Theory's a What Comes Natcherly*

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My comments will have to be a bit sketchy because of the constraints of time. Fortunately, I agree with so much of what the presenters have said that I believe I can be brief. I will begin with a few general remarks and then respond to each presenter specifically.

First, we do theory all the time, naturally and inevitably. We humans are theorizing beings in that we reflect upon our experiences and generalize about them. Those who become philosophers generalize about how we generalize. In theorizing we do not, of course, transcend the linguistic and cultural categories through which we make the world intelligible. We are always employing those categories, even when revising them. However, this point—the postmodernist's hobbyhorse—is inert.

A "view from nowhere," even though in some sense we understand quite clearly what it signifies, is in another sense quite unintelligible. And just as we cannot escape from our categories and situatedness to some Archimedean point, so too we cannot escape from using our cultural categories to theorize—to generalize and find "symmetries" where we had not seen them before, and likewise to deconstruct reigning categories by finding heretofore unnoticed asymmetries within them. Thus, we are always reflecting on the categories we employ, consolidating some, unpacking others, all the time employing other categories we possess. We humans are continually repairing the boat of our understanding of the world while at sea.

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So theory is not an issue. It is impossible to do without it. And our situatedness is as immaterial to our theoretical enterprises as it is inevitable. So what kind of theorizing do we do in law? First, we do empirical, predictive theorizing. We form hypotheses about how the world will be affected by various rules of law, because of their content and form, and by the design of our legal institutions. These hypotheses can be confirmed or falsified. We also form hypotheses about how particular judges will decide future cases, or how legislatures and agencies will react to various proposals. When we do legal history, we reason backwards from effects and form hypotheses about their causes.

The second type of theorizing we do is normative. In doing this we basically employ Rawls's method of reflective equilibrium:[1] moving from particular normative judgments to build more general normative principles, both testing and revising those principles through further particular normative judgments, and revising our particular normative judgments in light of the more general normative principles. Every discussion of what we ought to do that I have ever observed has taken this form.

Another type of theorizing is what I shall call analytical. We do it when we point out internal inconsistencies or incoherences, both in doctrines and in methods, such as analogical reasoning or constraint by precedent.

Finally, we philosophize—we theorize about theorizing itself. What are we doing when we engage in normative debate? What are we doing when we reason by induction?

As I said, we are theorizing sorts of beings. Thus, there is no use railing against theorizing in law, for theorizing is inevitable. However, there is every reason to rail against bad theorizing.

Let me now turn to the presenters' views. First, I am in wholehearted agreement with Leo Katz. We do look for symmetries between things that we otherwise thought were quite different. We discover that things we have put in separate categories are profitably regarded as belonging to a single category, perhaps a new one. In this way, the cultural software with which we understand the world is transformed, even though we are employing it in the process of transforming it.

Second, I also agree with Katz that, although much of our theorizing is aimed at discovering overlooked symmetries, much of our theorizing is also aimed at discovering overlooked asymmetries. Katz at one point invokes the ubiquitous exam instruction "compare and contrast." He spends most of his paper on the "compare" half of that injunction. Much of what we do in theorizing, however, is "contrast" items that are

1. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

considered to be alike. Not only do we construct big categories out of smaller ones, but we also splinter big categories into smaller ones. For example, I recently wrote an article arguing that killings in self-defense, something the criminal law treats as all falling within a single category of justification defenses, really form a quite disparate collection of homicides.[2] Some self-defense killings are justified, but many others are more similar to conduct falling within the excuse of duress than to conduct regarded as paradigmatically justified. Thus, I argued for asymmetry where the criminal law posits symmetry.

Turning now to Ron Allen's paper, I begin by noting that Allen makes three points with which I agree, or at least do not disagree. Allen takes the position, previously defended by Jeremy Waldron[3] against Michael Moore, that meta-ethical debates have no practical implications. Whether one is a cognitivist or a non-cognitivist or a realist or an irrealist will not affect the moral views one holds or the fervor with which one holds those views. I do not disagree with this position, although I do not agree with it either. I am agnostic about it—unpersuaded either way.

