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THE EFFECT OF LEGAL THEORIES ON JUDICIAL DECISIONS

ANTHONY D'AMATO*

INTRODUCTION

Stanley Fish has argued that theory does not constrain practice. Legal scholars by now are quite familiar with his argument. Yet they go on using theory in their teaching and writing. Indeed, legal theorizing seems to be healthier than ever. If you look at casebooks in torts, contracts, or constitutional law that were published fifty years ago, and compare them with today's casebooks, you will discover that the old casebooks were filled almost entirely with *cases*. In contrast, today's casebooks (more properly called coursebooks) are on average half-filled with cases, the remaining pages containing articles, notes, speeches, comments, and other materials dealing with various mid-level theories and concepts. The trend seems to be that "materials" are on the upswing and "cases" on the downswing. Law school teaching is becoming awash in theory.

If Fish is right, are all legal theorists wasting their (and their students') time? In the present essay, I want to take the apparently paradoxical position that Fish is absolutely right, and yet legal theory is definitely not a waste of time. Students in law school learn how to best predict what judges will decide the law to be. If judges are guided by legal theories, then students of the law need to know what these theories are. Yet if the decisions judges make are not constrained by theory, then why should students learn the theories? In this essay, I try to answer that question by introducing a distinction that, as far as I know, has not previously been drawn in this context: between judicial decision-making and a judge's decision-making. That distinction will only make sense after we briefly review the basis for Fish's argument.

I. THEORY DOES NOT CONSTRAIN PRACTICE

Fish's argument can be summarized as follows. We derive theory

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from practice; therefore, theory cannot constrain (or govern) the practice from which it is derived:

This, then, is why theory will never succeed: it cannot help but borrow its terms and its contents from that which it claims to transcend, the mutable world of practice, belief, assumptions, point of view, and so forth. And, by definition, something that cannot succeed cannot have consequences, cannot achieve the goals it has set for itself by being or claiming to be theory, the goals of guiding and/or reforming practice.¹

How does Fish's argument apply to *legal* theory? Ten years ago, I wrote an essay entitled *Can Any Legal Theory Constrain Any Judicial Decision?*² The idea behind the essay, which would have worked better as a classroom dialogue than a published article, was roughly this: name any legal theory that you say explains the result in any case (or series of cases), and I will show you how that same legal theory could just as satisfactorily explain the exact opposite result in that case (or series of cases).³ Since I did not have an interlocutor to pick theories (as I might in a classroom), I chose some theories that are widely accepted as explaining (constraining, governing) the results in some famous cases. To make the theories representative of legal theorizing in general, I chose theories that ranged from the very broad to the very narrow:

1. A very broad theory: Judge Posner's theory that judges in all cases should maximize wealth;⁴
2. A narrower, subsidiary theory to the above: judges in all cases should minimize transaction costs;⁵
3. A combination of theories: the three Brest-Levinson theories of the First Amendment—judges in all cases should protect representative government, advance knowledge, and promote truth;⁶

1. STANLEY FISH, *DOING WHAT COMES NATURALLY* 321 (1989).

2. Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1989) [hereinafter D'Amato, *Theory*]. I carried the argument further in Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U. L. REV. 113 (1990) (arguing that there are no easy cases); Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561 (1989) (arguing that legislative intent cannot be inferred); Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning"*, 33 ARIZ. L. REV. 529 (1991) (arguing that plain meaning as a basis for judicial decision-making is itself a theory that cannot work); and Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911 (1996) (arguing that public policy as a basis for judicial decision-making is itself a theory that cannot work).

3. See D'Amato, *Theory*, *supra* note 2, at 514.

4. See *id.* at 514-19.

5. See *id.* at 519-20.

6. See *id.* at 521-24.

4. An interpretive theory: the assertion that “strict constructionist” judges will be “tough on crime”;⁷
5. A process theory: Dworkin’s “chain novel” theory used to explain stare decisis;⁸
6. A mathematical theory: Judge Hand’s negligence formula used to explain tort cases;⁹ and
7. A theory so narrow that it can be stated in a single word: the idea of “cost” to help explain the result in any given case.¹⁰

Across this range of theories, I offered well-known case examples typically cited as examples of each theory. Then I showed that the exact same theory just used to justify or explain those case results could be used to justify or explain the opposite result in each of those cases. Thus, if Theory *X* can be “applied” in a case to reach the result *P* wins and also to reach the result *D* wins, then Theory *X* can hardly be said to “apply” at all. I contend that this is true of every theory that has ever been said to apply in every case that has ever been decided.

