Two Aspects of Law and Theory*

RONALD J. ALLEN**

In the last quarter of the twentieth century, there was much ado about law and theory, or the relationship between law and theory, or legal theory, phrases that I take to be synonymous, two aspects of which I want to discuss briefly today. With an introductory sentence like that, the normal expectation would be that the next sentence would somehow work in the phrase "about nothing," and, not wanting to be unpredictable, thus casting doubt on somebody's behavioral theory, I will fulfill this expectation by saying that a fair amount of the ado about legal theory was indeed about nothing. I do not mean by that statement that the discussions about and involving legal theory were not wonderfully interesting, erudite, deep, insightful, and maybe even significant at times. No, what I mean by saying that the arguments about, and fascination with, legal theory were much ado about nothing is that often it was literally about nothing: nothing corporeal, nothing real, nothing tangible, nothing, in short, that would look to a physicist, chemist, biologist, and probably not many sociologists or psychologists either, as data over which a theory could be constructed. Frankly, as I briefly discuss below, there was also generally nothing in these debates that mattered to the operation of the legal system or that bore upon significant questions of governance of the country.

The "data" that led, and still lead, to the most intense debates over legal theory virtually never involve careful analysis of cases, for example, or of legislative or administrative action, or of empirical work

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** John Henry Wigmore Professor, Northwestern University School of Law. J.D. 1973, University of Michigan; B.S. 1970, Marshall University.

on the nature or foundations of government or legal regulation. The most intense debates seem to be over ungrounded beliefs that are not testable by any imaginable falsifying test. Even access to definitive and authoritative cases would not suffice, for the case could always be magisterially declared to have been in error. And legislation, of course, doesn't even enter into questions of right or wrong in the modern American law school.

Most, maybe all, of these contested beliefs are moral beliefs. One of our panelists, Professor Fish, apparently believes that all moral beliefs are ungrounded in this sense. Whether he believes other kinds of beliefs are similarly ungrounded is not discussed in the paper prepared for today. Another one of our panelists today, Professor Moore, believes that moral beliefs are not ungrounded in the way that Professor Fish asserts, and that they are in some sense real. I have already disclosed my view of this debate, but the curious thing (and another manner in which many serious debates within the set comprising legal theory are about nothing at all) is that so far as I can tell not a single thing relevant to the legal system or the governance of the nation turns on who is right and who is wrong about the ontology of morality or ethics. Literally nothing. This is not equivalent to asserting that nothing turns on the perceived or known morality of some course of action, for a lot often turns on that. Rather, nothing programmatic turns on whether we're all caught within our own box from which there is no escape or whether there are rivers of morality running past our windowsills. No one's views on the morality of murder or the prima facie enforceability of contracts will change based on the ontology of moral propositions. The controversies over abortion and affirmative action will not be affected one whit by the conclusion or discovery that true moral propositions about the controversies may be uttered, or by the opposite conclusion that moral propositions are purely subjective. The debate would continue on its present course with at most a slight change in vocabulary. If, for example, Professor Moore were to succeed in convincing a skeptic, like me, that there are moral truths, and then proceeded to try to dissuade me from some moral positions that I held, surely I would respond that, no, it's you, Professor Moore, who is mistaken about the details, although thank you very much for convincing me that my moral positions are not just mine but are true as well.

Many of the theoretical debates over constitutional law bear a close resemblance to direct academic moralizing, perhaps because lurking behind many constitutional positions are moral positions. Whether that is true or not, as you all know, arguments over constitutional law are ubiquitous and never-ending. They never end, I have come to believe (on the basis, I should note, of empiricism, seat-of-the-pants though it

