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Theory Minimalism

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STANLEY FISH**

We must begin with a sense of what theory is, and I shall derive mine from a question Herbert Wechsler often put to his students. "Ask yourself," he would say, "'Would I reach the same result if the substantive interests were otherwise?'"[1] The challenge of the question is to the student who has determined where the right lies in a disputed matter, and who now must demonstrate that, even if every circumstantial particular of the case were varied—if the plaintiff were a woman instead of a man, if the object of hate speech was a descendant of someone who came over on the Mayflower rather than the descendant of a slave, if the publication subject to regulation were *The New York Times* rather than *Hustler*, if the organization requesting a permit were the Salvation Army rather than the Aryan Nation—both the result and the reasoning leading to it would be the same. This requirement, in all its severity and stringency, is the theory requirement, the requirement that cases be decided from a perspective—sometimes called the forum of principle, the realm of neutral principles, or the view from nowhere—unattached to any local point of view, comprehensive doctrine, partisan agenda, ideological vision, or preferred state of political arrangements. For some years now, I have argued that there is no such perspective, and that the abstractions usually thought to be its habitation are empty of content. Of

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** Dean of the College of Liberal Arts and Sciences at the University of Illinois at Chicago. Ph.D. 1962, M.A. 1960, Yale University; B.A. 1960, University of Pennsylvania.

1. Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 925 (1993).

course, that is in fact another way of formulating the theory requirement—that it be empty of content. The theory of the kind I am interested in—grand theory, overarching theory, general theory, independent theory—claims to abstract away from the thick texture of particular situations with their built-in investments, sedimented histories, contemporary urgencies, and so on, and move toward a conceptual place purified of such particulars and inhabited by large abstractions—fairness, equality, neutrality, equal opportunity, autonomy, tolerance, diversity, efficiency—hostage to the presuppositions of no point of view or agenda but capable of pronouncing judgment on any point of view or agenda. When faced with opposing courses of action or conflicting accounts of what the law demands, one can ask of the contenders, "Which is most responsive to the imperative of fairness?" or "which most conduces to the achievement of equality?" or which will promote the greatest diversity?"

The trouble with such questions (or so my argument goes) is that you will not be able to answer them without fleshing out your favorite abstraction with some set of the particulars it supposedly transcends. If you are determined to go with the alternative that is fairest, you will first have to decide whether by "fairness" you mean fairness to everyone independently of his or her achievements, failures, crimes, citizenship, gender, sexual orientation, or fairness inflected by at least some of the considerations in my non-exhaustive list. If "equality" is your loadstar, then you will have to decide whether you mean equality of access (a strongly procedural notion) or equality of opportunity (which will take into substantive account the current situation and past history of those on whom equality is to be conferred). And, if "diversity" is your watchword, you will have to decide whether under its umbrella you wish to include pedophiles and Neo-Nazis; if you do not, you will have to think of reasons—and those reasons will inevitably be particular and historical—for excluding them. And if you refuse this task and, when asked "What do you mean by fairness or equality or diversity?" merely repeat the words as if they were a mantra, your interlocutor will rightly complain that you have given him no direction, that if the abstraction is not thickened and provided with content, there is no way to get from it to the real-world dilemma he faces, or—it is the same thing—there are so many ways that the choosing of any one them will be arbitrary.[2]

2. This does not mean that invoking an abstraction like fairness or inequality will not make a difference in your argument, or that there will be no difference in the difference made if you invoke one rather than the other. It is just that the difference will have been made not by an abstraction purged of substance, but by a substantively changed word or phrase, the meaning of which has been conferred by the disciplinary context into which it is now reinserted. Someone who invokes fairness at the point

