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ON LEGAL THEORY AND LEGAL PRACTICE

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Law is a normative enterprise; it is inevitably philosophical. For this reason, the distinction between legal theory and legal practice is at most one of degree. Certainly it can be shown that much legal practice takes theoretical issues for granted, but this does not mean that it is not pervaded by theoretical claims. On the other hand, there are real hazards for lawyers who use political philosophy to inform legal practice, especially when the philosophy is designed for a first-best world, or when it rests on assumptions that do not hold for us. Moreover, legal practice might seek to bracket philosophical questions, in order to facilitate change over time, to allow an incompletely theorized agreement on particular outcomes among people who disagree on first principles, and to avoid various forms of hubris.

These will be my basic claims in this essay. In part 1, I briefly support the view that even mundane claims about the content of law have large-scale theoretical components. In part 2, I discuss some of the problems that arise when lawyers rely on what philosophers think. In part 3, I explain why a system of legal practice might limit its philosophical ambitions, in the process contrasting an antitheoretical, highly practical judge—Justice John Marshall Harlan—with Ronald Dworkin's Hercules. An important point here is that people who diverge sharply on large principles might well be able to agree on spe-

cific cases. This point helps explain why in a heterogeneous society, a normative practice, including law, might seek to bracket philosophical questions, and do so successfully.

I. How Law Is Philosophical

All descriptive claims about the content of law depend in some important way on ideas about the right, the good, or both. When we read Supreme Court opinions or appellate briefs, or if we listen to how lawyers discuss their cases, we find many claims about liberty, rights, equality, and justice. For example, the Constitution says that no state shall deprive any person of the equal protection of the laws. What does this mean? How do we even go about knowing what it means? Suppose that a state discriminates against homosexuals, fails to provide welfare benefits, creates an affirmative action program, or stops people under eighteen from voting. Has there been a constitutional violation?

Begin with the text. Very rapidly it becomes clear that the word "equal" has multiple meanings. The term could be a prohibition on irrational differentiation; it could guarantee minimally decent conditions for all; it could forbid caste systems; it could require a legitimate public purpose for all laws; it could forbid large disparities in wealth. Because of the multiplicity of textually plausible readings, we will be forced to resort to something supplemental to text in order to bring it to bear on disputed cases. Unless we can get help elsewhere, it will be necessary to make some substantive judgment about the appropriate conception of equal protection under the Constitution.

We might then try another route. We might ask some questions about the understanding of the people who wrote the provision. Suppose that they intended to prohibit all discrimination against blacks but to do nothing else. (Let us put to one side the many complexities in the notion of an "intention" or an "understanding" of a collective decision-making body.) Then it becomes necessary to ask whether this intention is binding. How will we resolve this question? Without circularity we cannot say that the intention is binding because the framers intended it to be binding. Before long, we will have to say something about

democracy, majoritarianism, rights, and much else. Here too, large-scale theoretical claims seem unavoidable.

We might turn then to the judicial precedents, at least if we have some. The first question is: On what principle of equality are those precedents based? But this question will not be easy to answer. Suppose, for example, that the Court has forbidden school segregation. How does this precedent bear on affirmative action or substandard welfare benefits? To decide, we will have to choose how to characterize the precedents, and to do that, we will have to say something substantive about the appropriate equality principle. Precedents are not brute facts. And if the precedents are genuinely helpful, we have to ask whether they should be binding. And to answer that question, we will have to discuss the need for stability in law, the possibility of mistake, the potential for democratic correction, and so forth.

I think that this example shows the extent to which people engaging in the practice of law must make theoretical claims. The line between legal practice and legal theory is blurry. The point is not limited to the sometimes exotic area of constitutional law. Suppose, for example, that someone claims that he need not comply with his contractual obligation to sell one thousand barrels of widgets for one hundred dollars, because the price of widgets has risen so unexpectedly in the past week as a result of a strike in the widget factory. A legal system must answer this question by reference to something—and that something must be a conception of autonomy, or utility, or efficiency, or welfare, or something else. Even mundane areas of the law of contracts are thus pervaded by theoretical claims about the reasons for social obligations. The familiar notion of "party autonomy" hardly makes such claims unnecessary; it is merely a resort to a certain kind of theoretical claim.

