Theories of Areas of Law*

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The topic of this symposium is "theories and the law." Since this is such an enormously broad topic, the first thing to do is to narrow it a bit. As I shall discuss it, the topic is not on the central topic of jurisprudence, which is the theory *of* law. My topic is theories within our law, rather than theories about the nature of law in general. Often we call such theorizing internal to the law we have, "internal jurisprudence," to be contrasted with an "external jurisprudence" that is about law as such. Within internal jurisprudence, there is still considerable variation in the generality of the object of one's theorizing. One can theorize about areas of law, as I intend to do, or one can theorize about discrete causes of action within areas of law, developing "theories of negligence," and the like. One can also theorize about items as discrete as a "theory of a case," as lawyers use the phrase to refer to a basis for recovery in a particular case. Such internal theories can, on the other hand, be as broad as Ronald Dworkin's kind of internal jurisprudence, which is about law (as we practice it in the Anglo-American legal culture) itself. Irrespective of their level of generality, I call all of these theorizings internal jurisprudence.[1] Such jurisprudence is "internal" in the sense that

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1. On the difference between internal and external jurisprudence, see Michael Moore, *Hart's Concluding Scientific Postscript*, 4 LEGAL THEORY 301 (1998), *reprinted in* MICHAEL MOORE, EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE ch. 3 (forthcoming 2000).

the theories that I shall discuss are theories within the law, theories that aim to be a part of the law of which they are a theory.

In setting out our topic, we next need to be clear about what we mean by a "theory" of something. A theory is a set of general statements that aim at justifying, explaining, or describing some more discrete legal phenomena, be it a doctrine, an area of law, or a particular case decision. Generically, we should think of a theory simply as a set of general statements doing one of these three tasks. More specifically, the kind of theory that interests me here is what I call a descriptive theory. It is not an explanatory theory. Such a descriptive theory does not aim to give an explanation of why we have particular doctrines or why particular cases were decided as they were. Consider by way of example Richard Posner's early foray into theory-building, his "theory of negligence" in terms of efficiency.[2] I took Posner, in that early article, not to be giving a historical account explaining why we had the common law of negligence that we did at the turn of the century. Such a descriptive theorizing was not an attempt to show that the judges who decided 1528 turn-of-the-century negligence cases were motivated in their decisions by efficiency considerations, nor was it an attempt to show that somehow (by the invisible hand) the goodness of efficiency caused the cases to be decided as they were. Posner's theory was not causally explanatory in that way at all. But neither was such theorizing overtly evaluative. Efficiency was not put forward in an attempt to evaluate the tort law that we have by some external normative standard. It was not that kind of a reform-oriented theory, or what I call a purely evaluative theory. Rather, Posner, like Langdell before him,[3] aimed to describe (at a very general level) the doctrines he found to exist in American tort law at the turn of the century.[4] His was a descriptive theory in the sense that it, like the law of which it was a theory, was a description of what had been decided in particular cases. The theory differed from the doctrines only in that the theory was at a more general level than most of the doctrines.

If we distinguish such descriptive theorizing from both explanatory and evaluative theorizing, it is natural to wonder why anyone would engage in this task of descriptive theory building. The answers are various. What apparently motivates some theorists is their architectonic

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2. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

3. *See generally* C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (2d ed. Boston, Little Brown (1880); C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little Brown 1871). Morris Cohen sympathetically portrays Langdell's vision of theory-building in law in Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622-39 (1915).

4. *See* Posner, *supra* note 2.

ambitions—a desire to display the law as having a pleasing logical architecture. While such a motive may well explain some theorists' activities, such aesthetic motivation is no justification for the activity. It is kind of "arts-for-arts-sake" justification that can "move" (that is, motivate) certain theorists, but it does not justify anybody else in paying much attention to their theories. Theories of law, in truth, are pretty poor art. So we need something else to justify descriptive theorizing about law.