I sometimes make this point in a melodramatic way by declaring that neutral principles and the realm of general theory do not exist.[3] However, the formulation is too sweeping and should be qualified. Neutral principles obviously exist in the sense that people continually invoke them in support of arguments and agendas, and declare that they are following them, and accuse their opponents of falling away from them. They even exist in the pure form often claimed for them on the level of philosophical analysis. It is an intelligible and even pleasant activity to sit around and debate the virtues of strict constructionism versus judicial activism, originalism versus present-oriented interpretation, interpretivism versus non-interpretivism, deontology versus consequentialism, individual rights versus utilitarianism, indeterminacy versus plain meaning, or pragmatism versus almost anything. It is the next step—the step of deriving from theses debates some methodological aid that will be of help when you descend to a particular problem—that cannot be taken, or can only be taken by providing your theory or principle with a substance (and therefore with a direction) borrowed from one of the very contexts from which it supposedly enjoys a magisterial independence. And once you have done that, it is true to say that your theory or neutral principle does not exist, for in its degraded—that is, contextual—form it has lost the distinctiveness that would make the designation "theory" or "principle" meaningful, make it something more (or less) than just another substantive argument.

The point is, finally, a simple one: there is no relationship between the level on which high-theory debates usually occur and the level on which you are asked to sort through the complexities of a real life situation and determine a course of action. This is pretty much what Professor Allen says in a slightly different vocabulary: "[S]o far as I can tell not a single thing relevant to the legal system or the governance of the nation turns on who is right and who is wrong about the ontology of morality or ethics. Literally nothing."[4] And it has also been said by several others, including Richard Posner in his recent book *The Problematics of Moral and Legal Theory*: "there doesn't appear to be a

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where someone else would invoke diversity will be taking the discussion in a different direction; but there will always be a third person arguing that, properly construed, diversity and fairness are one and the same.

3. I do this in my "there's no such as" moods.

4. Ronald J. Allen, *Two Aspects of Law and Theory*, 37 SAN DIEGO L. REV. 743, 744 (2000).

universal moral law that is neither a tautology (such as "don't murder") nor an abstraction (such as "don't lie all the time") too lofty ever to touch ground and resolve a moral *issue*, that is, a moral question on which there is disagreement."[5] Legal sociologist Brian Tamanaha, Dean of St. John's University School of Law, says it this way: the "overarching end" of judges may be "to do the right thing," but "[i]n itself this overarching end is empty of content;"[6] "[l]egal theory generated legitimation—'law provides one right answer'—or delegitimation—'law is politics'—alike seem largely beside the point to the massive intertial presence of law in the United States."[7] My personal favorite, Matthew Kramer, Director of Studies in Law at Churchill College, Cambridge, declares roundly: "Fish quite rightly contends that a proposition at the level of jurisprudence cannot *entail* a particular proposition at the level of judicial practice."[8] He gives his reason for this pleasing judgment as thus: "Precisely because a metaphysical doctrine must abstract itself from specifics . . . in an effort to probe what undergirds all specifics of any sort, it retains its lesser or greater cogency regardless of the ways any specific facts . . . have turned out."[9] "Strictly speaking, then, a proposition of the former [jurisprudential] type cannot serve as an argumentative justification for a proposition of the latter [judicially practical] type."[10] That is, you may be correct in your jurisprudence (whatever it is) or incorrect, but your correctness will not enable you, nor your incorrectness impair you, when you come to consider a specific set of facts and embark on the effort to make sense of them. The theory game is fun to play and can even yield winners and losers, but its relevance to the world of practice is nil unless it is so highly mediated that it is no longer theory at all.

Of course, my ability to adduce four legal worthies for my side of things does not mean that the argument we severally make holds the day or is acceptable to everyone. There are still normative theorists aplenty. So Ronald Dworkin, a die-hard if there ever was one, ends a recent essay, entitled "In Praise of Theory," this way: "We must strive, so far as we can, not to apply one theory of liability to pharmaceutical companies and a different one to motorists, not to embrace one theory of free speech when we are worried about pornography and another when we

5. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 19 (1999).
6. BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY 240 (1997).
7. *Id.* at 251.
8. MATTHEW H. KRAMER, IN THE REALM OF LEGAL AND MORAL PHILOSOPHY 83 (1999).
9. Matthew H. Kramer, *God, Greed, and Flesh: Saint Paul, Thomas Hobbes, and the Nature/Nurture Debate*, 30 S.J. PHIL. 51, 52 (1992).
10. KRAMER, *supra* note 8, at 84.

are worried about flag burning."[11] We can move in that desirable direction, he says, only if we "raise our eyes a bit from the particular cases . . . and look at neighboring areas of the law, or maybe even raise our eyes quite a bit and look in general, say, to accident law more generally, or to constitutional law more generally, or to our assumptions about judicial competence or responsibility more generally,"[12] spiraling ever upward in a "justificatory ascent"[13] toward the forum of principle. Dworkin's presentation of his jurisprudence is dramaturgical; he portrays himself as the common sense moral realist beset on all sides by various sects of pragmatist and postmodernist absurdists, and he succeeds, rhetorically at least, by tilting against views none of his targets actually holds. Here, for example, is his report of what Richard Rorty supposedly says: although Rorty will acknowledge that mountains exist, "if you ask him . . . whether mountains exist as part of Reality As It Really Is, with very big capital letters on these phrases—he would reply no, that is ridiculous."[14] No, Rorty would reply that (a) although I do not doubt that Reality As It Is exists, we can assert nothing about it except in the vocabularies of description and predication available to us as finite creatures, vocabularies generated by the structures and sedimented histories of our cultures, educational traditions, disciplinary matrices, and so on, and (b) that, while in any one of those human vocabularies, to say that mountains exist—and are bigger than hills and more enduring than skyscrapers—is to speak an obvious truth, to say that Reality As It Is would also confirm the truth that mountains exists is to say something that is not so much wrong but unintelligible; for no sense can be given to the notion that Reality As It Is makes propositions about itself. Human beings make propositions, and it is only in relation to those language-limited propositions that issues of truth and falsehood about the world arise and can be resolved by contingent and revisable historical methods of verification, disconfirmation, and so on. Or, in Rorty's own words, "The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own—unaided by the describing activities of human beings—cannot."[15] That is, "the world on its own" is surely a category of existence, but not one

11. Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 376 (1997).
12. *Id.* at 356-57.
13. *Id.* at 356.
14. *Id.* at 363.
15. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 5 (1989).

about which humans can know or say or pronounce anything; what humans can know and say and pronounce about are the objects, events, and states available to them within the systems of knowledge and predication in which they live and move and have their being, systems of knowledge and predication that at once both enable and limit what can be seen, asserted, and declared to be true or false: "where there are no sentences there is no truth" and "sentences are elements of human languages, and . . . human languages are human creations."[16] Any of the questions Dworkin might put to Rorty—Is genocide wrong? Do mountains exist? Does water boil at a certain temperature?—can be answered firmly and without metaphysical reservation (even by persons aware that the answers could change if the systems of knowledge and predications within which we "naturally" move change). The question that cannot be answered about any of these matters is: is this so in Reality As It Is?—is this *really* so, where by "really" is meant "independently of any of the ways of knowing and predicating and verifying available to us as human beings." Rorty's answer to *that* question, and it is also mine, is not "no," but, rather, the question doesn't make any sense because no sense can be given to the category "independently of the ways of knowing, predicating, and verifying available to us as human beings."

So what? What does it mean? It means what Dworkin fears it means: the law, and any other structure of organized human knowledge, is rhetorical, that is, ungrounded in Reality As It Really Is, and therefore contingently formed and, at least potentially, available to revision and capable of disappearing from the Earth. This is not as big a deal as it sounds. It would be a big deal if the unavailability of confirmation by an unmediated Reality, the unavailability of foundations, the unavailability of independent grounds, were disabling. Those who think it is disabling typically conflate two propositions, one of which is true, the other false. The first and true proposition is that our convictions and practices cannot be grounded in some reality or authority or principle wholly independent of them; the second and false proposition is that therefore our convictions and practices are ungrounded. The second proposition will seem necessarily to follow from the first only if you assume that without independent grounds and convictions, our assertions and actions rest on quicksand. But, in fact, convictions and practices come equipped with their own grounds in the form of assumptions concerning what the task to be performed is, and a *material* history of the task's performance, complete with authoritative pronouncements; revered, even sacred, texts; canonical authorities; exemplary achievements; known patterns of