Much the same is true of tort law, which has to decide on appropriate spheres of human action. Judgments about causation are of course rooted in theories of moral responsibility. Nor can judges say whether there is an act or an omission—a relevant distinction in many areas of the law—without positing a morally privileged state of affairs. To do that, we will have to discuss theoretical questions. Similar things can be said about criminal law, which is pervaded by issues of intention, fault,

and responsibility; these issues cannot be approached without theoretical claims.

It is sometimes thought that those engaged in law may often bracket such claims and that they must speculate on abstract matters only on issues at the frontiers of the law, when existing legal materials are not decisive. Such "frontiers" cases, it is said, are rare. But even the easiest cases present theoretical issues. Jones is said to have violated the law fixing a speed limit of fifty miles per hour. Perhaps Jones was trying to get to the hospital; perhaps he was late for work; perhaps his mind wandered. In any of these cases, should the judge convict Jones? If the answer is yes, it is for reasons that have to do with, among other things, the appropriate role of judges in a democracy, and this is a substantive view that should be defended even if now uncontroversial. Easy cases can claim to be easy only on the basis of reasons.

These ideas do not need to be belabored. Much of the change in legal education in the last decades has stemmed from work by economists, philosophers, and others who have shown that many of the conventional legal categories—even conventional conceptions of how to describe "the facts"—turn out to depend on philosophical claims, and often on controversial ones. In this sense, legal practice has inescapable theoretical dimensions.

It may well be unfortunate if those who practice law are not self-conscious about this fact. Sometimes the claims that underlie law are taken as self-evident—as in the view that an abortion is an act rather than an omission, or that the meaning of a text is determined by investigating the views of its drafters, or that emotion and reason are at opposite poles, or that democracy and majoritarianism are the same thing, or that there is sharp distinction between "words" and "conduct." Such claims depend on complex theoretical judgments that ought to be brought into the open and evaluated as such.

II. How Lawyers Misuse Philosophy and Philosophers

None of this necessarily means that lawyers should turn to philosophy or to great philosophers for the answers to their

questions. There are several characteristic risks with efforts of this sort. First, lawyers may misunderstand philosophers (as they sometimes misunderstand economists). Here as elsewhere, a little knowledge may be a dangerous thing. Second, and more interestingly, lawyers may fail to understand the difficulties in bringing philosophical arguments to bear on concrete legal disputes. The application may seem mechanical, but it usually requires an act of translation, and one that involves a large element of construction. Suppose that we seek to be good Lockeans, and that we want to know how to deal with the question whether government should forbid private race discrimination. When a private employer refuses to hire blacks, the employer has not committed any act of conventional force or fraud. Does this mean that Locke is opposed to the Civil Rights Act of 1964? It should be obvious that there is no purely factual answer to this question. Instead, lawyers will be forced not to try to uncover some fact, but to offer the best constructive interpretation of Locke, recognizing that the relevant interpretation is neither pure discovery nor pure invention. The Lockean who approves or disapproves of Civil Rights Acts is hardly the historical Locke. Even when a philosopher makes explicit claims about a topic, the application can be far from clear. The Lockean proviso about the need to leave "enough and as good for others" cannot realistically be said to decide questions about welfare entitlements.

There is a third problem, having to do with the need for legal solutions to operate in a world with distinctive limitations. Let us suppose, for example, that philosophers have persuasively shown that wealth maximization is a philosophically indefensible ideal, and that a just state should be concerned instead with utility, with human flourishing, or with protection of a category of basic rights. It might be clear, for example, that the maximization of wealth is too crudely connected to anything that human beings do or should really care about. Have we therefore shown that lawyers should reject the pursuit of wealth maximization through the law of contract and tort? Not necessarily. It may be that wealth maximization is the approach to contract and tort law that best combines the virtues of substantive plausibility and real-world administrability. Even if wealth

maximization is not in the end a good approach to justice, it might be shown that greater social wealth is at least roughly connected with the achievement of important human values. And if those other values cannot easily be promoted by common law courts—consider utility—perhaps wealth maximization is not so bad after all.[1] In any case the philosophical defects with wealth maximization, even if they run deep, may not be decisive for law.

The example is not exotic. Some philosophers think that a free speech principle that places a special premium on political discussion is extremely attractive.[2] But perhaps this approach would be too readily subject to abuse in the real world. Perhaps any institutional judgments about the category of what counts as "the political" would be too biased and unreliable to be acceptable. For good institutional reasons, we might adopt a free speech principle of a philosophically inadequate sort, simply because that inadequate approach is the only one that we can safely administer.

