be desirable? And who should be the sanitation engineers?

In this regard I do not see myself as anti-intellectual, just skeptically anti-theorist. There are alternatives to building and rebuilding castles in the sky. I am talking about alternative ways for lawyers and, especially, law professors and law students to spend their time. Greater fact orientation (which, as I have suggested, is also a theoretical species) is one alternative.⁹ While armchair legal theory formulation may have been excusable in the past, information retrieval and storage systems combined with advanced social science analytical techniques now permit and encourage fact orientation. Information overload, despite increasing complexity, is simply much less a problem than ever before. Information overload should not be a cause for retreats from "fact" into "theory."

It is now possible, to continue my example, to measure and quantify the marketplace realities of competition with considerable sophistication. Thus it is often not necessary to speculate whether a market reflects "workable," "monopolistic" or "theory X" competition when economists (and qualified lawyers) can reasonably ascertain the state of competition in that market. Policy planners and litigants may still usefully communicate in terms of the "theories" of their cases, regulations or legislative proposals. Laypersons may more readily identify with and understand antitrust law as a consequence of its theoretical underpinnings. Law professors and law students will continue to communicate on a theoretical plane which facilitates antitrust learning and research. But it is increasingly the case that basic market "facts," before, after, or while antitrust law is being enforced, altered or studied, need not be the subject of theoretical speculation.

Theory Lives

Future shock is not the only perspective in these reflections. I recognize and oppose the general tendency of theories to take on

9. This is not a new insight. American "realists," sometimes characterized as naive, have been saying much the same thing for years. See W. TWING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

lives of their own. While a "living" law or constitution may be desirable, a "living" theory of law can be downright dangerous. Legal theories by their very nature represent simplified pictures of legal processes. Moreover, legal theories are backward looking abstractions—things which are already cut loose from present-day life.

Theories thus distort from birth. Nurtured along by theorists, legal theories can gradually assume lives of their own, more and more distant from the "facts" upon which they were based. As this process of "theorization" occurs, the potential for distortion increases. Instead of constantly rechecking the observational basis of a theory, as a measure of its present utility, legal theorists may prefer to theorize about theory. Grafts and transplants appear. Dialogue continues. Distance is achieved. At some point, a legal theory can resemble a living being, lacking only a social security number. When living theories will die and who will issue their death certificates are uncertain. One hundred and fifty years passed before H.L.A. Hart was able to inter, in the opening chapters of *The Concept of Law*,¹⁰ some of the "command" theories of law of John Austin. In Kuhnian terms,¹¹ the paradigm finally changed. During the interim, the study of law suffered considerably. Law was read, if you like, with the wrong blinders on. And who is to say Austin's theories will not be reincarnated? Are Hart's concepts of law necessarily better blinders? Should law professors spend their time making blinders?

Ideology and Theory

Although the relationship between theory and ideology is virtually uncharted, I suspect there is at least one linkage which occurs somewhere near the point when a legal theory takes on a life of its own. I use the word "ideology" in the sense of generally shared values or perspectives. Independent of the bases upon which they were formulated, living legal theories may become legal ideology.

Take, for example, contract theory and ideology. Law teachers, lawyers and law students have long belabored the "bargain" or "meeting of the minds" theories of contract. The hours spent in these efforts are probably incalculable. Linkage of these theories to the ideological value of "freedom of contract" is easily made. Regardless of which is the chicken and which is the egg, too few stopped to analyze the social and factual premises behind the

10. See H.L.A. HART, *THE CONCEPT OF LAW* (1961).

11. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

theory or the ideology.¹² Only recently has recognition of the incidence of standard form contracts or the impact of economic regulation been acknowledged,¹³ revealing that in this century parties to contracts do not often "bargain" or "meet each others' minds" in offer and acceptance. Yet, in certain quarters, it may still be considered heretical to question whether freedom of or to contract is a shared value or shared experience in society.¹⁴ Some law school courses in contracts are still skewed in these theoretical and ideological directions. Restructuring legal theory and law courses is difficult. Restructuring legal ideology may be impossible.

Theory and Life

The reader will by now have discerned that these reflections contain a distinctly humanistic orientation. I would like to see more focus on human affairs in legal theory and legal ideology. At least since Freud, for example, few would deny that mankind frequently acts in irrational, emotional ways. Yet relatively infrequent acknowledgement of this "fact" is to be found in Anglo-American legal theory. I suggest that this is perhaps the case because law professors, jurists, lawyers and law students are so engaged in rationally oriented intellectual processes that they simply project these biases into their theories regardless of what humans involved in legal processes are doing *or* feeling. Such a reflection raises fundamental questions. Can rational, simplifying legal theories ever adequately explain complex, individual and group motivations and activities? Should such theories attempt to deal with how people *feel* about law and justice? Does this kind of acknowledgement intensify or dilute the impact of future shock? Does it shorten or lengthen the half-lives of all or some legal theories? Mere lawyers are not well prepared to begin to resolve these questions. I do believe intuitively, however, that these lines of inquiry will reveal further limits on legal theory.

12. Compare CORBIN ON CONTRACTS (1950), with WILLISTON ON CONTRACTS (1938).

13. See, e.g., Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

14. See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); G. GILMORE, *THE DEATH OF CONTRACT* (1974); *The Relevance of Contract Theory: A Symposium*, 1967 WIS. L. REV. 803.

Consider just one example: theories of fault in divorce proceedings. Traditional common law and statutory concepts of fault (adultery, non-support, drunkenness) are in a sense attempts to rationally explain why a nuclear family unit should be given permission to legally dissolve. Yet it is arguable that a family is essentially not a rational human construct but rather exhibits irrational, emotional human tendencies. The reality and experience of "family" include a wide range of complex, social and psychological phenomena which theories of fault in divorce proceedings tend to ignore. If we must retain theories of fault, why not make "failure to love" a ground for divorce? Psychiatrists, psychologists, social workers and other professionals could give meaning to such a standard (which is, admittedly, a theoretical standard). I welcome, in the process of legal theory formulation, any acknowledgement of the emotional and irrational aspects of human affairs. Is there not room and need for an "unreasonable person" theory in tort law?

Some readers, true-believing theorists or those for whom legal processes are "fact" and nothing else, may be discouraged by my moderation. Following a middle road, I have tried to take a provocative position upon some limits on the use and formulation of legal theory. I hope that others (especially other law professors), familiar with different branches of law and legal theory, will find a kernel of an idea (dare I say theory) in these reflections which will cause them to reconsider how they spend their lives.

Chorus:

"....."