



IN DEFENSE OF THEORY

NOTES ON THE PRODUCTION OF LEGAL SCHOLARSHIP

Samuel Estreicher

To: Faculty

Fr: Sam Estreicher

Re: Manuscript – In Defense of Theory

We have been going through the office of our departed colleague, and found this manuscript which may be of general interest.

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WE ARE ON THE VERGE OF A MAJOR BREAKTHROUGH in our understanding of the social production of legal knowledge. For too long, we have been prisoners of the German philosophers. Either we stood with Kant and Hegel and celebrated the role of reason in the creation of intellectual work, the process by which we give life to intuition through words. Or we stood with Marx and his followers and dismissed intellectual activity as mere “superstructure,” thinly-veiled attempts to use ideas to mask material interests.

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Attempts have been made to bridge the idealist-materialist divide. Karl Mannheim¹ promoted a sociology of knowledge that kept sight of the independent creative force of ideas; indeed, intellectuals were considered the only social group capable of transcending their immediate material conditions. The Marxist theoreticians Georg Lukacs² and Antonio Gramsci,³ both like Mannheim writing in the 1920s, struggled to reconcile creedal insistence on the overarching importance of social class with their recognition of the importance of intellectual activity to the class struggle. Gramsci offered the concept of “hegemony” to capture the cultural forces by which the dominant persuade the powerless to accept their fate.

Over time, the idealist side has prevailed, with both left and right declaiming that ideas matter, that politics comes out of the mouths of intellectuals, even if it needs to be pushed along, perhaps more than occasionally, with the barrel of a gun. Given the decline of working class militancy across the globe, and the stubborn, persistent reality that a good portion of the working class in many countries votes contrary to its predestined interests as carriers of necessary social overhaul, class as an explanatory vehicle of central importance today attracts few adherents.

In the law schools, we have never fallen sway to the materialist fallacy. Historically, at the core of our professional identity are the beliefs that words count, especially those that find their way into court decisions and enactments, and that words through law can become norms that fundamentally shape behavior. Ours was a creed of doctrinalists, of seminarians in the legal cathedral.

Happily, we are finally breaking free of the fetters of legal doctrine as well. We remain purveyors of the word, but no longer

¹ Karl Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* (Louis Wirth & Edward Shils trans. 1936). See generally Robert K. Merton, *The Sociology of Knowledge*, 27 *Isis* (Issue 3, November 1937) 493.

² Georg Lukacs, *History and Class Consciousness* (Rodney Livingstone trans. 1967; originally published in 1920).

³ Antonio Gramsci, *Prison Notebooks* (volume 1: Joseph A. Buttigieg ed. & Joseph A. Buttigieg & Antonion Callari trans. 1992; volume 2: Joseph A. Buttigieg ed. & trans. 1996).

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handmaidens of lawyers, courts and legislators. The cathedral is now of our making. Our words, our articles, our books now add to legal knowledge, to our own free-willed literature. We are self-creators – no longer seeing ourselves as employees, hired hands, agents. We meet our classes and grade examination papers – tasks requiring anywhere from 6 to 12 hours a week. For the remainder, we write to educate, edify and elucidate – for ourselves, not our employers, our students, our clients. We engage in free activity, self-realizing activity: Neither work nor play – but scholarship. And a scholarship that matters, not epiphenomenal contributions to the day-to-day needs of lawyers, soon to be discarded as new decisions roll in; we aim for lasting contributions to the body of literature. Veblen offered a theory of the leisure class.⁴ We are writing the leisure of the theory class – not naked, aimless, hedonic leisure, but leisure in the service of theory, in the service of legal knowledge.

We have our critics, but their criticism dissolves under scrutiny. Essentially six points have been leveled against our foundational work, all beginning with the letter A. They are:

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|---------------------|------------------------------|
| (1) Armchair-ism | (4) Assertion-ism |
| (2) Abstraction-ism | (5) Affinity-group-ism |
| (3) Ampersand-ism | (6) Altruistic Expiation-ism |

We take each in turn, to expose the poverty of the opposition, the poverty of their imagination, the poverty of their aspirations.

ARMCHAIR-ISM

We are, indeed, principally armchair intellectuals.⁵ What our enemies deride as a limitation, we claim as a virtue. We have no armies of graduate students, no laboratories, no National Science Foundation grants. We are not part of the production proc-

⁴ Thorstein Bunde Veblen, *The Theory of the Leisure Class* (1899).