To take another example: Some philosophers believe that emotions have important cognitive dimensions, or that they are a form of cognition, and indeed it seems clear that various emotions—grief, hate, love—are based on judgments of value.[3] But a democratic society might still decide that emotions are so likely to be partisan or parochial, or to go wrong in some predictable way, that they should be excluded from certain areas of law. The exclusion might be based not on a philosophical mistake about the distinction between reason and emotion, but instead on an awareness of institutional limits faced by human beings in certain situations.

One final example: Suppose that we wanted to ensure that confessions are made under circumstances in which they are truly voluntary. Suppose that we can generate a philosophically adequate account of voluntariness, and that with respect to that account, some confessions that come after the *Miranda* warnings are involuntary, while some confessions that are given without those warnings turn out to be voluntary. The *Miranda* rules, in short, turn out to be both overprotective and underprotective with reference to the best philosophical understanding of voluntariness. Do we have a sufficient reason to abandon *Miranda*?

Surely not. The *Miranda* approach may be the best means of combining real-world administrability with substantive plausibility. If so, it may be more than good enough despite its philosophical inadequacy. The phenomenon of philosophically inadequate but nonetheless justified legal strategies seems to be a pervasive part of a well-functioning system of law.

This leads to a final point, having to do with the complex connection between theories of the good or the right on the one hand and concrete legal disputes on the other. Perhaps the point emerges most simply by thinking about works of literature that seem to have political components. Dickens and James are obvious examples. It would be obtuse to ask whether Dickens favors worker ownership of plants, or whether James believes that any real revolution must occur quickly or instead in short steps. The problem is not that the works of Dickens and James do not bear on these issues. It is that Dickens and James may greatly deepen understanding of capitalism or of the revolutionary sensibility without at the same time telling us about what sorts of legal reforms and approaches make sense.

Some of these same things may also be true of Hobbes, Locke, Rousseau, or Rawls and Raz. The relationship between any philosophical account of (say) justice and liberty need not lead to any particular specification of outcomes in disputed cases in law. We may believe, with Raz, that human values are not commensurable[4] without having endorsed a position about prostitution and surrogacy, about the appropriate remedy for natural resource damages, or about the relationship between specific performance and monetary damages in tort cases. Of course, views about commensurability may influence these debates. But the philosophical claims cannot be decisive, because there is much else of which real-world institutions must take account. We may think, with Rawls, that the difference principle is required by good thinking about justice, without believing that the Constitution mandates that principle, or even that the United States Congress should pursue that principle in light of the multiple constraints that it faces. In this way philosophical commitments may inform understandings about law without leading to particular judgments about legal disputes.

III. Philosophy vs. Law? Of Harlan and Hercules

Legal positivists sometimes think that law has nothing to do with philosophy, at least in the quiet narrow sense that the legal enterprise can often operate without offering any philosophical or theoretical claims at all.[5] In this way, positivists believe that legal practice and legal theory can be sharply distinguished. As against the positivists, Ronald Dworkin famously argues that there is an inevitable evaluative or normative dimension to statements about what the law is.[6] Often, at least, one cannot say "what the law is" without also saying something about "what the law should be." That is, when lawyers disagree about what the law is with respect to some question—can the government ban hate speech? cross-burning?—they are disagreeing about "the best constructive interpretation of the community's legal practice."[7] Thus Dworkin argues that interpretation in law consists of different efforts to make a governing text "the best it can be." This is Dworkin's conception of law as integrity.

Hercules, Dworkin's infinitely patient and resourceful judge, approaches the law in this way. Here we have an interesting view of the relationship between legal theory and legal practice. Is Hercules a theorist or a practioner? The answer is that he is neither and both. Hercules is a practitioner insofar as he takes legal practice—in the form of the existing legal materials—very seriously indeed. People's legal rights may well be different from the rights that would be yielded by the best abstract theory. Dworkin thus places a large emphasis on "fit" with existing materials as a criterion for correctness of legal outcomes. The lawyerly virtue of integrity is connected with achievement of principled consistency among similar and dissimilar cases; principled consistency may generate outcomes that diverge from what justice requires if it is understood as an independent ideal. Thus justice and integrity are not the same thing. On the other hand, Hercules is a theorist too. To know what the law is, the judge has to cast the existing materials in their best light, and to do this, the judge must often (and perhaps always) take a stand on some large theoretical questions.

