

What We Do When We Do What We Do and Why We Do It*

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The general purpose of my remarks is the same as my fellow-speakers'—to explore what we do when we do what we do and why we do it. But my specific aim is going to be different. My specific aim is to make us self-conscious about an important aspect of legal scholarship that we usually deal with by instinct or intuition rather than self-consciously. Being self-conscious about what you do is a risky thing, to be sure, as noted in a famous little verse, which goes like this:

The centipede was happy quite
Until a toad in fun
Said "Pray, which leg goes after which?"
That wrought its mind to such a pitch
It lay distracted in a ditch
Considering how to run.¹

Indeed, a psychology book I recently read gives the following diabolical piece of advice for unhinging your tennis opponent: compliment him on his strongest stroke, and be very specific about what is so terrific about this stroke. It will make him so self-conscious about it, he will flub it the next few times for sure.

But there are some upsides to self-consciousness, too. Knowing the rules of grammar or the meter of blank verse is not pointless, even if you

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1. The origin of this verse is unknown.

rarely consult them when you speak, write, or versify. The chief benefit to being self-conscious about what you do as a legal scholar is that you might be able to extend a trick that you use instinctively in one domain of your scholarship into a domain where it would work equally well if only you would think to try it there. The particular aspect of legal scholarship I want to make you self-conscious about is one which philosophers of science have started to pay considerable attention to in recent years: first, when they tried to explain what it is that mathematicians do when *they* do what they do, later to explain what natural scientists do when *they* do what they do, later yet, to explain what social scientists do when *they* do what they do. It stands to reason that it can also explain what we legal scholars do when we do what we do. What philosophers of science have claimed about mathematics, and later about the sciences more generally, is that what it really comes down to, or what a good part of it comes down to anyway, is *the search for symmetry and for asymmetry*. The Princeton mathematician Hermann Weyl, in a famous set of lectures simply titled *Symmetry*,² advises all scholars, mathematicians especially but he exempts no one, that the best way to explore any subject you are interested in (provided you are dealing with what he calls a “structure-endowed entity”³) is to explore its symmetries and asymmetries. Most of what is important or interesting about any subject, Weyl claims, you will uncover if you simply look for those.

But what exactly am I talking about when I speak of symmetry and asymmetry in law and ethics? It may be clear enough what those notions mean in geometry, but how are they to be understood in law, or for that matter in ethics, more generally? Let me start with symmetry—its meaning and the benefits of exploring it. Rather than try to define the term, however, I will offer what I think is a pretty self-explanatory example of the phenomenon as it arises in law and ethics. It is an example that has fascinated me for quite some time: the symmetry between the principles by which we dispense praise and those by which we dispense blame.

The principles by which we dole out blame are the familiar rules of the criminal law. The interesting thing is that the principles by which we give out praise are an exact mirror image of the rules of criminal law. Just as we condemn someone more if he caused harm by an act rather than an omission, we praise someone more if he caused a good consequence by an act rather than an omission. And just as we condemn someone more if he intentionally caused harm rather than inadvertently,

2. HERMANN WEYL, *SYMMETRY* (1952).

3. *Id.* at 144.

we praise him more if he caused a good consequence intentionally rather than inadvertently. And just as we condemn someone more if he caused harm as a principal rather than as an accomplice, we praise someone more if he caused a good consequence as a principal rather than as an accomplice. And just as we condemn someone more if he tried and succeeded in causing some harm than if he merely unsuccessfully attempted it, we praise someone more if he tried and succeeded in causing some good consequence rather than merely unsuccessfully attempted to bring it about. This should give you a pretty good idea of what the idea of symmetry comes to in the legal or the ethical context.

Now what is the benefit in focusing on such symmetries? Simply put, the search for symmetry serves to reveal larger patterns in the law and these larger patterns allow us to understand all sorts of matters that previously seemed puzzling. If one is puzzled, for instance, as to why the law attaches such significance to the difference between causing a harm by an omission and causing it by an act, one is likely to feel less puzzled once one sees the distinction as part and parcel of a larger principle of responsibility that holds for the dispensation both of blame and of praise, and once one sees how intuitively compelling the principle becomes when applied to praise. If we did not draw the act or omission distinction when it comes to praise, we would have to praise equally lavishly the person who brought about some particularly praiseworthy result and the person who simply failed to prevent it by not standing in the way of its attainment.