It is morality, not aesthetics, which justifies construction of descriptive theories in law. Let me separate several strands to this moral justification for theorizing. To begin with, morality enjoins us to generalize more particular doctrines into more general ones in order to treat alike litigants who are in fact alike in relevant ways. The goal, in other words, is one of equality, treating alike people who differ from one another only by the fact that they happen to be captured by isolated pockets of doctrines of different sorts. Suppose, for example, that landlords are liable in torts to those with whom they are not in privity of contract (such as guests of tenants), but that manufacturers are not liable in torts to those with whom they are not in privity of contract (such as remote purchasers in a chain of distribution). Although compartmentalized in different areas of doctrine, one might well think, as did Cardozo,[5] that there is no relevant difference between such classes of litigants. If either a remote purchaser or a guest of a tenant is within the class of persons foreseeably hurt by negligent activity (be it manufacturing or residential leasing), such persons are owed a duty of care in torts. It is a more general, descriptive theory that allows one to see such similarities (and also any relevant differences). One reason to construct such theories is thus to enhance equality before the law with which litigants are treated.

The second moral goal justifying descriptive theorizing is to enhance the completeness of the law. More general descriptive theories have the capacity to extend doctrine to hitherto unknown areas. When a fellow named John Moore came before the California Supreme Court in the early 1990s, there was no obvious law in California on whether he had a property right in what came to be known as his "three billion dollar spleen."[6] (The spleen was valued, at least in his complaint, at three

5. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1054 (N.Y. 1916).

6. Moore v. Regents of Univ. of Cal., 793 P.2d 479, 489 (Cal. 1990). Then-Chief Justice Malcolm Lucas told me that he and other members of the court dubbed Moore the "man with the golden spleen."

billion dollars because of the capacity to do recombinant DNA research with it.) There was no obvious California property law on spleens or other severed body parts; however, there was a set of more general principles of property law, as Stanley Mosk pointed out in his dissenting opinion.[7] Such principles defined what property is and normatively justified the allocation of those distinctive legal rights we think of as property entitlements. Such principles constitute part of a theory of property. Such a theory allowed a principled extension to the novel case in a way that the doctrine did not.

There were no spleen cases, nor were there any body part cases, in California. At the level of doctrine, the *Moore* case was thus a "case of first impression." Yet such cases of supposed "first impression" are not that unusual if one ignores more general theories of law. You may remember Oliver Wendell Holmes's famous joke about the Vermont justice of the peace who was assigned a case in which a farmer complained that another farmer came on his land and broke his butter churn. The justice remarked that he had looked up butter churns in the Vermont Code and in the cases, and, having found no butter churn statutes or cases, gave judgment for the defendant. Holmes regarded that as a joke, which lawyers in common law countries well understand. Common law lawyers regard that as a joke because the justice was guilty of an obvious failure of generalization. It was a failure to see that there is no relevant difference between butter churns and other objects broken maliciously by somebody else. If the malicious plow-destroyer ought to pay for the plow, the malicious butter churn-destroyer ought to pay for the butter churn. There is no morally relevant difference. It is a descriptive theory that allows the kind of generalization that extends doctrine to new areas.

Third, there is a moral justification for theorizing an area of law even if one is neither changing isolated pockets of legal doctrine to conform to the mass of settled law nor creating new legal doctrine in cases of first impression. We legal professionals would like to think that we owe allegiance to the law, that it obligates us in our role as legal professionals. Seemingly, to have such obligations is at a minimum for there to be some good served by some particular legal institution, be it a case decision, a more general cause of action, an area of law, or Anglo-American law itself. And to show that such goods are served by things legal is to have some kind of a general theory. Such a theory shows us why settled doctrines are good doctrines to have in our legal system, good in the sense that such doctrines serve some end that is sufficiently worthy as to obligate us to them.

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7. *Id.* at 506.

Fourth and lastly, more general theories can serve a valuable heuristic function. As Langdell pointed out long ago with reference to the doctrines of contract law,[8] it is easier to know a few general principles than it is to know a multitude of more finely grained doctrines. It is good that law be knowable to those to whom it is applied—good because it enhances their liberty, lessens unfair surprise, and heightens the efficiency of self-executing laws. By serving a heuristic function, descriptive theories serve these goods of liberty, fairness, and efficiency.