We might compare Hercules' conception of the judicial role

with the search for reflective equilibrium in politics and ethics.[8] Much of practical reasoning, in law and elsewhere, entails an effort to produce general theories by close engagement with considered judgments about particular cases. Those judgments may serve as provisional "fixed points" for inquiry, in the sense that we have a high degree of confidence in them and cannot readily imagine that they could be shaken. In searching for reflective equilibrium, what we think tentatively to be the general theory is adjusted to conform to what we think to be our considered views about particular cases. The particular views are adjusted to conform to the general theory and vice versa.

There is a close relationship between the search for reflective equilibrium and Hercules' approach to law. Hercules also attempts to go back and forth between particular judgments—reflected in judicial holdings—and the various theories that account for them. The general theory is adjusted to conform to the holdings. This search for an equilibrium between "fit" and "justification" might be understood to be the practical lawyer's analogue to this conception of the philosopher's project.

Here we have a distinctive picture of the relationship between practice and theory in law. The picture helps show how the lawyer's task is both similar to and importantly different from that of the philosopher. It is also true that a statement describing the law is not a statement about some "plain fact"; when it comes to interpretation, there is often a large evaluative dimension to positions about what the law is.[9] Often the disagreement really rests on what approach makes for the best system of law—which is not the same as saying that it rests on an independent judgment about the best theory.

Many lawyers, however, wonder whether Dworkin fully describes how lawyers think, and their puzzlement says something important about the relationship between theory and practice in law. A serious problem has to do with the practice of analogical reasoning, which lies at the heart of how lawyers (and many ordinary people) proceed. In Dworkin's hands, theories are produced in the large, on the basis of fairly abstract moral theory (so long as the judge respects the duty to fit the cases). These theories are then brought to bear on particular problems. Consider, for example, Dworkin's description of how judges

should think about free speech law.[10] Dworkin begins with a noninstrumental, "constitutive" conception of free speech, in accordance with which speech is protected because of the need to respect the moral autonomy of the citizenry. On Dworkin's view, moral autonomy is insulted whenever government attempts to prevent people from hearing things that they find persuasive.[11] Dworkin brings this idea to bear on the area of libel; he concludes that the Constitution imposes firm barriers against liability for public or private libel. Or consider the area of race discrimination. On Dworkin's account, the judge must ask: Does the legal prohibition on race discrimination reflect a category of suspect classifications stemming from a general right to be treated as equals; or a right against the use of certain banned categories; or a right not to be subject to prejudice? Dworkin concludes that the third theory is best and that affirmative action is therefore constitutional.[12]

Dworkin emphasizes that in answering such questions, lawyers will not be pure philosophers. They do not simply develop the best theory from the standpoint of principle; they must offer their answers in a way that is attuned to the need for "fit" and to the courts' proper role. But this concession may be insufficient. In deciding whether, for example, a restriction on private libel offends the first amendment, lawyers usually do not ask which interpretation makes the amendment the best it can be. They do not begin or end with a high-level conception of the values promoted by the amendment. These are broad and abstract questions. They are too hard, large, and open-ended for legal actors to handle. They call for responses that are, in one sense, too deeply theorized.

We might think here about Justice John Marshall Harlan, a very different judge from Hercules. I cannot discuss Harlan's opinions in detail here, but let me offer a few observations. Harlan was an extraordinarily skilled but in many ways a highly conventional common lawyer.[13] Harlan's approach to law was at most intermittently theoretical. He avoided large claims. He was a great analogizer. He was closely attuned to connections among cases without attempting high-level theories about the right or the good. And here, I think, we can find a conception of legal practice that at least attempts to be divorced from legal theory.

That is, Harlan's writings show the possibility of a form of what we might call low-level normative practice, diverging from full-scale normative theory.