may be), for precisely the same reason that the debates over morality never end—they are based largely on ungrounded beliefs, in Professor Fish's sense, incapable of being falsified, and as I say, often (although surely not always) these are moral beliefs. They are based, to recur to my earlier phrase, although do remember its meaning, on nothing at all. Here is part of my evidence for that proposition. At Northwestern, as I am sure everywhere else, faculty workshops on constitutional law dominate the scene. Many years ago, some of the participants in a workshop were having a hotly contested, many-sided debate. I innocently (I swear it was innocent) raised my hand after about an hour of listening to a discussion that so far as I could tell was going nowhere and the point of which I could not discern, and asked: "What verifiable, or if you prefer falsifiable, proposition can you all articulate that would resolve this dispute among you?" There was silence. I was closely examined by about four pairs of eyes as though I were a creature from Mars, and then the disputants picked up exactly where they had left off. My question has now become as ubiquitous at Northwestern as the workshops on constitutional law, although no longer wholly innocently, and I have yet to get a serious response to it. I infer from this, induction though it may be, that verificationism, fallibilism, or any other attempt to make sense of empirical knowledge, has not had much of an impact on constitutional law scholarship.

Now, it seems to me that constitutional law and constitutional scholarship are presented, at least implicitly, through the great emphasis given to them in modern law schools, as paradigmatic of the nature of law, or at least as occupying the highest rung on the status ladder. Add to this mix wrangling over moral issues, and together you have what occupies a fair amount of the time and attention of both students and faculty. This aspect of legal theory has two detrimental consequences. First, constitutional law and moral debate are not paradigmatic of law or government, and we do a disservice to our students by implying to the contrary. We live in a web of regulation constantly emanating from legislatures and administrative agencies of various kinds that affects virtually every action we take. Almost none of this web is subject to serious constitutional challenge or amenable to deep philosophical discourse, yet it is the creation and sustenance of the web of regulation that is paradigmatic of, indeed in large measure just constitutes, the legal and governance systems. The primary professional tasks of virtually every one of our graduates will be to assist in the maintenance of the

web and in their clients' navigation of it. Moreover, it is how well these tasks are performed that will determine in large measure the quality of life that people live, not the never-ending debates over what passes for constitutional or moral theory, as fun and interesting as they are.

By saying this, I do not diminish the very strong feelings that lie behind positions on matters like abortion and affirmative action. Indeed, it is important for a novice lawyer to gain an understanding of the deep commitments and, it must be said, anger and irrationality that are at play. But the task of the legal system, the task of lawyers, is to deal with these deep commitments, anger, and irrationality, not to add fuel to the fire by implicitly suggesting to law students that adding another forum for unfalsifiable rhetoric, especially heated unfalsifiable rhetoric, somehow is an adequate response to these deep social conflicts. The appropriate response to such matters (and yes, I admit it, there is a moral theory creeping in here, as much as I try to keep it at bay) from the law schools, it seems to me, is to treat such matters as exemplars of the pathological problems that affect any legal system that deserve study for just that reason: they are serious pathological problems that need to be accommodated to preserve the civil peace. They are thus marvelous exemplars of dispute resolution, generally conceived, and its difficulties, but I daresay that is not how they are treated in legal pedagogy or scholarship, to the diminishment of both.

One last point on this first aspect of legal theory: I do not argue that the rhetoric of modern moral and constitutional debates has no place in the law schools, save as examples of social pathology, a position at least somewhat related to Judge Posner's recent attack on academic moralizing.[1] Although I think Judge Posner's attack largely hits the target, he may neglect somewhat the distinction between fully formed adults and the young, and for the most part law students are in the latter category. It is a useful exercise for the young to check their moral intuitions against the more fully formulated positions of others, as does occur effectively in the law schools, I think. In addition, certainly an understanding of the burning moral issues of the times, and some guided self-reflection on one's own relevant moral intuitions, is well within the purview of institutions of higher education, including law schools. Rather, my concern is the deleterious consequences of the inversion of this subsidiary aspect of legal education and scholarship into its primary exemplar.