Allen also takes the position that divisive moral debates, such as those over abortion and affirmative action, represent social pathologies that it is law's function to control, rather than indicators of a close tie between law's nature and moral theorizing. This point, if spun a certain way, is one that I wholeheartedly endorse. Indeed, I have argued that law's moral function is not to mimic moral argument but rather to provide determinate resolutions of moral controversies. Such a task requires a complete divorce of legal from moral reasoning.

Allen makes a third point with which I agree. He argues that most of law is ad hoc adjustment, and that it is not amenable to overarching conceptualizations. Along with Allen, I do not believe that there can be a grand theory of, say, tort law that is at all faithful to the very messy data, the jumble of judicial doctrines and statutory interventions, that make up the field.

But Allen is too dismissive of theorizing and its impact on law. He points out the paucity of judicial citations to high theorists. With due respect, I believe he is looking for theory's impact in all the wrong

2. *See* Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475 (1999).

3. *See* JEREMY WALDRON, *The Irrelevance of Moral Objectivity*, *in* NATURAL LAW THEORY 158 (Robert P. George ed., 1992).

places. If one views law as rules posited by authorities—legislatures, constitutional framers, precedent courts—then one would expect most judicial opinions merely to cite authoritative rules. The real question, however, is what influenced the content of those rules; and although the answers will vary with the rules, many rules are the product of arguments traceable to theorists, both empirical and normative. John Rawls or Richard Posner may influence generations of policy wonks whose testimony before legislative bodies influences the shape and content of rules. It is only in those areas where the law is standard-like and heavily moralized—as is the case with substantive due process—that one might expect to see judicial citation to Allen's high theorists. The fact that the "philosopher's brief" in *Glucksberg*[4] proved ineffectual only shows that the current Supreme Court has a less standard-like vision of the Due Process Clause than did the Warren Court. Had the latter decided the *Glucksberg* case, I would have expected frequent citations to Rawls or Dworkin, just as one finds fairly frequent citations to Montesquieu in separation of powers cases of first impression.

Michael Moore's taxonomy of theories of law is a bit different from mine. In Chapter One of *Placing Blame*,[5] entitled "A Theory of Criminal Law Theories," Moore classifies legal theories as explanatory, descriptive, and evaluative. His evaluative category of theories is the same as my normative one. Moore's explanatory category consists of a subpart of my category of empirical theories—the subpart in which one reasons from extant legal doctrines to hypotheses about antecedent causes. Moore has no category corresponding to the remainder of my empirical category of theories—all those theories that either predict the effect of legal doctrines and institutions, or, more narrowly, that predict decisions or doctrinal trends. Perhaps they are a component of his evaluative category, or perhaps they do not count for him as theories of law at all.

Moore's remaining category of descriptive theories does not appear on my list at all. This is not because I overlooked it, but because I think it is deeply misguided. Its most visible proponent, Ronald Dworkin,[6] urged upon us the view that law does not consist principally of statutes, administrative rules, and judicial decisions that the man on the street would identify as its referents, but rather consists most fundamentally of those principles that are the morally most attractive principles that "fit" a sufficiently large percentage of the statutes, rules, and decisions. Let us

4. Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, *Washington v. Glucksberg*, 521 U.S. 702 (1997), available at 1996 WL 708956.

5. MICHAEL MOORE, PLACING BLAIME: A GENERAL THEORY OF THE CRIMINAL LAW (1997).

6. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE chs. 6-7 (1986).

call this form of legal theorizing rational reconstruction of doctrine—placing *most* of doctrine in the *most* morally attractive light possible.