16. *Id.*

reward, punishment, advancement, success failure, and so on. The richness and density of this material structure is such that those who move within it are quite secure in their knowledge of what they are doing and the location and value of the resources available to them for the doing of it; this remains so even when disciplinary actors become aware of the contingent and potentially revisable status of the tools at their disposal. It may seem counterintuitive, but your awareness, even knowledge, that the routines you are running and the evidentiary procedures you rely on and believe in are features of a contingent and revisable practice, of a practice that is, as they say, "socially constructed," will in no way erode the confidence with which you run those routines or generate that evidence.

The reason is one I have already given. The assertion that independent grounds are unavailable or that everything is socially constructed is made at so general or lofty a level that it does not touch down on particulars and does not in and of itself provide either justification for or an argument against any action taken within a real world context. That is to say, the argument that so-called neutral principles are unhelpful to embedded actors because they only have traction when fleshed out by the substantive concerns they supposedly transcend is itself unhelpful, does not tell you what to do, does not tell you what not to do, does not tell you that there is nothing to do. All it tells you is that guidance will not come from neutral principles, and that if you want to do something you will have to look to other resources, and it will *not* tell you what those resources are. Those resources, if there are any—not all challenges can be successfully met—will be discovered to be internal to the practices that rest on no other foundation than themselves—in the practice of law, on statutes, rules, norms, standards, precedents, leading cases, categories of causes of action, three-, five-, and ten-part tests, general doctrines like stare decisis, more local doctrines like consideration, proximate cause and felony murder; and even if, as is the case today, these resources have been the object of skeptical rhetorical and postmodern analysis, they will still be the ones you turn to when you are confronted by, and accept the assignment of dealing with, an actual, everyday, garden variety, legal problem. And you will do this precisely because your skeptical, postmodern analysis does not tell you what to do. It is not that kind of thing; it is a metacritical account of the practice, not a recipe for performing it, or a knock-down reason for abandoning it. You may know that the key

terms in contract law have been "deconstructed" by scholars as different as Stanley Henderson, Grant Gilmore, and Claire Dalton; and you may know that the vocabulary at the heart of First Amendment doctrine has been exploded by scholars as different as Steve Schiffren, Richard Abel, Richard Delgado, and Fred Schauer. But if you commit yourself to participate in a dispute framed in contract or First Amendment terms, those are the terms you will go with, even if in the course of going with them you labor to stretch, bend, enlarge, or restrict them in ways also licensed by the practice you are engaging in. Nor will you be acting in bad faith. Remember, the conviction that your practice is not underwritten by independent grounds and is revisable says nothing about the worthiness of that practice or about the stability—in the short run—of its machinery, unless of course you believe that without independent grounds, there is no worth and no stability. But that's just a mistake.

The mistake, as I have already said, is to think that any of this matters, to declare as Dworkin does that if we wish to pursue the "indispensable ambition"[17] to fashion a just society in which we can live together as equals, we must turn our backs on postmodernists, radical feminists, strong neo-pragmatists, and social constructionists, and commit ourselves to the theoretical project of integrity and to the hope that through the process of justificatory ascent we might someday live with Hercules (his superman judge) in the forum of principle. But it is equally a mistake—it is the *same* mistake—to think that the counterargument, the argument that no forum of principle exists and limited, local, revisable contexts are all we have, matters either. If Dworkin attributes too much negative power to the rhetorical/deconstructive account, his opponents accord it too much positive power by endowing it with the capacity to generate practices always alert to the provisional status of their own pronouncements. Both sides take the rhetorical, deconstructive, or postmodern lesson too much to heart, one by worrying that it will leave nothing standing, the other by hoping that it will leave nothing standing.