Let me illustrate the benefits of this search for symmetry further by pointing to a number of famous insights in law and ethics which basically come down to the uncovering of a hitherto overlooked symmetry. Start with the Coase theorem.⁴ The key insight that makes the Coase theorem take off is a simple symmetry argument. When I play my music so loud as to be a nuisance to my neighbor, then it may be tempting to think of me as the cause of the problem. But, as Coase points out, that is much too quick; for there to be a nuisance requires not just a perpetrator but a victim. Indeed, on closer inspection, perpetrator and victim play such symmetrical roles in the creation of the nuisance that one cannot really persist in calling the music player the perpetrator and the music listener the victim, or in doing what at first glance seems like the legally, ethically, and economically sensible thing, namely

4. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

making the music player pay for the discomfort he inflicts on the listener. It is the symmetry of perpetrator and victim that lies at the heart of the Coase theorem.

Consider next Judith Jarvis Thomson's argument in favor of the permissibility of abortion.⁵ What exactly is the point of the hypothetical about someone who wakes up in a hospital hooked up to a world-famous violinist? Thomson wants to argue that a mother has no duty to carry her fetus to term because the person who finds himself hooked up to that violinist has no duty to remain hooked up to him. And the reason he does not have such duty is that we generally do not impose a duty on citizens to be good samaritans. What had not been perceived before Thomson came up with her example is the symmetry between the good samaritan case, in which we think aid would be nice but not mandatory, and the abortion case.

Take Hohfeld's great analysis of rights.⁶ What it amounts to at bottom is the discovery of a series of overlooked symmetry relationships between various kinds of rights. What he uncovered was the multiple symmetries between our multiple rights-related concepts—that of a duty, a claim, a privilege, a license, a power, an immunity. Hohfeld discovered that you can neatly characterize a claim as being nothing more than the presence of a duty, a privilege as the absence of a duty, a power as the ability to alter duties, and so on. It was a pattern no one had clearly discerned before. But to say it is a pattern leaves the matter unnecessarily imprecise. It was a series of symmetries he unearthed—that is much of the source of his appeal.

Then there is Calabresi and Melamed's great paper on property rules, liability rules, and inalienability rules—their view of the cathedral.⁷ At the heart of their paper is a set of symmetries characterizing the way all entitlements across the legal landscape are protected. They all come down to being bundles of three very simple kinds of protections—property rules, liability rules, and inalienability rules. What Calabresi and Melamed uncovered was both a symmetry across all manner of legal contexts and a set of symmetries as between different kinds of remedies. Obvious though their insight seems in retrospect, no one had properly noticed before that we are dealing with three ways of protecting entitlements differing in the narrow way that liability rules, property rules, and inalienability rules do.

5. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. PUB. AFF. 47 (1971).

6. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 35-64 (1923).

7. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Perhaps none of these examples strike you as sufficiently legal to make the case that symmetry is at the heart of legal scholarship. Coase and Calabresi and Melamed you may tend to allocate to economics, Hohfeld and Thomson to philosophy. So take something as quintessentially legal as the General Part of the Criminal Law—the systematic presentation of our rules of criminal responsibility.

What makes the General Part so general is that it lays bare the key symmetries running through all of our criminal offenses—the act-omission distinction, the voluntary act requirement, causation, complicity, attempt, the basic forms of mens rea, and the classic defenses. But it goes further than that. The General Part reveals symmetries between these different elements; symmetries between different forms of mens rea (intention, knowledge, recklessness, and negligence); symmetries between the principles of attempt and the principles of complicity; symmetries between the different prongs of the act requirement; symmetries between necessity and duress and self-defense and defense of others. Relationships that had previously been only dimly sensed are laid out in the General Part with stunning, if not exhaustive, completeness.

Well, the search for symmetries is only one half of the agenda that I said legal theory typically pursues. The other half is the search for asymmetry. Let me begin by explaining more fully what I have in mind by asymmetry in the legal and ethical context and then go on to show the benefit for searching them out.

For a striking instance of asymmetry, let us revisit the rules by which we dispense praise and blame. Given what I said earlier, we would in general expect the rules to be mirror images of each other. The astonishing thing is that there are many situations in which the rules fail to mirror each other, even though we would expect them to. For example, if someone commits a crime while insane, we do not blame him. But, interestingly, if someone does something quite praiseworthy while insane, that generally does not stop us from praising him. Van Gogh painted several paintings in a state of mind which, if he had committed a crime while in that state of mind, he could not be held responsible for. Yet, we continue to praise his artistic achievement. Or think of someone who takes a great risk in order to bring about some praiseworthy consequence. We think his taking that risk makes him all the more praiseworthy. But compare him to someone who takes a great risk in order to commit some terrible crime. We do not think him extra-

blameworthy because he took that risk. Those are tantalizing instances of *asymmetry*—the role of insanity when it comes to praise versus when it comes to blame, the role of risk-taking when it comes to praise versus when it comes to blame. Once one has noticed such asymmetries, of course, one has to try to explain them. But first one has to notice them. And that is just what the search for asymmetries does for us: it generates intriguing research questions it would not otherwise have occurred to us to ask.