Moore endorses this type of legal theorizing, claiming that it renders law capable of serving the rule of law values of predictability and formal equality, and also the value of substantive equality. I have written enough for tenure many times over on the specific topic of why this kind of theorizing—this way of viewing law—is normatively unattractive, despite its claim to the contrary.[7] Predictability can be served directly, the claims of formal equality are empty, and substantive equality is theory-dependent, incapable of serving as a value to guide theory selection. I would urge Moore to accept that there are good moral reasons to separate what law is—nothing deeper than the statutes, rules, and decisions in their canonical forms—from what it ought to be. Running them together in Dworkinian fashion makes law less capable of clear guidance without guaranteeing its moral virtue.

Finally, I come to Stanley Fish. Fish and I are in agreement on fundamentals. We agree on the situatedness point—the postmodern rejection of views from nowhere. We also agree on its banality—the fact that it leaves everything unchanged and that there is no postmodern program. Fish is careful to emphasize this point in each of his books and articles, but he is also aware, no doubt, that most of those who enthusiastically cite to him as authority for their positions do not see that Fish's postmodernism is an unarmed soldier—a completely useless conscript for their jihads. Indeed, given the fervor with which Fish makes his postmodern point, I believe that sometimes he too forgets about its inertness.

Finally, Fish and I agree that some highly touted arguments for liberalism appear to claim a view from nowhere, and thus are arguments that we should reject. This is not to say, however, that we should reject liberalism and its core values. It is only to deprive liberals like me of one way of convincing others to accept our positions. I obviously think there are better arguments in support of liberalism than those Fish flogs. I even suspect that Fish himself subscribes to the core liberal tenets.

However, Fish and I do disagree about substantive matters. He supports affirmative action, and I oppose it. From what little I have read

7. *See, e.g.*, Larry Alexander & Ken Kress, *Against Legal Principles*, *in* LAW AND INTERPRETATION 279 (Andrei Marmor ed., 1995), *reprinted in* 82 IOWA L. REV. 739 (1997); Larry Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 LAW & PHIL. 419 (1987).

by him on the subject, I think he attributes both arguments and motives to the opponents of affirmative action that neither I nor many others I know endorse.

More to today's point, Fish is famously the scourge of the National Association of Scholars ("N.A.S.") while I support it. On this issue, I have actually tried to convince Fish that he is on the wrong side. For those whom the N.A.S. opposes and Fish supports are the very people who, contrary to Fish's admonition, *do* make postmodernism a program. The N.A.S., on the other hand, supports the very academic values that Fish himself displays in his own work and obviously prizes. On this issue, I think, Fish resembles Robert Frost's caricature of a liberal, that is, someone who cannot take his own side in an argument.[8]

For present purposes, however, the most notable disagreement we have is over the value of theory. I have argued that we are theorizing beings, and that we cannot imagine a life without theory. The postmodern point that all theories are perspectival and in some sense partisan—that we can only experience the world through our limited sense organs and culturally and experientially structured categories—is, to repeat, inert. It does not mean, however, that we are radically uninterpretable for each other. We manage to persuade and be persuaded, even though our differing perspectives and finite experiences mean that sometimes we will just have to force our view on others or have their views forced on us. It is significant that nowhere in Fish's many screeds against theory can an attack on quantum theory or evolutionary theory be found. Theory in the sciences would, however, seem to be as wrongheaded as other theories if theorizing is to be condemned. Even Dennis Martinez and Earl Weaver theorized about baseball, even if they did not articulate their theories in the manner of academic theorizers.

Thus, I will conclude by invoking the principle of charity and interpret Fish, not as inveighing against theory per se, but as inveighing against only those theories that deny the postmodern point that they are inevitably perspectival. But then, as both Fish and I have said now countless times, that point leaves everything as it was, including theory.

8. "A liberal is a man too broadminded to take his own side in a quarrel." MORROW'S INTERNATIONAL DICTIONARY OF CONTEMPORARY QUOTATIONS 298 (1982) (compiled by Jonathan Green) (the saying is commonly attributed to Robert Frost).