Consider, for example, the case of Pierre Schlag. In a recent essay, Schlag says many of the things I have been saying here: the "normative life of the law has no readily apparent relation to the actual structure or content of legal practice."[18] He continues:

> [P]racticing lawyers experience law as a complex network of bureaucratic power arrangements that they have learned to manipulate. That is what legal practice is about. Words get used, arguments get made, institutional pressure builds, situations become increasingly intolerable, somebody gives, and a

17. *See* Dworkin, *supra* note 11, at 376.

18. Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 803 (1991).

> settlement is reached, or a contract is signed, or a jury comes back with a verdict. It's law.[19]

And Schlag sees, too, that while normative legal thought cannot make good on its promise to deliver the one right answer or an answer generated by universal principles, it does nevertheless do real (and in his mind regrettable) work by establishing the authority of a "style of argument . . . that reinforces a certain . . . representation of social life—of who the key actors are, of how they are related, of the status of discourse, communication, and reason, of the relations of theory and practice, form and substance, outcome and process."[20] Here one might expect a rehearsal of the sins this style of argument enables, preliminary to the recommendation of the style of argument Schlag favors; but instead we find normative thought charged with what he regards as the most grievous sin of all: "[N]ormative legal thought has not paid much attention to its own rhetorical situation;"[21] that is, it "is not terribly self-conscious or self-critical."[22] Well, of course it is not. Normative legal thought does not include in itself any recognition of its rhetoricity. If it did, it would no longer be normative legal thought; rather it would be some form of thought—sociological or anthropological in nature—that took normative legal thought as its object, and the activity it would be engaged in would not be the activity of doing law but the activity of reflecting on, analyzing, or dramatizing doing law. Schlag precisely, but helpfully, misses the point when he compares the actual practice of law unfavorably to the presentation of the practice of law on the TV program *L.A. Law*:

> On *L.A. Law* . . . it is often a real—that is to say, a dramatic—question whether acts of conscience are acts of morality or acts of rationalization, whether acts of persuasion are acts of rationality or acts of power, and whether the relations among the various actors are overdetermined, undetermined, or determined at all. By contrast to *L.A. Law*, normative legal thought seems thin and two-dimensional . . . .[23]

But it is the business of a theatrical presentation to provide its audience with a perspective or frame from the vantage point of which what the characters say and do can be assessed in terms of which they are

19. *Id.* at 804 (internal citation omitted).
20. *Id.* at 834.
21. *Id.* at 852.
22. *Id.*
23. *Id.* at 876 (internal citation omitted).

themselves unaware; and their lack of awareness is not a fault, but a condition of their performance and of the parsing out of tasks between them and the audience.[24] The audience of *L.A. Law* does not applaud a lawyer on the screen because he has picked the right precedent (unlike a judge or the opposing attorney, most in the audience will know only the precedent written into the script), or found the right rubric within which the facts can be construed in favor of his client; the audience of *L.A. Law* applauds or hisses (metaphorically, of course) because the lawyer's action is a sign in the larger drama (most of which concerns matters outside the courtroom) of some advance or relapse in the narrative of his moral life (he does or does not betray a client for some "larger purpose"; he does or does not ask a question designed to provoke from a witness a small lie that can then be turned against her in very large ways). In the TV program, the theater of the courtroom is a theater within a theater, and the vocabulary of the law acquires value and meaning in the context of concerns that are extralegal. In the actual practice of law—theatrical to be sure, but nonetheless a different theater—the vocabulary of law refers directly to the issues at stake and names the categories within which everyone's performance will be assessed. Nor should this difference be moralized as Schlag moralizes it when he speaks of comparative thinness and dimensionality. Neither theater is thinner than the other; one may lack the level of distanced, staged reflection that defines the other, but the other in turn lacks the level of consequences in the world—fines levied, verdicts given, sentences served, lives lost—that makes the first so gripping *in its own terms.*