Let me add a few more examples to illustrate the fruitfulness of looking for such asymmetries. Consider, for example, an article by Larry Alexander on the subject of precedent.⁸ The ostensible purpose of the article is to inquire why we find precedent ethically binding. But, at the heart of the article is Larry's puzzlement at finding an asymmetry where one would expect to find symmetry. When a doctor has treated a patient in a certain kind of way for a certain disease, and the doctor then encounters another patient with the identical disease, but he has since changed his mind about what the best treatment would be, what should the doctor do? Why, treat the patient in accordance with his latest best judgment, of course—it would be malpractice to do anything else. But what do we expect of a judge who has disposed of a certain case in one way and then encounters another case that is on all fours with the prior one—but the judge has changed his mind as to what the best way to dispose of such a case would be? We think he should attach a lot of weight to the way he decided the prior case. But that makes for a strange asymmetry between medical and judicial decision makers. The doctor is supposed to do the best he can given everything he knows at the time, and the judge is not. What could account for this asymmetry? Larry concludes that nothing can. Whether you agree with him is beside the point; the thing to note is the potent role that the discovery of an asymmetry plays in suggesting an immensely fruitful question.

Here is yet a further example of the discovery of an asymmetry being used to generate an immensely fruitful line of questions: the tax expenditure debate. Granting someone a deduction and granting him a subsidy are very symmetrical things. Both involve the government putting some money into a taxpayer's pocket. That would lead one to expect deductions and subsidies to be governed by fairly symmetrical tax principles. What tax scholars noted is that this expectation of symmetry, strangely enough, is in fact not fulfilled. Deductions and subsidies are treated remarkably asymmetrically. We grant people deductions for business expenses, charitable donations, medical expenditures, all of which seems eminently reasonable, but suppose we

8. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989).

think of these deductions as subsidies. Suddenly they start to look mighty strange. Deductions for business expenses and charitable donations are typically claimed by wealthy people, but why are we giving subsidies to the wealthy? Deductions for medical expenditures put more money into the pockets of someone in a high tax bracket than someone in a low tax bracket. But why are we giving more medical assistance to the wealthy than the poor? It is a very neat puzzle that has generated an illustrious line of articles. I have no idea what the answer is, and I do not need to. All I mean to alert you to is the powerful role that the discovery of an asymmetry plays in generating a fascinating line of research.

Interestingly, the answers to these kinds of questions—why there is a particular kind of asymmetry in a particular area of law—turn out to be remarkably uniform, more uniform than has hitherto been noticed. The usual answer turns out to be that what looks as though it is a violation of symmetry actually involves a deeper kind of symmetry, or at least a different kind of symmetry. A simple example of this is a problem in tax law, the so-called marriage penalty. At first glance it strikes us as a puzzling and unjust violation of symmetry that a person should be taxed differently depending on whether he is married or not. The problem is that we also think that there should be perfect symmetry between all families, regardless of whether it is the husband who earns most of the money, the wife who earns most of the money, or whether each earns half of the family's income. As it turns out, in a progressive income tax system we have a choice to make—only one kind of symmetry is feasible. Either we treat all families symmetrically, regardless of how the family income is generated, or we treat single and married people symmetrically. One kind of symmetry is incompatible with the other kind of symmetry; it is just not possible to have both.

The situation is like one that confronted Ann Landers some years ago. The annoyed parents of two adult children wrote to Ann Landers complaining that, whereas their married daughter dutifully brought her husband and family to spend Thanksgiving and Christmas with them, their son chose to spend the holidays with his in-laws instead. Why could not sons be as dutiful as daughters? What they were complaining about was an asymmetry—an asymmetry between sons and daughters. Ann Landers, of course, pointed out to them that they were asking for a logical impossibility—it is not possible for every married son and every married daughter to make their families spend their holidays with their

parents rather than their in-laws, unless, of course, you treated some parents differently from other parents. But that would just buy you one kind of symmetry at the price of another.

So that is what I think legal scholarship is about. That is what I think we do when we do what we do. We emulate Ann Landers, and Coase, and Calabresi and Melamed, and Hohfeld, and Alexander: we look for symmetries and asymmetries that the rest of the world has missed.