The second aspect of legal theory is at least tangentially related to the first, and it has to do with whether legal theorists accurately model the

1. *See* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

object of their inquiry. Judge Posner excoriates academic moralists for, among other reasons, being ineffectual in bringing about changes of view, and more particularly legal consequences. He is absolutely right about this, but his argument has a much wider domain. It applies to a wide swath of legal theory, although how widely I'm not yet in a position to assert confidently. In a recent article, Scott Brewer has captured what I suspect is the generally held view of the relationship between theory and practice in the United States:

> In this area of law, as in many others, there is an intellectual division of labor between "high theory" workers and the appliers and administrators of theory-motivated doctrines. The paradigm for this division of labor is the common law itself. In that system, some judges, scholars, and lawyers take the lead in organizing, systematizing, analyzing, rationalizing, and revising doctrines and the theories that motivate them (e.g., theories of justice and equity in contract, tort, constitutional, and property law; theories of mind and motivation in the criminal law; economic theories throughout public and private law). These are the Holmeses, the Cardozos, the Brandeises, the Learned Hands, the Posners, and the Corbins, as well as innumerable scholars. These jurists organize and reorganize whole lines of cases, propose values to explain and criticize and motivate changes in common law doctrines. These "high theory" jurists can indeed quite plausibly be seen as making thick theoretical commitments to metaphysical and epistemological theories of the sort seen in probabilistic accounts of factfinding judgments. But of course not all jurists, and certainly not all judges, make or even attempt to make deep theoretical commitments of this sort. Many *defer epistemologically* to their high-theory brethren, *administering* doctrines articulated by the high theorists, but without engaging in sophisticated high theory themselves. These judges tend only to administer the doctrines that high theorists create for the law's epistemology. They tend to make only the incremental changes that are inevitable in the face of gaps, conflicts, and ambiguities that attend any system of laws. Quite often they deploy the resources of analogy to make these incremental changes, not least in using analogy-warranting *rationales* developed by high-theory judges. And as it is in the common law, so it is in the amalgam of common law, legislation, and administration that comprises the official rules of legal epistemology.[2]

Professor Brewer has covered a lot of ground in this passage, but I only want to focus on a small part of it, in particular the implications of what he refers to as "high theory." I think his picture of the high theorists clearing the ground that is later sown and reaped by others is conventional, but I'm not sure it is accurate if it means to refer to the relationship between the high theorists of law and law itself, however accurate of relationships within legal scholarship it may be. As a minor

2. Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1649-50 (1998).

part of some work I am now doing, I have begun looking at the relationship between citations of legal scholarship in law reviews and citations in cases and legislative hearings. There is virtually no relationship between the two. The high priests of theory who get thousands of citations in the legal literature, including perhaps the two giants of modern American legal theory, Posner and Dworkin, get virtually no citations in cases or legislative reports (excluding Posner's judicial opinions, of course). As Ross Rosenberg and I have done the search, Posner's academic work has gotten close to 9,000 citations in law reviews, but only 628 in cases.[3] Dworkin has gotten by our count close to 4,000 citations in law reviews, and a grand total of 87 in the cases. Cass Sunstein has gotten approximately 5,000 citations in law reviews, but only 227 in cases. Both Catherine MacKinnon and Jack Balkin have been cited in law reviews close to 1,000 times, but get only scattered cites in cases (MacKinnon 12 and Balkin 3). Indeed, do you know what is the single most cited authority for an argument that we have been able to identify? It is common sense, invoked as an argument.[4] And its only close competitors that we have been able to identify are the Wright and Miller treatise[5] and maybe *Moore's Federal Practice*[6] (we're not sure yet). The words and phrases "common sense," "commonsensical," and "sensible," used as an argument (based on crude sampling), appear upwards of 70,000 times in Westlaw. *Wright and Miller* is cited about 35,000 times. *Wigmore*[7] is next with about 22,000 cites, and then things fall like a rock. *Corbin*[8] gets about 1,000, and almost no non-treatise writer gets more than 100. This is not because law reviews aren't cited. Cases cite law reviews over 350,000 times. They just don't cite what passes for high theory very much.[9] Perhaps the