Schlag believes that anything that operates on its own terms is suspect and must be deconstructed until it acquires the requisite critical self-consciousness; he does not exempt deconstruction itself from this requirement: "it would seem particularly appropriate for deconsruction . . . to examine the scene in which it is operating—or rather, to displace and overturn the conceptual and nonconceptual matrices and forces within which it is received";[25] and, similarly, "it would seem appropriate for legal neo-pragmatists to examine their own context: the social, cognitive, and rhetorical scene of their own thought, the scholarly situation within which their talks and articles and classes are being produced."[26] It would be appropriate because, after all, if the

24. I know, of course, that in certain avant-garde productions the characters turn away from the enclosure of the state set and speak directly to the audience, thus breaking the theatrical illusion; but it is really not broken, merely extended in the form of a new convention that will succeed, if it succeeds, by aesthetic criteria, not the criteria of "real life."

25. Schlag, *supra* note 18, at 890.

26. *Id.* at 888.

anti-normative lesson (the lesson of rhetoricity) is that everything and everyone is situated, contextual and provisional, should not those who preach that lesson apply it to themselves? Should not one difference between normative and anti-normative theorists be that the latter are more ready to question their own assumptions than the former? The answer is "no" because, like normative thought, anti-normative thought is a place one has reached in a philosophical conversation; it is not a mode of being, but an answer to some questions posed in an academic discipline. While it is certainly possible to step back from anti-normative thought and scrutinize the "matrices and forces" that make it intelligible and forceful (then you could mount a TV show called *L.A. Philosophy Department*), that stepping back would mark the moment when you stopped doing anti-normative thought and began doing the cultural study of anti-normative thought. Self-consciousness about its own assumptions is no more an integral part of anti-normative thought than it is of normative thought. Indeed, anti-normative or rhetorical thought, taken seriously, precludes awareness of its own assumptions, for what is required for it to have such awareness is a place to the side of its own presuppositions, and it is anti-normative/rhetorical thought itself that tells us that there is not and could not be any such place. Ironically, the demand Schlag makes of rhetorical/deconstructive legal thought—that it critically "challenge the very discursive scene that enables"[27] it—is an essentialist demand; it is the demand that anti-normative thought be *normative*, and produce, from the vantage point of its generality, changes in the behavior of those who have been persuaded of it.

Rhetorical/deconstructive legal thought produces nothing, for, like normative legal thought, it is not a practice, but an account of a practice. Just as normative legal thought cannot confer on the practices of which it is an account, the qualities it prizes (stability, neutrality, and so on), neither can rhetorical/deconstructive legal thought confer on the practice of which it is an account the qualities *it* prizes (indeterminacy, dispersal, de-centeredness, and so on). Theorists like Schlag may be right when they describe the law and everything in it as "socially constructed," but the rightness of the description does no work. It does not lead to an alteration in practice. There is no practice of social constructedness, rhetoricity, or deconstruction, and it is hard to imagine what one would be like. What would be its imperatives? Make everything up? Be

27. *Id.* at 892.

rhetorical? Question the ground you walk on, or rather the ground you do not walk on? The insight of social constructedness, or rhetoricity, goes nowhere, issues in nothing, is of no consequence whatsoever.