Harlan was an especially distinguished judge, but his approach to law is far from unfamiliar. In thinking about free speech issues, lawyers engaged in ordinary practice do not generate large-scale theories about the meaning of (for example) free expression in a democracy. Instead, they ask what particular sorts of practices clearly seem to violate the first amendment, or the principle of free expression, as these are understood through our practice. Then they ask whether a restriction on (for example) private libel is relevantly similar or relevantly different. The same is true of much judicial work in private law; it is also true of statutory construction, at least in difficult cases, where the issue is whether the case at hand resembles the cases at which the statute is unambiguously aimed. Of course, the description of relevant similarities and differences will have evaluative dimensions, and these should be made explicit. But lawyers and judges will not engage in anything like general moral theorizing. If a distinction between legal practice and legal theory is to be sustained, I think that this is the place to start. Everyday legal thinking proceeds without taking high-level stands on questions of the right or the good.

Is this project possible or worthwhile? From the standpoint of Dworkin's Hercules, we might respond in the following way. A judge who operates in this apparently conventional way might end up being Herculean, too. At least he had better have that aspiration in mind. When our modest judge—Harlan rather than Hercules—uses analogical reasoning to say that case *A* is like case *B*, he has to rely on a principle. If he is reasoning well, he will have before him a range of other cases, *C* through *Z*, in which the principle is tested against others and refined. At least if he is a distinguished judge, he will experience a kind of "conceptual ascent," in which the more or less isolated and low-level principle is finally made part of a general theory, or of reflective equilibrium. On this view, Harlan should be seen as someone who engages in a truncated form of what Hercules seeks to do, with the truncation starting at just the point when things start to become interesting or difficult. Little can be said

for something as modest and cautious as that. It might therefore be concluded that legal practice is simply a form of legal theory without the requisite self-consciousness or ambition.

There is some truth in this response. Any claim that one case is like another does depend on the implicit or explicit invocation of a principle. We cannot tell whether a ban on private libel is like a ban on commercial speech, or like a ban on attempted bribery, without a principle enabling us to know what is similar to what. The principle should of course be identified. Once we know what it is, we might want to test the principle by seeing how it coheres with all of the existing legal materials (or with a theory independent of those materials). Thus far, then, Harlan does not seem to be a worthy competitor to Hercules, but merely a somewhat lazy imitator.

But this view is incomplete. We can identify a number of distinct advantages to what I am describing as a form of practice that is in important respects independent of theory. Each of these advantages is especially important for people engaged in legal reasoning.

First, this form of reasoning may be the best approach that is available for people of limited time and capacities. The search for reflective equilibrium, or for vertical and horizontal coherence, may be simply too difficult for participants in law (or for others engaging in practical reasoning in an attempt to think through difficult problems). Often there are too many real-world constraints to work out a fully general theory. And when compared with the search for reflective equilibrium, analogical reasoning has the advantage, for ordinary lawyers and judges, of humility and modesty. To engage in analogical reasoning, one need not take a stand on large, contested issues of social life, some of which can be resolved only on a sectarian basis. For this reason, we might think that practical reasoning in law of the sort I am now describing can claim to avoid the risk of hubris.

Second, reasoning by analogy may have the large advantage of allowing a convergence on particular outcomes by people unable to reach anything like an accord on general principles. Sometimes it is exceedingly difficult to get people to agree on the general principles that account for their judgments. But

sometimes it is possible to get them to agree on particular solutions or on low-level principles.[14] An incompletely theorized agreement[15] is often possible on the view that case *A* is relevantly similar to case *B*—even if those who join the agreement could not decide as between utilitarianism or Kantianism, or come to closure on the appropriate role of religion in society. This is especially important in a legal system, for people must be able to converge on particular judgments even if they disagree on matters of high principle. It might even be said that allowing this form of convergence is one of the most crucial tasks for a system of adjudication in a liberal democracy.

There are many examples inside and outside the law. Consider the enormous difficulties that would arise if any heterogeneous faculty attempted to set out the appropriate general principles by which to decide issues of faculty diversity. It is certainly possible that no such principles could command consensus, or indeed, that the effort to reach consensus would produce acrimonious and only mildly productive debate. But even such a faculty might well be able to agree on a wide range of particular appointments cases, with its agreement on outcomes supported by diverse (and incompletely debated) justifications. This example may serve as a metaphor for how legal arguments—and perhaps day-to-day normative practice—really work. People who could not reach agreement on high-level principles, or theorize about their judgments without collapsing into sectarianism, might nonetheless be able to engage in productive, low-level debates, and precisely because particular judgments can be supported by a range of diverse principles on which no stand need be taken. This is what happens with most disputes in both public and private law.