Of course, simply describing what I (*believe* I) proved in another article is woefully insufficient; I invite the reader to consult the original article. What is interesting here is that, ten years later, the arguments in that article have not (so far as I am aware) been challenged. My essay does not seem to have slowed down in the slightest the burgeoning amount of theorizing going on in law journals, casebooks, and classrooms. No one seems to have given up on theorizing as a result of what Stanley Fish or I wrote over a decade ago. And this, in a perverse sense, corroborates our anti-theory views. For if, as Fish says, theory has no effect on practice,¹¹ then his (and my) anti-theory—which is itself a theory, of course—also cannot be expected to have any discernible effect upon the academic practice of theorizing! Our anti-theory, if *unaccepted*, is by that very fact *corroborated*! What else could we expect? In Ira Gershwin’s immortal words, who could ask for anything more?

II. WHERE LEGAL THEORY SEEMED TO WORK

The most well-known and perspicuous case in the legal literature

7. See *id.* at 524-27.

8. See *id.* at 527-30.

9. See *id.* at 530-34.

10. See *id.* at 534-36.

11. See FISH, *supra* note 1, at 321.

that illustrates the force of legal theories in action is Lon Fuller's *The Case of the Speluncean Explorers*.¹² Fuller constructed his mythical case on a stipulated set of facts and a single applicable one-sentence statute (with no legislative history), thus giving the five justices of the Newgarth Supreme Court no room to argue over the facts or legislative materials.¹³ Five speluncean explorers were trapped in a cave for thirty-two days; they survived only by killing and eating the flesh of one of their party.¹⁴ After their rescue, they were prosecuted under a statute that simply provided: "Whoever shall willfully take the life of another shall be punished by death."¹⁵ Each justice applied his deepest theory of law to the question whether the four surviving speluncean explorers should be found guilty of murder.¹⁶

None of the justices' theories could be labeled "ivory-tower." Each justice took into account all the facts and circumstances of the four defendants. Each justice thought about the effect of his decision on society and its receptivity to the rule of law. Each justice considered whether the Chief Executive would pardon the defendants if they were convicted. In addition, each judge examined his own moral impulses. In short, each justice had a world-view, shaped through long experience in the deliberation and decision of cases, that constituted for him an overarching commitment to the proper role and function of courts in the legal system.

Chief Justice Truepenney's opinion was the most cut-and-dried: the defendants clearly violated the statute and thus there was nothing for the court to do but to find them guilty of murder.¹⁷ But he went on to urge the Chief Executive, in the strongest possible terms, to pardon

12. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). The opinions of the five justices in Fuller's article did not exhaust the range of applicable theories. I added three new opinions (in memory of my mentor Lon Fuller) in an article published in 1980. See Anthony D'Amato, *The Speluncean Explorers—Further Proceedings*, 32 STAN. L. REV. 467 (1980). Seven new opinions were added in a symposium issue in Naomi R. Cahn et al., *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754 (1993). Peter Suber has recently contributed nine additional opinions. See PETER SUBER, *THE CASE OF THE SPELUNCEAN EXPLORERS: NINE NEW OPINIONS* (1998).

13. See William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1731-32 (1993).

14. See Fuller, *supra* note 12, at 616-18.

15. *Id.* at 619.

16. It is perhaps a weakness in the case that no justice presented a strong argument that the explorers were actually guilty of murder. I tried to present such an argument in the first of the three opinions I wrote in 1980. See D'Amato, *supra* note 12, at 468-75. This particular opinion has been reprinted in Feinberg & Gross's treatise on legal philosophy. See PHILOSOPHY OF LAW 549 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).

17. See Fuller, *supra* note 12, at 619.

the defendants.¹⁸

Justice Foster constructed two arguments on the basis of natural law. First, he argued that the explorers, trapped in a cave, were effectively removed from Newgarth's jurisdiction and hence were in a "state of nature." Newgarth's laws, therefore, could not apply to them.¹⁹ Second, and in the alternative, he accepted the applicability of Newgarth's murder statute, but argued that its purpose—to deter crime—could apply neither in the case of self-defense (a traditional judge-created exception to the statute) nor to a case of necessity where the only result would be that all five explorers would have starved to death before they could have been rescued.²⁰ Their decision to consume the flesh of one of their number meant that four lives out of five were saved, and it would be absurd now to sentence the survivors to death.²¹