Schlag knows this, but he knows it as a complaint. The complaint is that because the stage on which our rhetorically constructed selves play their part is so completely furnished, "the critical reflexive turns become (virtually) unthinkable" and "for the most part, we are simply not capable of even entertaining the requisite doubts to investigate how *we* are socially and rhetorically constructed."[28] I would delete "virtually" and "for the most part," which suggest that there are some strong souls—Schlag perhaps—who are able to catch a glimpse of their groundless, rhetorically constructed selves, while the rest of us continue to languish in various states of complacency and false consciousness. But the inability to look sideways at oneself is not a failure or defect of thought; it *is* thought. Thought—the complex of assumptions, demarcations, hierarchies, desiderata—covers the field, occupies the whole of consciousness, and there is no space left over in which the especially alert and responsible intelligence can spy and monitor its own limitations. That again is the essentialist or foundationalist dream—the dream of entering a space purged of the inclinations our lived histories have given us—and it is not a dream someone of Schlag's views should be flirting with. Schlag's mistake can be seen by considering the nature of the "doubts" he considers "requisite," the doubts he thinks too few of us ever entertain. They are cosmic doubts, not doubts about this or that, but doubts about the entire cognitive structure within which "this" or "that" emerge as objects of inquiry. That form of doubt is not available to situated beings, and therefore it cannot be a criticism of anyone, or of the forms thought habitually his, that such wholesale doubt is absent. This does not mean that doubts of all kind do not arise, only that they arise in ordinary contexts—when some expectation has been disappointed, some person has performed badly, or some experiment has not turned out well. Doubts can be provoked by almost anything, but they cannot be provoked by some theory or anti-theory, even if you find it persuasive. This is because, to make my original point once again, the persuasiveness of a theory exists on so general a level that the only doubt it provokes is doubt about the soundness of some rival theory pitched at a similarly general level. The rest of the world, the world we live in when we are not being theoreticians or anti-theoreticians, will not be touched by that kind of general, all-encompassing doubt, although it can certainly be touched by the doubts we experience in a thousand everyday moments.

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28. *Id.* at 893.

Now that I have exploded the claims of normativists and anti-normativists alike, where does that leave me? I guess I am a pragmatist, although by that I mean something very limited. I am a pragmatist in the sense that if you were to ask me a series of questions (Could we find independent grounds for our practices and convictions? Are we progressing toward a clearer sight of something called Reality? Could we identify moral imperatives that would be appropriate to any and all situations? Do texts have plain and perspicuous meanings?), I would give answers (no, no, no, and no) that place me in the pragmatist camp, rather than in the realist camp, or the proceduralist camp, or the strict-constructionist camp. But that would be it; nothing else would follow, no method or style of lawyering or judging. In short, my pragmatism is a badge of identification in the philosophy game, not a recipe for action or a way of deciding between alternative paths in particular situations. In the taxonomy provided by Matthew Kramer, mine is a philosophical pragmatism—a "position which denies that knowledge can be grounded on absolute foundations"—rather than a methodological pragmatism—a "position that attaches great importance to lively debate and open-mindedness and flexibility."[29] Kramer goes on to say, and I agree with him, that the fact of having been persuaded to the one does not commit you to the other: philosophical "pragmatism cannot necessarily point us toward methodological pragmatism or any other specific methodological stance."[30] The reason, of course, is that no position on the level of philosophical generality can point us toward any methodological stance because that level of generality is by definition at a huge distance from the world of lived particulars and provides no bridge to it. Once you have determined your philosophical position—if you are the kind of person who likes to do that sort of thing—all the work of making decisions, assessing evidence, and reaching conclusions remains, and you will not be helped one whit by remembering that you are, philosophically, a pragmatist, a postmodernist, or anything else. Brian Tamanaha makes the point concisely: "Pragmatism has nothing affirmative to offer precisely at the point at which the hard questions begin, when we are called upon to make and justify judgements about good and bad, right and wrong."[31] And Posner says pretty much the same thing when he remarks that a pragmatist account of judging does

29. KRAMER, *supra* note 8, at 94.
30. *Id.* at 97.
31. TAMANAHA, *supra* note 6, at 246.

not direct judges to be pragmatists or tell them "what is best."[32]

Unfortunately, however, both Tamanaha and Posner deviate from their common insight and move in the direction of claiming more for pragmatism than the parsimony of their argument properly allows. Immediately after having declared that pragmatism has nothing affirmative to offer, Tamanaha has it offering something negative.