Now let me turn to some criticisms of descriptive theories in law. I shall consider four such criticisms. The first is that descriptive theories pretend to be value-free when they are not, should not, and cannot be value-free. In the history of jurisprudence, this criticism does not lack targets. Langdell's theory of contracts in terms of his meeting of the minds principle,[9] Posner's theory of efficiency for torts,[10] Rolf Sartorius[11] and Herbert Wechsler,[12] all thought that they had neutral, value-free theories of law. I am not one of those folks. Descriptive theories must contain some evaluations in order to have an acceptable theory of an area of law. Mostly, this is because of the reasons given above justifying the doing of the theorizing. If you are trying to justify settled doctrine, to extend it to new areas, or to synthesize it into larger and larger wholes, that can only be done in light of some moral vision about what the end or function of that area of law or legal institution is. One cannot, for example, decide when one case is deserving of like treatment with another case except by some theory as to what are *relevant* similarities and differences; such relevance can only be a matter of substantive moral judgment because equality is not served by treating cases alike that are alike only in morally irrelevant ways.[13] So I am not one of those claiming that descriptive theories are, can be, or should be value-free.

Another criticism is that theories of law are necessarily metaphysical, and that is bad. While heavy-duty metaphysics may well characterize

8. *See* LANGDELL, SUMMARY, *supra* note 3. *See also* Cohen, *supra* note 3.
9. *See* LANGDELL, SUMMARY, *supra* note 3.
10. *See* Posner, *supra* note 2, at 37.
11. *See generally* ROLF E. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS (1975).
12. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
13. For my rejection of purely formal equality (*i.e.*, like treatment of cases that are alike only in formally categorized ways) see Michael S. Moore, *Legal Principles Revisited*, 82 IOWA L. REV. 867 (1997), *reprinted in* MOORE, *supra* note 1.

the theories I happen to favor, it is not necessarily true of theories of areas of law as such. Theories about areas of law can have metaphysics within them, such as a corrective justice theory of tort liability heavily relying on some metaphysics of causation.[14] Or, theories can have a metaphysical justification for theorizing, as when you are theorizing about a kind and its nature is such that it invites theoretical depth. This is most plausibly the case about natural kinds like water, but also perhaps about moral or functional kinds, too.[15] Yet there is nothing necessarily connecting theories to metaphysics. I think everyone, save Stanley Fish, can have theories in my sense, whatever their taste for metaphysics.

Coming then, to the third criticism, it goes something like this. Stanley Fish vis-à-vis my theories is like Edmond Burke vis-à-vis Locke's theories. For Fish shares with Burke a distrust of any kind of abstract generalization and thus a distrust of theory in my sense.[16] Fish (and Burke) have a metaphysical distrust, too, but that is separate. The distinct distrust here considered is the distrust of abstractions, including abstractions of the sort I call a theory. They doubt the existence or the usefulness of any generalizing set of statements that deductively justifies (with suitable connecting promises) more particular legal institutions—that is, they doubt the existence or the usefulness of theory. Consider as our example a theory of criminal law. Such a theory starts with something very abstract and very general, namely, what is the value served by that area of law? I defend retributive theory, one that says that the point of criminal law is to achieve retributive justice,[17] but there is nothing here that turns on adopting my particular theory. However, for illustration, suppose that criminal law serves retributive justice; then punishment is proper when, but only when, offenders are morally blameworthy. So now we need a theory of moral blameworthiness or responsibility. I divide blameworthiness into two parts, moral wrongdoing and moral culpability.[18] We now need a theory of the nature of these two items. For wrongdoing, I have a theory that goes like this.

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14. *See* Michael S. Moore, *Causation and Responsibility*, 16 SOC. PHIL. & POL'Y 1, 4 (1999).

15. On the justification for theorizing given by a metaphysics of kinds, see, for example, Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107 (1989).

16. *See, e.g.*, Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1781 (1987). For a summary of Burke's basis for distrusting theory, see Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263, 266-71 (1996).

17. MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW chs. 2-4 (1997).

18. *See id.* at ch. 9.