⁵ As Richard Epstein puts it: “Armchair empiricism is at times the best tool we have for resolving [legal] matters.” Richard A. Epstein, *Let “The Fundamental Things Apply”: Necessary and Contingent Truths in Legal Scholarship*, 115 *Harv. L. Rev.* 1288, 1295 (2002).

ess for science and technology. We are not part of the military-industrial-research complex. We are not part of the cultural hegemonic forces of the larger society. Our work is our own, our time is our own, our contributions admit of no materialist calculus.

We are like Kant in maintaining that the truth of the world must emerge from reasoned reflection, proceeding from first principles; but our work is grounded in the world as-is, in real-world materials: legal decisions, legal institutions, law. John Rawls offers “A Theory of Justice,”⁶ but Ronald Dworkin tells us what Herculean judges should do – justice as realizable virtue.⁷ Our theory does not emerge from behind a veil of ignorance, but in the light of knowledge of the institutions on the ground. Robert Nozick applauds the “Night Watchman State,”⁸ but Richard Epstein reaches into the Supreme Court’s “takings” doctrine to measure the actual work product of the legal system against Nozickian premises.⁹ Rawls and Nozick work in the spirit of the ideal, Dworkin and Epstein in the world of the sentient, the suffering ones.

Whether judges take Dworkin or Epstein seriously is, ultimately, irrelevant. We would like judges to adopt our work in their decisions, but we know they are, in the end, merely lawyers under black robes, who see the world through the lens of their jobs. Judicial acceptance is nice, but not essential. We do not seek the approval of practicing lawyers or judges, and they do not provide valorization for our work. We have and seek no power over the apparatus of the state. Our only criterion is: Have works like those of Dworkin and Epstein provided fresh, foundational, fructifying insights that add to the literature? There is no test of utility, other than the utility of the relevant community of academics.

Some of our colleagues do empirical work and we applaud them for it. Empiricism is nice but not essential. The test of a good theory

⁶ John Rawls, *A Theory of Justice* (1971).

⁷ Ronald Dworkin, *Taking Rights Seriously* (1977); *Law’s Empire* (1986).

⁸ Robert Nozick, *Anarchy, State, and Utopia* (1974).

⁹ Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

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is whether it is novel and interesting, not whether it does a good job in predicting the course of future events. Happily, we shed legal and epistemic positivism long ago: A fact cannot beat a theory! For example, in competitive markets, supply and demand curves intersect at the equilibrium wage: at that wage, the firm obtains all the workers it needs, and no worker will take a job for less or be offered a job for more. This is a world without unemployment, without racial or gender discrimination. Is it the “real world”? Of course not. If real-world markets do not conform, there are two responses: The first is to change the world: We have identified markets that are not competitive; the state should strive to make them competitive through some form of appropriate intervention. The second response is to improve the theory, but to do so without sacrificing the elegance, the parsimony, the heuristic promise, the conceptual resonance of the original model. Thus, if the real world shows unemployment, maybe employers are willing to pay more than the equilibrium wage to get above-average workers or to encourage workers to commit to the firm. Nobel prizes in economics are awarded for no less.¹⁰

We are not in the business of predicting events in the real world. We are in the business of modeling an understanding of processes in the real world, and testing whether our model does a good job of explaining those processes.

Our theory is not arid dreamings. Our theory is, ultimately, in the service of a better world. But we cannot hope to change the world, until we understand it. Understanding requires, first and foremost, a sound theoretical foundation.

ABSTRACTION-ISM

The criticism that our work is abstract is no more salient than the first. Our work is abstract; it has to be. We have to abstract our analysis from unruly, situational fact which can clutter up theory

¹⁰ George A. Akerlof & Janet Yellen, *Efficiency Wage Models of the Labor Market* (1986). Akerlof won the Nobel prize in economics in 2001.

without compensating explanatory pay-off. The facts we work from are “stylized” facts, often drawn from court decisions – prototypical facts that form a template for building theory.