> First, it insists that any normative arguments based upon an alleged special insight into the Absolute are based upon a false claim; secondly, it suggests that what counts when determining which normative assertions we should accept is whether . . . the assertions result in consequences we find desirable; thirdly, it reminds us that the best way to determine whether the consequences are desirable is to [pay] close attention to the facts of the matter.[33]

But these little lessons are either practically unhelpful, or not exclusively pragmatist, or so general as to be truisms. The assertion that there is no Absolute to invoke is made at the level of philosophical argument and does not preclude declaring the absolute truth about a matter as you now see it. And everyone, even a determined anti-consequentialist, is concerned to bring about a desirable outcome (hewing to the law, no matter what, is, after all, an outcome, if it could be achieved); the real question is what is the desirable outcome, and pragmatism cannot answer it or even identify outcomes that are undesirable. And, of course, everyone pays close attention to the facts; it's just that everyone has a different idea of what the facts are and where they are to be found, and again pragmatism will not direct you toward the right ones or warn you away from the wrong ones. Exactly the same analysis applies to Posner's characterization of pragmatism as "a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities."[34] But again, fact and consequences are taken into account by everyone—could one disdain them and still proceed in any intelligible sense?—and one's skepticism about conceptualisms and generalities in their pure form does not deprive you of generalizations that derive their meaning from the historical contexts of practice to which they are now applied. And while Posner is surely right to say that "[p]ragmatism in its role as skeptical challenger of orthodox philosophy encourages a skeptical view of the foundations of orthodox law,"[35] the rightness is philosophical and has no implications for what one does or does not do in practice. Skepticism about law's foundations does not generate a skeptical legal practice—what would

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32. Richard A. Posner, *Pragmatic Adjudication*, *in* THE REVIVAL OF PRAGMATISM 248 (Morris Dickstein ed., 1998).
33. TAMANAHA, *supra* note 6, at 246.
34. POSNER, *supra* note 5, at 227.
35. POSNER, *supra* note 5, at 228.

such an animal be like?—although it could generate a determination to leave the law and take up something else.

In the end, Tamanaha and Posner yield to the temptation of wishing to say something, of wishing to claim for their arguments on the level of theory some practical payoff, however modest and qualified. That is the temptation I always try to avoid by resolutely refusing to draw any conclusions from the assertions I characteristically make, chief of which is the assertion that there is no such thing as anything. It is a frequent complaint of those who read my work or hear me speak that they know nothing of my position on the issues glanced at in my discussions, whether those issues are moral, political, methodological, or procedural. This is often regarded as a defect in my position—that it yields nothing in the way of recommendations or policies—but it *is* my position and my argument. What that argument aspires to is a severe minimalism, a refusal to be positive so pure that it provides those who hear it and understand it with no handle to grasp or lever to operate. It is this parsimony of ambition that distinguishes it from almost any other argument in theory, and distinguishes it too from Cass Sunstein's recent book, *One Case at a Time: Judicial Minimalism on the Supreme Court*.[36] Whereas my minimalism is a function of my unwillingness to turn my argument into a project (lest it become a version of what it inveighs against), Sunstein's minimalism *is* a project, the project of "saying no more than necessary to justify . . . and leaving as much as possible undecided."[37] He calls this project "decisional minimalism"[38] and hopes that if he presents it attractively enough, it will lead to a minimalist court whose characteristics would be as follows:

> A minimalist court settles the case before it, but it leaves many things undecided. It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions. . . . [I]t attempts to promote the democratic ideals of participation, deliberation, and responsiveness.[39]

I am not in the business of promoting anything. I merely want to explain to you that whatever you might want to promote, no general

36. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).
37. *Id.* at 3.
38. *Id.* at 4.
39. *Id.* at ix-x.

theory is going to help you; and, for that matter, no argument that theory is not going to help you will help you either. If it has been my argument that theses on the level of general philosophy do not dictate answers or strategies on the level of practical behavior, it must be the case that no form of behavior follows from that argument, which is itself general. Indeed, if there is anything I have said here that moves you in some direction, if after hearing me you go away in possession of something useful, I will have failed.