3. We continue to refine our analysis. I will provide our methodology to anyone who requests it.

4. Surely precedent would topple even common sense. We just could not come up with a method of getting a count of case citations as authority. "Common sense" is also involved frequently without being referred to in such terms, thus making our count much too low. For example, in *Balderos v. City Chevrolet,* 214 F.3d 849 (7th Cir. 2000), Judge Posner disposed of one legal contention by saying: "If there were such a relationship it would mean that the buyer could tell the dealer to shop the retail sales contract among finance companies and to disclose the various offers the dealer obtained to him, and no one dealing with an automobile dealer expects that kind of service." *Id.* at 854.

5. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1987).

6. JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE (3d ed. 1997).

7. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940).

8. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS (1993).

9. See Deborah Jones Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI. KENT L.

zenith, or nadir depending upon your point of view, was the recent cases of *Vacco v. Quill*[10] and *Washington v. Glucksberg*,[11] in which the Court held that state bans on assisted suicide do not violate the Fourteenth Amendment. The cream of the American philosophical crop[12] wrote an amicus brief to the contrary, which the Court did not even mention in reaching its unanimously opposite conclusion. By the way, I'm not sure how unique the law is in its relationship to common sense. I did a survey of books listed in the philosophical index with the term "common sense" in the title, and got 257 titles.[13]

These data are hardly dispositive; perhaps they are even a bit silly, although I must say they are much more dramatic than I had predicted. Still, some might claim that the high theorists do their work, which then filters down the pyramid where it is finally absorbed at even the bottommost level. For example, in a recent Seventh Circuit opinion, Judge Posner asserted, consistently with the tenets of the law and economics movement, that the cost/benefit formula of Learned Hand "is used to determine negligence in a tort case."[14] We're still searching, but we have not found a single instruction that is even remotely analogous to such a charge within the traditional field of torts. There are plenty of definitions of negligence, and plenty of instructions on discrete torts, but not one of them refers to the Hand formula or any of its derivatives of which we are aware.[15] If the legal economists had captured a major truth about the nature of tort litigation, one would expect that truth over time to be reflected in the system itself, which has not occurred. One test of this prediction is the field of antitrust, which has also been given, as I understand it, a microeconomic justification, but in which our preliminary work indicates jury instructions are rife with economic concepts.

REV. 871 (1996).

10. *See* 521 U.S. 793 (1997).

11. *See* 521 U.S. 702 (1997).

12. Ronald Dworkin, Peter L. Zimroth, Peter H. Curtis, Kent A. Yalawitz, Anand Agneschwar, and Abe Krash.

13. However, philosophical work gets short shrift by the courts, as well, at least as judged by its reception by the Supreme Court. According to Neomi Rao, philosophers have been cited a total of 49 times in the entire history of the Supreme Court. *See* Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1375 (1998).

14. Navarro v. Fuji Heavy Indus., Ltd., 117 F.3d 1027, 1029 (7th Cir. 1997).

15. Whether courts, appellate or trial, review jury verdicts from the Hand formula perspective is a different matter. *See, e.g.*, Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898 (7th Cir. 1994).

Our (Rosenberg's and my) explanation of such data is that in many instances the high legal theorists have mismodeled the phenomenon they are supposedly explicating, and many less-high legal theorists have followed in these mistaken footsteps. They have modeled the law as an integrated formal system or process amenable to top-down theorizing, and much of the law's domain is not—an argument, as some of you know, as Ross Rosenberg and I have developed in detail in the Fourth Amendment context.[16] It is a bottom-up, organic process at the heart of which is the deployment of common sense in order to muddle through the complexities of the human condition. Thus, I suspect it is not that the high theory is too obscure for the legal practitioners to understand that explains the short shrift given it in the real legal world; rather, it is that those very astute but commonsensical practitioners realize its irrelevancy—as do the judges that decline to cite it.