Justice Tatting's opinion can be said to reflect the legal theory of deep uncertainty in the law. He noted strong objections to all the arguments that had been made, both those in favor of convicting the defendants and those that favored acquittal.²² Torn by this uncertainty, he withdrew from the case.²³

Justice Keen was a positivist in the grand Bentham-Austin tradition. He believed that a judge should simply apply the words that the legislature has enacted into law in the form of a statute.²⁴ The murder statute has no exceptions; therefore, the defendants have violated it. No judge should allow his personal feelings to enter into a case. Justice Keen said this in the strongest possible way: he began his opinion by saying that if the decision were his to make in a private capacity, he would not hesitate to free the defendants.²⁵ But because he is empowered to make the decision in his public capacity as a judge, he has no choice but to find the defendants guilty.²⁶

Justice Handy's theory was one of legal realism. He stated that public opinion polls showed that ninety percent of the public would vote to acquit the defendants.²⁷ He also revealed that he heard,

18. *See id.*

19. *See id.* at 620-23.

20. *See id.* at 623-26.

21. *See id.* at 625.

22. *See id.* at 626-31.

23. *See id.* at 631.

24. *See id.* at 632.

25. *See id.*

26. *See id.*

27. *See id.* at 639.

through a friend of the Chief Executive's secretary, that if the court found the defendants guilty, the Chief Executive would not pardon them.²⁸ Since, realistically speaking, the pardoning route was not available to the court, the decision that would best satisfy the public and not make the court look foolish was to vote to acquit.²⁹

The final vote on the supreme court was 2-2 (with Justice Tatting having withdrawn).³⁰ The decision of the judge below was thus affirmed, and the speluncean explorers were sentenced to death.³¹

Fuller constructed his case so well that there are four complete theories that stand on their own merits—five if you include Tatting's indeterminacy as a theory. Despite the criticisms that each justice leveled at his brothers' theories, the opinions emerge as polished and complete. We can well imagine that if the Supreme Court of Newgarth had only one justice that was assigned to review this case, then the outcome of the case would have been completely determined by the deeply held theory of whomever of the five jurists—Truepenny, Foster, Tatting, Keen, or Handy—was sitting on the bench. But if there were more than two justices assigned to the case—whether three, four, or five—then *no* theory could explain the result.³² The theories would be incompatible with each other.

III. DWORKIN'S THEORY

The Case of the Speluncean Explorers is certainly what we might call a "hard case." Ronald Dworkin has taken the position that the hard cases in principle have a unique solution if only the deciding judge—whom he names Judge Hercules—had infinite time, all the resources in the world, and infinite brain-power.³³ One could respond to Dworkin that since there are no such judges, hard cases in the real world defy unique solutions. But this argument would miss Dworkin's point: that in principle a unique solution exists, and hence real judges should try to get as near to it as possible within the inevitable constraints of time and money.

Rather, what I find fascinating about Dworkin's argument is the

28. *See id.* at 642.

29. *See id.* at 641-44.

30. *See id.* at 645.

31. *See id.*

32. If there were only two justices and they happened to be Truepenny and Keen, it is possible that they could hammer out a variant of positivism to serve as their joint theory of the case.

33. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105 (1977).

not-often noticed point that he employs a single judge to do his theoretical work. What if, instead, Dworkin had posited a panel of three super-judges—Hercules, Kirkules, and Smerkules? Suddenly he and his readers would have grave misgivings. For it is easy to imagine that these three judges would each expend infinite time and resources reading the same materials and yet come to divergent conclusions. Suppose the case involved a hard issue of interpreting a clause in the U.S. Constitution. Judge Hercules could find, after reading all the materials, that the Madisonian world-view was the most persuasive political theory informing the correct interpretation of this clause. Judge Kirkules could find on the contrary that the Hamiltonian world-view was the deepest and most persuasive theory. And Judge Smerkules could find that both the Madisonian and Hamiltonian views unfairly distorted the true intentions of the Framers, and hence the most persuasive theory informing the proper interpretation of the constitutional clause could only be one that was both anti-Madisonian and anti-Hamiltonian.