Sometimes wrongdoing is a voluntary act that without justification causes a harmful state of affairs. This is what I call the consequentualist kind of moral wrongdoing. Alternatively, sometimes wrongdoing consists in the unjustified doing of any action that violates an "agent-relative" prohibition of morality; this is the deontological view of moral wrongdoing. I think both kinds of wrongdoing are prohibited by our criminal law.[19] Culpability is the intent to do a wrongful act or foresight that you are doing a wrongful act or unreasonably risking that you are doing a wrongful act, in situations where the actor is without excuse.[20] Each of these elements of wrongdoing and culpability in their turn invite their own subtheories. For wrongdoing, we need a theory of voluntary action,[21] a theory of causation,[22] a theory of what makes some states of affairs harmful.[23] We also need a theory of justification, that is, a theory that can tell us when a prima facie wrongful action is not actually wrongful because it is justified.[24] Turning to culpability, we need a theory about intentions, beliefs, and their objects.[25] We need a theory of negligence, and we need a theory of excuse.[26]

Each of these items, in turn, will invite yet more particular theories. For example, if part of our theory of voluntary action includes some state of willing or volition, we will need a theory about the nature of that mental state;[27] if part of our theory of causation involves "intervening causes," we will need a theory of intervening causes;[28] if part of our theory of excuse is in terms of character, we will need a theory of character;[29] and so on. Moreover, we will also then need to theorize each of the subcategories of justification and excuse. We will need theories of self-defense, defense of others, insanity, duress, and the like. And, of course, a theory of each of these will need some theory making sense of the various elements of these discrete defenses, such as the retreat

19. *See* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993).
20. *See* MOORE, *supra* note 17, at chs. 9-10.
21. *See* MOORE, *supra* note 19, at chs. 2-6.
22. *See* Moore, *supra* note 14.
23. *See* J. FEINBERG, HARM TO OTHERS (1984).
24. *See* MOORE, *supra* note 17, at ch. 17.
25. *See id.* at ch. 11.
26. *See id.* at chs. 12-13.
27. *See* MOORE, *supra* note 19, at ch. 6.
28. *See* Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CAL. L. REV. 827 (2000).
29. *See* MOORE, *supra* note 17, at 548, 562-92.

obligation in self-defense. And away we go, to theorize about the "castle exception" to the retreat exception to the self-defense justification. Eventually, we will be theorizing about the best decision in a particular case.

The point of this example is this: I do not see any end or natural break when we begin with the most abstract theory and continue down to the most particular decision in a particular case. While one can of course distinguish the most abstract part of the theory ("retributivism") from much less general theories of particular doctrines or even particular cases, there is some degree of abstractness, some degree of generalization, all the way down the continuum described above. The burden is on those who want to be theory-less to find some significant break point in that continuum, a break point below which one is no longer doing "theory." Yet, there is no such break point: it is theory all the way down. So those aspiring to the theory-less position must reject it all; there can be a theory of liability in a particular criminal law case no more than there can be a theory of self-defense no more than there can be a theory of the criminal law. About the only way one could be led to this kind of view is to say that all knowledge is inherently particularistic. We never use anything general because knowing anything is intuitive, particular, contextualized, and so on.

Fish said as much at a debate we had in 1987 at the University of Michigan.[30] According to Fish, it is fine to do the practice of theory, but it has nothing to do with the practice of practice. Theory is just a different practice. I told Stanley at that debate that he was trying to unemploy me in my teaching of theory seminars for judges. He admitted that he certainly was. Yet, after the session he asked me if he could join me in one of the seminars. I asked Stanley what he would tell the judges about the practice of judging, inasmuch as he could not use any theory, no matter how discrete. Fish said, "I'd tell them not to listen to you." Needless to say, that cooperation never happened.

On the merits, none of us thinks in the particularistic way that would decry all theory. If you did not, for example, have some general notions of logic, you wouldn't understand the sentence I am presently uttering. You have to get the "if... then," you have to supply the missing premise ("I do understand that sentence"), you have to use modus tollens to negate the consequent, and now you make the inference. Right? We all use more general stuff to interpret anything that is particular. So Fish cannot mean what he literally says about knowledge. He must be

30. Fish's side of the debate became *Dennis Martínez and the Uses of Theory*, *supra* note 16. My side became part of Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989).

critiquing something else when he is critiquing "theory."

One possibility is that he is critiquing foundationalist views of justification in epistemology.[31] Maybe when Fish decries "theory," he is decrying those who claim to find foundational starting points in the justification of beliefs, starting points that are "self-evident" or in some other way unquestionable. If this is the critique, it is not a critique of me for I agree with it. It is not the case that more abstract statements ("theories") have any kind of justificatory priority. It is not the case that you should always start with the theory and then justify everything else by applying the theory to the particulars. A nonfoundational view of knowledge about law, ethics, or anything else gives as much priority to the particular intuitions in particular cases as to intuitions about the correctness of general statements. There is no epistemic priority to theory in terms of justification. If that were Fish's point, we could all agree.