Third, analogical reasoning may be especially desirable in contexts in which we seek moral evolution over time. If the legal culture really did attain reflective equilibrium, it might become too rigid and calcified; we would know what we thought about everything, whether particular or general. By contrast, Harlan's method has the important advantage of allowing a large degree of openness to new facts and perspectives. It enables disagreement and uncertainty to turn into consensus. This is a large

advantage of a form of day-to-day normative practice that is distinct from abstract and general normative theory.

Fourth, analogical reasoning in law operates with precedents that have the status of fixed points. This is so even for people who disagree with those precedents as a matter of principle. In searching for reflective equilibrium, by contrast, everything is revisable. (Here, there is a contrast as well between Dworkin's approach and the search for reflective equilibrium; because Hercules places a high premium on fit, it seems clear that he must take cases as given even if he would not agree with them in principle, though Dworkin is not entirely clear on this point.) The fact that precedents are fixed points helps to bring about an incompletely theorized convergence as well, by constraining the areas of reasonable disagreement. In this way, analogical reasoning introduces stability and predictability, which are important virtues for law.

There is a larger point here. Lawyers could not try to reach reflective equilibrium without severely compromising the system of precedent. The judgments at work in the search for reflective equilibrium are subject to critical scrutiny, and any of them might be discarded. The point helps explain Rawls's suggestion that "for the purposes of this book, the views of the reader and the author are the only ones that count. The opinions of others are used only to clear our own heads."[16]

In a legal system, precedents are far more than an effort "to clear our own heads." If a judge or a lawyer is to attempt to reach reflective equilibrium, precedents will have at most the status of considered judgments about particular cases, and these might be revised when they run into conflict with something else that he believes and that is general or particular. In the legal system, precedents have a much firmer status. To be sure, precedents are not immune to revision, but the principle of stare decisis ensures that they operate as relatively fixed points.

I conclude that the search for reflective equilibrium is a misleading description of law, and in some ways an unattractive prescription, for participants in a legal system aspiring to stability should not be so immodest as to reject judgments reached by others whenever those judgments could not be made part of reflective equilibrium for those particular participants. Of

course, it is only a mixed blessing to have fixed points that may be wrong as a matter of principle. For this reason, observers of or participants in the legal system may be pushed in the direction of theoretical challenges to current legal materials. These challenges should hardly be disparaged; sometimes they prevail, and rightly so. But legal practice often operates with a kind of consensus on theoretical issues, a consensus in which people who diverge on large-scale issues can agree on how to approach particular controversies.

Now let us return to Hercules, who does not seek to achieve reflective equilibrium of the ordinary sort, acknowledging as he does that the existing legal materials must usually be accepted even if they seem wrong. Does Harlan have some advantages over Hercules? I think that he does. Insofar as Harlan avoids resort to large-scale theory, he not only avoids unrealistic expectations for people engaged in law, but also promotes a system in which people who disagree on a great deal can converge on the particular judgments of which a system of adjudication must consist. This too is at best a mixed blessing. It may perpetuate errors. It may tolerate inequality and unfair treatment. But a blessing that is mixed is a blessing nonetheless.

One additional note: Dworkin's conception of law contains an interesting account of what it means for law to be legitimate. Hercules can produce vertical and horizontal consistency among judgments of principle; Harlan can offer nothing so bold. A legal system that is incompletely theorized will not yield anything like coherence, and perhaps this is a decisive defect.

A complete response would require more detail than I can offer here, but a few remarks are in order. Full theorization consists of much more than a legal system of numerous, heterogeneous, hierarchically arranged courts can be expected to offer. Because of the need for predictability and stability in law, judges must reason from cases with which they disagree, and the resulting judgments are unlikely to be fully theorized. If this is so, a system of legal practice may well be able to claim the requisite legitimacy if it is democratic (broadly speaking) and if individual judges seek to produce the limited but important sorts of consistency that Harlan can yield. If this is correct, a system in which judges reason by analogy, and do not seek

reflective equilibrium, might itself be justified as part of the reflective equilibrium reached by informed observers who take institutional issues into account.