Deeply-held theories are hard to reconcile with one another (unless they turn out to be variants on the *same* theory). One can test this by paying a visit to a good philosophy department. Arrange a meeting with the specialist on analytic philosophy and ask her whether she has many discussions with her colleague, the specialist on metaphysical philosophy. She probably will say, "Yes, our children are on the same little league team, so whenever we see each other we talk baseball." "No," you say, "I mean discussions on philosophy." She will probably answer, "Well, when I first came here years ago we started into such a discussion, but we were really talking past each other and it got a bit heated and we figured that talking about these things would only lead to bad collegial feelings." "Well," you ask, "what do you think of the things he's written?" "Frankly," she might reply, "he addresses very large issues, like the ontology of the universe. But I don't think he actually *says* anything at all. He's totally ivory-tower." Then you pay a visit to the metaphysician and get pretty much the same answers until the last question. He says, "Frankly, she addresses very small issues that nobody in the world cares about except other analytic philosophers—such as the grammatical structure of simple sentences. She's totally ivory-tower."

If we go all the way back to Plato and Aristotle, we find that they talked completely past each other. Plato's method was deductive: you start with ideal forms and reason downward to get to the real world. Aristotle's method was inductive: you begin with the real world and

reason upward to get to theories. As Lon Fuller once resignedly told me about another twentieth-century jurisprudential giant, H.L.A. Hart, "I guess we're fated never to understand each other." Or, in the immortal words of Gilbert & Sullivan:

I often think it's comical (fa, la, la!)
 How nature always does contrive (fa, la, la!)
 That every boy and every gal
 That's born into the world alive
 Is either a little Liberal
 Or else a little Conservative.³⁴

So far we are left (I hope, if I have been doing my job right) with an uneasy feeling. What *good* is theory unless it locks in a particular solution to a problem? Why should professors be teaching legal theory to their students? In the next and final part of this essay, I will try to spell out my answers to these questions.

IV. THE UTILITY OF THEORY

As Einstein and many others have said, our theories of the world determine the way we see the world. We cannot help but see the world through the lens of our theories. "Einstein held that there is no 'real world' to which one can repair—the whole concept of the 'real world' is justified only insofar as it refers to the mental connections that weave the multitude of sense impressions into some connected net."³⁵ Since the deepest theories we hold in our minds interpret for us what we see, it follows that for each of us our theories "work." They "apply" to the real world. As Stanley Fish put it: "[T]heories always work and they will always produce exactly the results they predict, results that will be immediately compelling to those for whom the theory's assumptions and enabling principles are self-evident. Indeed, the trick would be to find a theory that *didn't* work."³⁶

But the important point is that although my theory works for me, it does not necessarily work for you. My theories may appear to constrain my decisions (whom I vote for, what I read, what I write) but they certainly do not appear to constrain yours. They do not even seem to make the slightest impression on my two sons, despite the

34. WILLIAM SCHWENCK GILBERT, *IOLANTHE, OR, THE PEER AND THE PERI*, act 2 (1882), reprinted in *THE MIKADO AND OTHER PLAYS* 107, 141 (Modern Library ed. 1917).

35. Gerald Holton, "What, Precisely, Is 'Thinking'?" *Einstein's Answer*, in *EINSTEIN: A CENTENARY VOLUME* 153, 158 (A.P. French ed., 1979).

36. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 68 (1980).

many years I put into bringing them up to understand, absorb, and share my well-formulated theories of the world.

When we look at the decisions of judges, we can say that each judge always follows her own theories. But we cannot say that any judge always follows another judge's theories. Even if some judges are strongly influenced by other judges—as Justice Thomas seems to be influenced by Justice Scalia—no judge can see the world exactly the way another judge sees it. Judge *A* cannot see as deeply into Judge *B*'s theory as Judge *B* sees it. For example, Judge *B* may believe that legislative intent has nothing to do with the interpretation of statutes. Judge *A* might be convinced by all the reasons that Judge *B* has given in his opinions that legislative intent is irrelevant to statutory construction. But then some day Judge *B* could surprise everyone by saying that when a clause in the Constitution has to be construed, the intent of the Framers is indeed relevant. Judge *B* might not be able to draw a distinction that would convince his brethren on the bench. Yet in his own mind, Judge *B* might “see” a world of difference between a constitution and a statute—a difference so great that *no* theory of interpretation could work for both. He might not be able to articulate this difference in a principled way, except to say that you cannot compare apples and oranges.³⁷ After all, it is *his* theory of statutory and constitutional construction, *his* way of looking at the legal world, and if others do not see it or understand it, so much the worse for them.

More generally, if I say that *M* is being inconsistent, *M* can reply, “You can't understand the deep consistency that lies beneath the surface inconsistency.” *M*'s theories always make sense—to *M*. They make sense *and* they work.