A second possibility is that Fish is attacking a certain kind of discovery procedure when he attacks "theory." His target here seems to be a kind of deductive decision procedure whereby one decides a particular case by deducing its result from more general standards. Yet no believer in the power of theory need be stuck with some simple-minded, deductive decision procedure whereby a judge simply finds the theory and then deduces the result in a case from some abstract theory. As a matter of discovery, judges often do better taking a cold shower or doing any of the kind of "hunching" procedures of which the legal realists in the 1920s were so fond.[32] Yet what the "betterness" consists in when the judge *does better* is to arrive at a deductively justified decision, that is, a decision that does follow logically from a good theory. In other words, where the judge ought to get to is determined by theory, even if how he gets there may be without conscious application of theory.

A third target for Fish lies in his construal of theories as kinds of texts. A theory, in this view, has a canonical formulation like a statute. Worse, such a canonically formulated set of standards can be sensibly applied knowing no more than ordinary English semantics. Needless to say,

31. On foundationalist versus nonfoundationalist views in epistemology, see, for example, ROBERT AUDI, THE STRUCTURE OF JUSTIFICATION (1993).

32. *See* Joseph C. Hutcheson, Jr., *The Judgment Initiative: The Function of the "Hunch" in Judicial Decisions*, 14 CORN. L.Q. 274 (1929), *reprinted in* 39 S. TEX. L. REV. 889 (1998).

Fish has little difficulty in shooting down this plain-meaning approach to theories. His only real problem is finding anyone who views theories in this way.

With those clarifications, we should see descriptive theory-building to be a useful enterprise for the reasons described above. Theorizing an area of law allows us to grasp quickly what such doctrines are about, allows us to extend those doctrines in a principled way, and allows us to render such doctrines consistent in the sense that they collectively promote equality. Theories of tort, property, and so on, do all of these things without for a moment succumbing to simple-mindedness in decision procedures or naiveté about foundational status.

The fourth and last criticism I want to talk about has more to do with Ron Allen's concerns than with Stanley Fish's. Allen's concerns are causal criticisms, not logical ones, in the following sense: Allen's question is not whether theories have logical implications for particular cases; rather, his is a question of whether we theorists actually ever make a difference in the world with our theories. Do those with power over our law, such as judges or legislators, actually follow our theories in their law-making, or do our theories have a causal impact on doctrine in some less direct way? The case I mentioned a while ago, *Moore v. Regents of the University of California*,[33] the case about the man with the three billion dollar spleen, is a counterexample for me. A majority of the justices who decided that case had attended the seminars for judges that I put on in California for a decade and a half. Sad to say, the majority never learned one of the major lessons in those seminars, which was that theory about an area of law gives judges more law with which to decide seemingly novel cases. As Justice Mosk (who never took my seminar) put it in his dissent, there *was* California property law bearing on Moore's ownership of his spleen even though there was no *obvious* law of statute or precedent.[34] So sometimes, certainly, we theorists do not have as much causal impact as we would hope.

On the other hand, there are examples the other way. Hart and Honore's *Causation in the Law*[35] is one of the least cited books in legal opinions on causation. Nonetheless, if you look at legal reforms by interpreters of Hart and Honore, what you might conclude is that there has been a trickle-down effect. By interpreters, I mean the likes of Sandy Kadish, former Dean at Boalt, who has done much to influence criminal law doctrine based on his understanding of Hart and Honore's

33. 793 P.2d 479 (Cal. 1990).
34. *See id.* at 509 (Mosk, J., dissenting).
35. *See* H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW (2d ed. 1985).

theory.[36]

Sometimes theory makes a difference; perhaps often it does not. I guess, as a theoretical scholar, I would like theory to make a difference in the real world, but I think the enterprise would be worthwhile even if it does not. It would be nice if somebody understood what we are doing in our various compartments of law, even if such understanding is gained only by a theorist with no power to change our practices.

36. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985), *reprinted in* SANFORD H. KADISH, BLAME AND PUNISHMENT (1987).