The “law and economics” school has taken hold precisely because it provides such a template. Ronald Coase,¹¹ another Nobel laureate, opened the door: Assume a world where people can bargain with each other costlessly – a world with zero transaction costs – where people know their preferences, and credit markets are available to all. In such a world, does the state need to prevent ranchers from allowing their livestock to feed on the ground of neighboring farmers? Of course not, Coase teaches. If the value generated by ranchers (say, \$10) exceeds the loss to the farmers (say, \$7), that difference (\$3) is the net social gain of their joint activity and provides a zone for bargaining. If the farmers have the initial right, the ranchers will pay somewhere up to \$10 to the farmers for the right to continue their ranching practices. If the initial right is given to the ranchers (keeping the valuations constant), the farmers will suffer the grazing herds but the net social gain remains unchanged. This is a symmetrical world concerned only with net social gain: it is neither pro-rancher nor pro-farmer. All that is needed – and all that law needs to provide – are clear background rules, so that the parties know who has the initial right. A rich, engaging literature on background, or default, rules has developed. How to determine the best background rule? Should parties have to make do with liability rules (the typical approach), in which case if the farmers have the initial right, the ranchers’ willingness to pay controls. Or are there stylized circumstances where the farmers should be given a property right – that is, the right to enjoin the offending party’s activity and thus have the farmers’ willingness to accept payment control?¹² In our example, a property right would have the farmers insisting on

¹¹ Ronald Coase, *The Problem of Social Cost*, 3 *J. L. & Econ.* 44 (Oct. 1960). Coase won the Nobel prize in economics in 1991.

¹² See generally Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1972).

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somewhere between \$7 and \$10 to allow the grazing to continue. Distributional effects differ (farmers plainly get more under a property rule than a liability rule), but the net social gain from the rancher-farmer joint activity remains unchanged. Other questions abound: E.g., is strict liability more efficient than negligence?¹³ Yet, how can these, and other foundational questions, be addressed except through an abstract analysis that builds on the essential Coasian insight?

What if we introduce positive transactions costs into the analysis? Do we chuck the theory? The answer is: no. The way to proceed is, again, through stylized facts of what those transaction costs look like. In a world with transaction costs, default rules will be stickier because deals in the service of net social gain may not be struck. Most often, we are going to want to choose the default rule that best mimics what the parties would do in a zero-transaction costs setting.

Coasian analysis is concerned with efficiency, which starts with the Paretian criterion (named after political theorist Vilfredo Pareto¹⁴): state of affairs A is more efficient than state of affairs B if it leads to an improvement for one of the parties without harming any of the other affected parties; Pareto optimality occurs when no further gains can be achieved from trade. Paretian efficiency is, however, too demanding a criterion because in the real world (which we do not ignore); virtually every change in affairs will benefit some while harming others. Most analysts employ the Kaldor-Hicks variant,¹⁵ which asks whether the gain from moving from

¹³ See generally Steven Shavell, *Foundations of Economic Analysis of Law* (2004). Judge Posner's apparent criticism is misplaced. See Richard A. Posner, A Review of Steven Shavell's *Foundations of Economic Analysis of Law*, XLIV J. Econ. Lit. 405, 408 (June 2006) ("The 'law' that Shavell analyzes is an abstract or stylized – a simplified – version of actual law; it is law minus detail and texture, law trimmed to fit the economic model.").

¹⁴ Vilfredo Pareto, *Manual of Political Economy* (English trans. 1971, originally published in 1906).

¹⁵ John R. Hicks, *The Foundations of Welfare Economics* (1939); Nicholas Kaldor, *Welfare Propositions in Economics* (1939).

B to A is large enough to compensate, in theory, all who lose from the change. (Actual compensation is not, however, required.)

There is a debate in the legal academy whether efficiency is the only relevant value. Certainly other values can count. The French, for example, attach great weight to social stability. Faculty meetings exhibit an unusual dedication to voice as a preeminent value. But efficiency remains a preeminent value in the social calculus because out of the gain from moving from B to A value is created, from which the state can fund essential public operations and even transfer wealth from winners to losers. Thus, those who care about the optimal redistribution of social wealth should also care about the creation of such wealth.

Abstracting away from facts also profoundly enriches our understanding of political behavior. Many scholars employ what is called “public choice” theory.¹⁶ Politicians are assumed to know what they want and to use the political system to realize those objectives. What do politicians want? They want to get elected and stay in public office. How do they do it? They sell legislative product that will elicit the votes of constituents and the money or in-kind resources of supporters to fund and staff reelection campaigns. Often constituents and funders share congruent objectives; politicians join political parties which serve as branding agents that help voters decide, instinctively, how to cast their ballots and help match funders with sympathetic legislators. Sometimes the interests of constituents and funders are not easily reconciled, and here the adroit politician learns how to package his political actions in a way which appears to meet voter concerns without antagonizing funders. Public choice theory teaches that the process of legislation, while it speaks the language of public interest, often reveals in substance the influence of private interest, both that of the legislators and their supporters.