So why do professors teach theories to law students? We might be misled if we ask the students or the professors. A student might say, “I'm learning this theory because I have to give it back on the final exam.” Another student might say, “This theory explains the result in a line of cases—or at least the professor thinks so, and I better be thinking the way the professor thinks if I want to do well on the final.” Another student might say, “This theory explains the cases in this chapter. It explains them for me.” A professor might reply, “I've studied these cases intensely, and I only give my students the

37. Why not? I have often wondered. They are both fruit. They are both round. They both grow on trees. They both contain seeds. Well, maybe the proper phrase is: you cannot *mix* apples and oranges. No? I have actually seen it done. In a blender in my neighborhood health food store. (But I was not the one who ordered it, and I would not think of drinking it.)

best explanatory theory that I am capable of giving. I really believe that these theories not only explain the case outcomes in the book, but they are the best predictors we have of future judicial decision-making.”

I do not know if these are the answers you will actually get if you make inquiries, but if they are, I want to disagree with them. No theory can explain the result in any case (as I argued in Part I of this essay), just as no theory explained the result in *The Case of the Speluncean Explorers* (as I argued in Part II).

But the judges in *The Case of the Speluncean Explorers*—and the judges in every case that has ever been decided in any courtroom in the world—believe that their own theories explain the decisions they reach. They also believe that their own theories are sound. They believe that if other judges disagree with their decisions, those other judges are just plain wrong.

In other words, the judge is like the professor (in the third paragraph above). Each judge believes that her own theory explains the results in previous cases, stands as the best predictor of future case results, and thoroughly accounts for the decision she has reached in the instant case. The professor believes the same of the theories he teaches to his students.

Thus, we are back to the distinction I drew in the beginning of this essay: between judicial decision-making and a judge’s decision-making. This turns out to be a distinction between the external point of view and the internal point of view. When we look at judicial decision-making, we are looking externally at a pattern of decisions over time. We try to fashion a theory that “explains” this pattern, but as Stanley Fish said in the first quotation in this essay, the pattern gives rise to the theory and not the other way around. If the pattern changes, we simply “refine” our theories. If someone claims that our previous theory failed to explain the change in pattern, we respond that a more sophisticated account of our previous theory—which was inherent in the theory itself—would have succeeded in explaining the change. Of course, what we have really done is modify the theory in light of the change in the practical world.

The external point of view, then, does not work and cannot work. Yet, it is the one we study. Why?

Simply because the external point of view helps us, in surrogate fashion, to get partially inside the heads of the judges who will be deciding the cases we will argue someday. Fortunately, all the judges

in the United States once went through law school and learned theories of law similar to the ones that are being taught today. Accordingly, we have a fairly good idea of what the judges may be theorizing simply by studying theories like the ones they studied.

For, ultimately, the essence of the lawyer's craft is not to learn theories but to persuade judges. To persuade a judge, we should try to discover what her theories are. In legal practice, we do this by reading her previous opinions. We try to "locate" her theories within the theories of law we learned while in law school. These theories we learned in school, therefore, have a heuristic value. If a judge's previous opinions reveal her to be a positivist, then we have an idea—from the theories of positivism we have learned—how to bring our client's side of the case within her theories. We will take a "positivistic" approach if we want to persuade her, because we have some confidence that that is the approach she will take in deciding the case.

If another judge in another case demonstrates a "natural law" view of the world, or a "legal realist" view, or a "pragmatic" view, or a "formalistic" view, again, we will be at our persuasive best if we can show how a proper interpretation of the facts of our client's case fits within these overarching theories.³⁸

My most important point is that we do these things not because we believe that any theory of the law explains the law, but rather because we understand that judges (from their internal point of view) believe that their own theories explain the law. To be persuasive in our advocacy, we must first identify the theory that the judge in our case believes in (to the extent we can from prior opinions) and then portray the facts of our case within that theory. We do not have to believe that the theory will work at all times and all places; no theory can "work" in that sense. All we have to believe is that the judge believes that the theory will work in the instant case. In order to be effective advocates, we need to persuade the judge by working within her theory rather than confronting her with a different theory that we may happen to think is "better" in some sense. The practice of law is not about advocating the best explanatory theories (there is no such thing); it is about persuading others whose theories are, to quote Stanley Fish once more, "self-evident."

38. For further accounts of these various theories and their use in the art of persuasion, see *ANALYTIC JURISPRUDENCE ANTHOLOGY* (Anthony D'Amato ed., 1996). The chapter headings tell the story: Positivism, Natural Law, Formalism, Realism, Pragmatism, and Justice.