IV. A Final Challenge for Legal Practioners

There is a final challenge to what I am describing as Justice Harlan's method, and this challenge bears directly on the relationship between theory and practice in law. The challenge would emphasize that Harlan's method, and especially his emphasis on incompletely theorized particulars, is necessary only because of our failure to develop general principles, which ought to be evaluated in their own right. The method of analogy, for example, is based on the question: Is case *A* relevantly similar to case *B,* or not? Is a ban on homosexual sodomy like a ban on the use of contraceptives in marriage, or like a ban on incest? We have seen that to answer such questions, one needs a theory of relevant similarities and differences. By itself, analogical reasoning supplies no such theory. It is thus dependent on an apparatus that it is unable to produce.

In short, everything is a little bit similar to, or different from, everything else. Perhaps better: everything is similar in infinite ways to everything else, and also different from everything else in the same number of ways. Without a set of criteria to engage in analogical reasoning, one has no idea what is analogous to what.

The first and most modest response to this idea is that judgments in particular cases may be an important part of the development of governing principles, which are often low-level. For example, it will be very hard to develop criteria or general theory without looking at the wide range of cases that raise free speech issues. This is certainly so for judges in a system of adjudication, and even more in a legislature during a period of enthusiasm for general rules. Specification of the general theory will be an extraordinarily difficult task. Often it cannot be described, except at an uninformatively high and crude level of abstraction, in advance.

Thus far I have suggested that Harlan's approach is helpful even if the criticism is fundamentally right: we do need princi-

ples to decide cases; but this is not an objection to reasoning from particular cases, which helps us to decide what our (low-level) principles are. But this humble point may establish only that analogies help us discover principles, which are in an ultimate sense freestanding. In Kant's formulation, examples may be like walkers for children, helping people who are ethically immature to begin to orient themselves like adults.[17] Thus "casuistry is most suitable to the capacity of the undeveloped and so is the most appropriate way to sharpen the reason of young people in general."[18] Convictions about particular cases—the stuff of practice—are like a ladder that can be discarded once we have climbed to the top.

I think that this metaphor is misleading, because it suggests that the relevant convictions are dispensable in a way that they are not; particular judgments are not a ladder to be tossed away, but an important basis for our general principles. And as many have emphasized, some faculty is necessary to bring general rules to bear on particular cases; often the application is far from mechanical. But a fuller response to this criticism will have to go deeper. I must be tentative about the point here, but the fuller defense would start with the claim that particular judgments about particular cases have a kind of priority in deciding what the law is or should be. My speculative suggestion is that correct answers in law might consist precisely of those particular judgments and these low-level principles, once these have been made (maximally) to cohere. The claim may extend beyond law to ethics and politics as well.[19]

The claim may be right even if we acknowledge, as we should, that the effort to develop broader levels of abstraction is often a check against partiality and error in particular cases. In ethics as in law, judgments about particulars should be provisional in the sense that sometimes they must be revised precisely because they cannot be squared with other judgments that are particular and general; but in certain endeavors, those particular judgments may deserve a kind of priority. They may deserve priority because they are more fully and carefully attuned to the multiple considerations likely to be at stake, and because general rules may be so broad and abstract as to ignore pertinent features of good judgment. Of course, nothing in this view

amounts to a denial of the need for general principles and rules, to counteract bias, to minimize costs of decision, and to bring about the various virtues associated with the rule of law.

Often, at least, general principles do seem inadequate to the matter at hand. Too many factors will be relevant, and too many variations will be possible, to allow a general formulation adequately to capture the range of right results in the cases. Sometimes any general theory will be too rigid and too inflexible. Part of the reason is that the relevant goods are diverse and plural, and most general theories are poorly attuned to this fact. In the law of free speech, for example, the Supreme Court has not offered a theory to account for its judgments. It has not explained what speech counts as "high value" and what speech falls in a lower tier. It is tempting to say that this is a major failure in constitutional law, and that the Court would do much better to tell us in plain terms what "test" it is using. But perhaps any test, described at a high level of generality, will be subject to decisive counterexamples, and will therefore be inadequate to the task.

Perhaps this is true partly because of the diversity of goods served by free speech—autonomy, development of the capacities, political liberty—and because diverse goods are unlikely to be well-captured by a highly general theory. Perhaps this is not true for the first amendment; it is possible that (1) if we thought well enough, we would come up with a perfect general theory, or—a quite different point—that (2) the advantages of an inadequately precise test might outweigh the disadvantages of having no general theory at all. All I mean to suggest is that sometimes analogical reasoning might, in principle, be preferred to a general theory, simply because no such theory can adequately account for particular convictions, and because those convictions, responsive as they are to the full range of interests legitimately at stake, deserve priority in thinking about good outcomes in law.