The virtue of public-choice analysis is that it strips away from the welter of words, actions and inaction to yield a model of the politi-

¹⁶ See James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962). Buchanan was awarded the Nobel prize in economics in 1986.

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cian as a rational actor with definable preferences that he seeks to realize through his work, no different in this respect from the corporate executive, the entrepreneur, or the trade union leader.

Critics of public choice insist that politicians are often moved by loftier considerations of the public interest, leading them to act in ways that cannot be explained by their self-interest. The deregulation of the airline industry in 1978 is often touted as an example of altruistic legislation, where Democratic politicians like Senator Edward Kennedy took positions that actually hurt their supporters – in this case, the airline unions that lost the sheltered market that regulation had afforded. Here, the exception does prove the rule. Without undermining theoretical parsimony, there is room in public choice theory for the policy entrepreneur who, suspecting that deregulation is on the horizon, moves in front of the issue to take personal credit for helping usher the inevitable, and in the process cushions the blow for constituent groups by ensuring passage of mitigating measures.

Is the law-and-economics or public-choice analysis unduly abstract? It is no more abstract that it needs to be. We are building theory, not predicting how cases will turn out or how legislators will vote on certain measures. In time, as we advance along this frontier, our theory may help judges and administrators decide “hard” cases and legislators to better understand the structure of incentives embodied in the measures they are considering. Whether in fact such uses occur is not, however, the measure of our work.

AMPERSAND-ISM

We applaud the growing number of our colleagues who have doctorates in non-law fields, and the proliferation of “law and science,” “law and literature,” “law and the fine arts,” “law and racism,” “law and the justice claims of indigenous peoples,” and other “law and _____” courses. For too long we have truncated our intellectual horizons to serve as a semi-glorified trade school for the law firms. For too long we have been a step-child of the university desired for the tuition monies we throw off but not respected in the

morning. We are finally taking ourselves seriously as scholars, and happily our host universities have acquired a new-found appreciation for what we can do for the life of the mind.

In former times, we drew our faculty from bright law school graduates who chaired their law reviews and completed a competitive federal court clerkship, which they then followed up with 3 to 5 years of real-world experience in a major law firm. Such candidates may not have had any substantive expertise and we certainly expected no record of writings. We were satisfied if the individual was smart and “thought like a lawyer”. But, then, what did we get from this recruitment strategy? At worst, we ended up with unproductive teachers who in the main never put a pen to paper except to endorse their paychecks. The upside was also unremarkable – at best, academics who did no more than write practitioner treatises, serve on bar committees, or perhaps help draft sections for a Restatement of the Law project.

Now, we consider only tried-and-true scholars who understand that their principal audience is the community of other scholars in their field. We prefer hiring laterally from other schools, if we can, because that it is the surest way of obtaining committed scholars capable of sustainable contributions to the relevant literature. But on occasion we hire newcomers to the academy, if only to provide grist for the promotion and tenure process. No longer, however, will we consider the Harvard Ames scholar, the Stanford law review president, the former Supreme Court law clerk, or the star associate at Wilmer Cutler or Jones Day – unless they have spent a year or two “immersing themselves in the literature” and are ready to present a completed academic paper exhibiting the appropriate level of theoretical ambition and reach. If the candidate has independent means, he is advised to take 2 or 3 years off from practice and prepare for his “job talk”; if not, we recommend one of the “cocoon” fellowships offered by the leading schools where, free of major real-world contact and responsibilities, he is provided a vehicle for necessary literature-immersion and academic production.

This change in hiring policy reflects the law school’s emergence as a serious part of the university. Most universities still allow an

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individual possessed of a mere J.D. to teach in their law schools, precisely because law schools were (and to a lesser extent are still) regarded merely as schools for professional training. Little was expected, and little was delivered, in the way of legal scholarship, serving as source material for devastating critiques such as Fred Rodell's¹⁷ or less open derision from our colleagues in the humanities and social sciences. But this is changing, as law school faculties, increasingly populated with graduates of Yale Law School,¹⁸ the leading progenitor of pure legal theory, hire mainly Ph.D.s¹⁹ and others viewed as serious scholars with a demonstrated record of, or pronounced proclivity for, theoretical work.

