Introduction

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Recent debate about theory in legal scholarship[1] has raised more questions about theory and law than it has answered. For example, just what is meant by "theory" in the context of law? Is there a form of theory that is uniquely "legal" theory, or is legal theory merely moral theory applied to law? If there is such a thing as legal theory, does the body of positive law, and particularly the decisions of judges, inform legal theory, or does theory inform law? What, if any, are the justifications for constructing theories of law?

In a chapter of his recent book *Placing Blame,* entitled "A Theory of Criminal Law Theories,"[2] Michael Moore addresses some of these questions from the point of view of a theorist and moral realist. The following collection of short papers includes a reprise and defense of Moore's views on theory within law, followed by remarks by Ronald Allen, Leo Katz, and Stanley Fish, and commentary by Larry Alexander. These five papers were first presented at the annual meeting of the American Association of Law Schools, in the Section on Jurisprudence.

The first four panelists—Moore, Allen, Katz, and Fish—can be

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1. For a colloquy on the subject of theory and law, see Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998); Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998); Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739 (1998); Anthony T. Kronman, *The Value of Moral Philosophy*, 111 HARV. L. REV. 1751 (1998); John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768 (1998); Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776 (1998); Richard A. Posner, *Reply to Critics of* The Problematics of Moral and Legal Theory, 111 HARV. L. REV. 1796 (1998).

2. *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW ch. 1 (1997).

roughly divided into two committed theorists and two skeptics. Moore discusses and defends theories within law—that is, theories that explain, describe, and evaluate legal doctrine. In particular, he outlines a series of moral justifications for the practice of constructing descriptive theories of law. He also addresses a variety of critical and skeptical arguments leveled against theory in law.

In contrast, Allen argues that abstract legal theory generates no verifiable propositions, and hence is incapable of resolving legal issues. Law, in Allen's view, is not an integrated system, but rather an organic process in which any change will produce consequences that can never be predicted by deductive analysis. Implicit in this argument, however, lies a theory: that law is by nature organic and not amenable to the logical tools of theorists.

Katz embraces legal theory, describing it as a process in which the mind perceives symmetries and asymmetries in practices or bodies of rules. Just how this occurs—how we perceive symmetry or asymmetry in advance of having a theory—is somewhat mysterious. Yet, as Katz asserts, this is often what we do in thinking theoretically about law. Katz's argument is interesting because it describes and supports a peculiarly "legal" type of theory, distinct from moral theory—a type of theory that is informed by the study of law and specially adapted to the analysis of law.

Fish eschews theory, maintaining that abstract theory is "empty of content." That is, abstract theory has no substance independent of the perspectival pre-commitments of the theorist. At the same time, Fish concedes, and in fact insists, that his conclusion has no consequences. We have no choice but to act on our pre-commitments, and the understanding that those pre-commitments are perspectival rather than absolute has no bearing on the use we make of them. Is there a theory of theory here? Of course there is, although Fish's theory has the odd property of denying its own significance (and perhaps even its existence) and thus retreating from the scene. This leads Alexander to question why Fish considers it important to make his initial point, that theory lacks independent content.

Alexander makes the point that humans are inherently theorizers. That is to say, we naturally organize and systematize the data we find in the world, including the data of law. He then presents his own taxonomy of the varieties of theory, which differs somewhat from Moore's. Specifically, Alexander identifies empirical-predictive, normative, analytical, and philosophical strands of theory.

Despite the very different views expressed here on the value of theory, readers may conclude that all these commentators—including the skeptics—have theories about the nature of legal theory and its relation

to legal data. This bears out Alexander's conclusion that theory is inescapable. It takes a theory of theory to say just what theory is or isn't and whether it is justified.