This claim may be wrong; certainly I have not defended it adequately here. But if it is right, it may have large and incompletely explored implications for the relationship among normative theory, operating through general theories, and what I

am calling normative practice, operating modestly with low-level convictions.

Conclusion

The practice of law is theory-laden. In their day-to-day work, many lawyers and judges are actually making theoretical claims. In some ways, it is most unfortunate that this point is not recognized more often. The absence of self-consciousness about the theoretical claims may conceal those claims from view and make it harder to see that they represent a choice among plausible alternatives. The attack on legal formalism is above all an insistence that legal work that purports to be mechanical is actually based on controversial substantive claims. Those claims ought to be brought out into the open and evaluated.

But there are some advantages to the divorce of legal practice from legal theory. Analogical reasoning might be taken as a model for a process of thinking that is appropriately nonsectarian and that tries to avoid large-scale claims about the right or the good. This approach is especially promising in light of the fact that it accomplishes a central task of a legal system and perhaps of normative practice generally: It enables people to converge on particular outcomes even though they disagree sharply on first principles. We might go further: Judgments about particular cases might deserve a kind of priority, or at least a distinguished place, in our thinking about law or even justice. It is unclear whether it is possible to have a form of legal practice that is agnostic on or largely independent of legal theory. But if this is possible, I contend that something of the sort suggested here is the place to start.

NOTES

1. As contended in Richard A. Posner, *Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990).

2. Alexander Meiklejohn, *Free Speech and Its Relations to Self-Government* (New York: Macmillan 1948).

3. See Ronald de Souza, *The Rationality of Emotion* (Cambridge: Cambridge University Press, 1989); Martha Nussbaum, *The Therapy of Desire* (Princeton: Princeton University Press, 1994).

4. See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), ch. 13.

5. I draw in this section on Cass R. Sunstein, "On Analogical Reasoning," *Harvard Law Review* 106:741. I discuss these issues further in "Political Conflicts and Legal Agreements," forthcoming in the 1995 Tanner Lectures in Human Values, ed. S. McMullin.

6. See Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

7. Ibid., 224.

8. See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 19–22, 46–51, and "The Independence of Moral Theory," *Proceedings and Addresses of the American Philosophical Association* 75 (1974–75): 5.

9. This issue is discussed in chapter 4 of Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993).

10. See Dworkin's discussion of free speech, in "The Coming Battles Over Free Speech," *New York Review of Books,* (11 June 1992): 55, where the governing theory is also developed at an exceedingly high level of generality and where analogical reasoning plays no role. In fact, many of Dworkin's particular discussions are based on a form of deduction, in which he develops a general theory and evaluates particular cases by reference to that theory.

11. The idea first appears in T. M. Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs* 1 (1972); 204. Scanlon significantly revised his theory in "Freedom of Expression and Categories of Expression," *University of Pittsburgh Law Review* 40 (1979): 519.

12. *Law's Empire,* 393–97.

13. See Bruce Ackerman, "The Common Law Constitutionalism of John Marshall Harlan," New York Law School L. Rev. 5: 1 (1992).

14. See the discussion in Albert Jonson and Stephen Toulmin, *The Abuse of Casuistry* Berkeley: University of California Press (1988), 16–20. See also my "Political Conflicts and Legal Agreements," supra note 5.

15. Cf. John Rawls, "The Idea of an Overlapping Consensus," *Oxford Journal of Legal Studies* 7 (1987): 1.

16. Rawls, *A Theory of Justice,* 50. I do not claim that the only function of this statement is to point to revisability. In the relevant section, Rawls is discussing the analogy between the sense of grammar

and the sense of justice, and suggesting that a knowledge of one person's sense of either would be a good beginning.

17. See the instructive discussion is Onora O'Neill, "The Power of Example," in her *Constructions of Reason* (Cambridge: Cambridge University Press, 1989).

18. Ibid., 168.

19. Compare John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), who suggests that in the search for reflective equilibrium, judgments at all level of generality are provisional and that no level has priority.

I do not deal here with the fact that analogies may sometimes be a result of patterns that reach deep into cognitive processes, and that there is no identifiable "principle" to make one thing analogous to another but instead patterns that are constitutive of human reasoning. The cognitive role of judgments of analogy would take me far beyond the present discussion.