We are also deriving systematic methodological payoffs from the lines we have built to other disciplines. The legal realists of the 1930s were confined to counting parking meter violations to measure the law's impact.²⁰ We, by contrast, have the benefit of the entire intellectual apparatus of the university. The fruits of our work with the economists have already been identified. Our ties with psychologists are also deepening; we are able to deploy the findings of a virtual mountain of "experimental" studies, using student subjects to identify fundamental psychological predispositions that enrich our understanding of human behavior and identify useful roles for the law to counteract those predispositions. Nobel laureate Daniel Kah-

¹⁷ Fred Rodell, *Goodbye to Law Reviews*, 23 *Va. L. Rev.* 38 (1936).

¹⁸ Harvard Law School, because of its size, remains the principal feeder of law teachers, but Yale Law School is moving up. At NYU Law, Yale Law graduates comprised 7.4% of the faculty in 1985-86 and 13% in 2005-06; at Harvard Law, the Yale component grew from 8.5% to 16.3% in the same time period. Source: compilation from AALS Directory of Law Teachers.

¹⁹ At NYU, 9.3% of the law faculty held Ph.D.s in 1985-86 but by 2005-06, 19.5% of the faculty had earned a doctorate; at Harvard, there was a less marked increase, from 12.7% to 15.1%. Source: compilation from AALS Directory of Law Teachers.

²⁰ See generally William Twining, *Karl Llewellyn and the Realist Movement* (1973); Underhill Moore & Charles Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 *Yale L.J.* 1 (1943).

neman and Amos Tversky²¹ started with mugs, testing what students would be willing to pay to keep them or receive to give up them up – modest beginnings in what is proving to be a grand analytic adventure. Our budding linkages to sociologists, literary theorists and even geologists offer similar promise for the future of legal scholarship.

ASSERTION-ISM

We are criticized for over-valuing a good story, for crediting assertions without proof. This is, simply, wrongheaded. The test of a good theory is how well you can defend it, how vivid, striking, and original your contribution is. Good work often offers a compelling metaphor or simile. Property law theory, for example, has entered a qualitatively new era with its focus on the “tragedy of the commons,” the “anticommons” and the “anti-anticommons.”²² These figures of speech help alter existing paradigms, opening up paths of insight not even imagined by previous scholars in the field.

Our best people do more than develop an intriguing metaphor; they put it out there, staking a broad position that engenders vigorous debate precisely because it is free of nuance, of local fact. For example, Owen Fiss is “against settlement.”²³ Is he serious? You bet he is. Does he mean to bar all dispositions without public trial? Perhaps. Who has done more to make us take seriously the costs of the ADR movement to the integrity and vitality of our public law?

²¹ Influential essays are collected in Daniel Kahneman & Amos Tversky eds., *Choices, Values and Frames* (2000). Kahneman won the Nobel prize in economics in 2002. For an interesting empirical non-validation of the “endowment effect” results, see Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay-Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 *Amer. Econ. Rev.* 530 (June 2005).

²² See generally Michael Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 *Harv. L. Rev.* 621 (1998); Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243 (1968).

²³ Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984).

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Richard Epstein wants to bring back the “common law of labor relations”.²⁴ Does he mean to bring back labor injunctions, Sherman Act damages actions against consumer boycotts, decrees outlawing peaceful picketing? You bet he does. Join the debate if you disagree.

Then-Dean Guido Calabresi wanted to bring on a “common law for an age of statutes,” where courts could remand legislation found to be out of kilter with the existing legal landscape.²⁵ Was he serious? You bet he was. Could this be administered without giving courts too much power to “misread” statutes? Perhaps. What you need to do is join issue, and offer your own competing, hopefully compelling, account. Don’t just stand on the sidelines!

Beyond convincing metaphors, beyond staking clear positional ground in the literature, the technique of narrative – the telling of stories by the voiceless, the vanquished, the vanished – offers a compelling way to engage in dialogue, to do theory. Emancipation was heralded by slave narratives, our appreciation of the continued virulence of racism stoked by testaments of African-American colleagues, and new visions of gender equality identified in the stories of struggling professional women who would not allow glass ceilings to curtail their dreams.