Again, I hope to be corrected if I am wrong, but much legal theory employs rather simple logical tools of deduction to do its work, and more importantly rests upon the unstated belief that such tools exhaust the possibilities. An area of law is said to be "conceptualized" when its basic assumptions are identified, and some logical consequences of those assumptions are derived. It is "reconceptualized," a sin I must confess that I have engaged in myself, when different assumptions are articulated, with sometimes differing implications. What goes neglected is the question whether a particular phenomenon is amenable to such analysis, and much of the universe is not, or at least is not yet, and my guess is never will be throughout the duration of the human race. Much of what goes on in the universe is a matter of adjustment to disturbances not easily, and maybe not at all, reducible to deductive logical forms. When gas is added to a container, all the other molecules react to the change, but typically in much too complex a fashion to ever be reduced to simple equations or deductions.

To be sure, lawlike behavior is at play in the motion of gases, but any actual observation will not be specifically describable in those terms. This is the standard problem of computational complexity, but the standard legal problem is more complicated still, for it involves not just physical laws but intent, motivation, knowledge—all the attributes of cognition. I cheerily admit that it must be the case (in other words, I believe it is the case) that all aspects of cognition are reducible to chemistry and physics, but this affects things again not a whit. Even if my admission is correct, that it is chemistry and physics all the way

16. Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1149-1201 (1998).

down, cognition is still too complicated to be computed using standard top-down deductive models. More importantly, and more deeply, even an irrefutable scientific demonstration that the material reductionists are right about mental states will matter hardly at all to how we organize ourselves, for it provides no useful organizing schemata that allow us to get along in life. Useful organizing schemata must, as they do, respond to the cognitive messiness in all brains, even the most clear, which I believe takes us back to a constant series of adjustments and away from top-down organizing theories.

"So what?" seems the appropriate question at this point. The answer is that most human interactions can best be understood as a process of ad hoc adjustment rather than an implication of, or understandable as, top-down deductive structures. I assert that this goes for much of the law's domain. To analyze many legal fields using the standard legal theory tools of theory, or assumption articulation and logical deduction, often grossly mismodels the phenomenon, and in part leads to the irrelevancy of the theorizing, an argument that Rosenberg and I are now in the process of making.

To many of you this may sound like an argument for irrationality, for if we give up top-down deductive structures, what is left? Indeed, this impulse is so strong that even writers like Cass Sunstein who seem to edge close to the point I am making here eventually back off and refer to such matters as "incompletely theorized agreement,"[17] or some such term, as though phenomena could only be completely analyzed in standard, top-down ways, or that even matters such as analogies must ultimately be understood as defective deductions. This is not true, however, or at least it is not true that no other useful, and more useful, tools exist, regardless of the final ontological status of any object or phenomenon under examination. Examples are connectionist, or parallel distributed processing, networks in artificial intelligence research that are used to model neural networks. Indeed, as my next-to-last point here today, I want to suggest that many fields of law, especially those still heavily influenced by common law methodologies, may be modeled as neural networks responding to disturbances until equilibria are reached, a modeling that may capture many salient features of legal reality better than present conventional models.

17. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1741 (1995); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

Now my last point: There is a lot that remains to be said about virtually every point I have made, but time is up. A few examples, though. I referred earlier to common sense. I have in mind something quite definite, and definitely not just the conventional notion of a set of propositions. If anyone is interested, we can discuss it later. Another example. It is perfectly understandable why the tools of logical deduction are the tools of choice of the legal theorist, and nothing said here today is intended to disparage logic. There are deeper currents running here as well that deserve further explication. The phrase "legal theory" is often used as though its meaning were clear, and I so proceeded today. However, in fact, what it is supposed to mean isn't clear to me. In science, the normal relationships are between theories that may entail experimental laws, among other things, that in turn explain observables. Even the sophisticated treatments of legal theory such as Professor Moore's leave out the intermediate step of experimental laws. This leaves ambiguous both the phrases extension and intension, at least to me. And so on. Each of the points made here requires elaboration, but I fear I have run out of time.