Narrative is inherently transgressive. It does not replicate hierarchy; it up-ends it. It is the poetry of the street, the cry of the unvarnished.

AFFINITY-GROUP-ISM

There is no single, indivisible proletariat; rather, there are many groups searching for their voices, hoping that their character will count for more than the color of their skin, the country they come from, the language they speak to each other. If we are only for ourselves, what are we? Some pursue their vocation apolitically. The rest of us cannot ignore the unmet demand for justice. We

²⁴ Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Legislation*, 92 *Yale L.J.* 1357 (1983).

²⁵ Guido Calabresi, *A Common Law for the Age of Statutes* (1983).

work to advance the cause of the silent ones. It is theory we weave, but theory in the service of a better world.

We have learned from Catherine MacKinnon and the late Andrea Dworkin the transgression inhering even in ostensibly consensual sexual relations.²⁶ My colleague Derrick Bell reminds us of the enduring, nearly inalterable, always corrosive legacy of slavery.²⁷ Kenji Yoshino unmasks the painful covering strategies the socially marginalized employ to shield their core identities from an unforgiving world.²⁸ Whether or not these observations resonate with our own intuitions, they serve to open up the inquiry.

Each social group, each ethnic minority, each religious and dissident political movement, each voice in the wilderness offers its own purchase on the truth. There are many paths to the truth, each providing a necessary perspective. Insistence on an all-encompassing, objective truth that each individual can access through effort, empathic understanding and careful attention to fact is sheer shibboleth. Truth is at bottom contingent, a social construction that can be reconceptualized, if not altered, through scholarship and social struggle.²⁹

ASPIRATIONAL EXPIATION-ISM

Finally, we come to the most invidious cavil of all – the charge that we are in it only for the politics, and indeed a politics of purely symbolic import, approximating the practice of the ancient Hebrews who offered burnt offerings to atone for perceived sins.

²⁶ See Catherine MacKinnon, *Toward a Feminist Theory of the State* (1989); Andrea Dworkin, *Intercourse* (1987).

²⁷ See Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (1992).

²⁸ See Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (2006), building on Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963).

²⁹ Compare Daniel A. Farber & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (1997).

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Our critics point to our political and ideological monism: few Republicans,³⁰ few supporters of foreign expeditions to ensure reliable oil supplies can be found among our ranks. They insist that our undiminishable, unvariegated opposition to torture, capital punishment, racism, sexism and domination of any kind, our sustained support for affirmative action, choice in reproductive decisions, wealth redistribution, public obscenity and public radio betrays a lack of nuance, a rigid commitment to preconceived beliefs.

Of course, we have aspirations. We hope for a better world, one free of poverty, colonialism, and all forms of depredation. The law shapes our norms: what society considers normative, and what we consider to be outside of the pale. We do not accept the status quo. We write not to enshrine what the courts have done but to extend the reach of justice's domain. Law is not an end itself, but an instrumentality, which we deploy to perfect justice while others practice law only to gain wealth.

Have we sinned? We have sinned because we live in a society that continues to ignore the faces of want and ignorance. Are we seeking expiation? Not in the sense of bringing sacrifices to the temple, but in order to make good on our promise, to work to redeem the soul of the nation. The personal is political, the political personal.³¹ We seek to integrate idealism with practice – to forge a new praxis of ideas in action. Our mission is to bring the struggle home, to broaden the aspirations of humankind through what we do – the production of legal scholarship.



³⁰ See generally John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 *Geo. L.J.* 1167 (2005).

³¹ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922; Geo. Schwab ed.): “The political is the total, and as a result we know that any decision about whether something is *unpolitical* is always a political question.”

A THEORY

Harry Randolph Blythe

When judges pass on pretty points
Not passed upon before,
Do they declare what is the law
Or what it was of yore?

I know a man who often says
(It may be legal sin)
That brand new cases but declare
What law has always been.

The court but simply calls to work
The living legal word,
Whose force has ruled the race of man
Since Eve in Eden erred.

This logic, therefore, would conclude
(Though I confess it jars)
That there prevailed in Babylon
The law of motor cars.

The theory may be beautiful,
But its results – Gee Whiz!
For one, I'm quite content to say
Courts make the law that is.

Harry Blythe (1882-1915), a Massachusetts lawyer-poet, occasionally contributed to the original Green Bag, in which "A Theory" appeared in 1910. 22 GREEN BAG 193.