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Anthony D'Amato

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Can Any Legal Theory Constrain Any Judicial Decision?*

ANTHONY D'AMATO**

I. INTRODUCTION

A growing number of legal scholars have recently revived the American legal realist thesis that legal theory does not dictate the result in any particular case because legal theory itself is indeterminate.[1] A more radical group has added that theory can never constrain judicial practice.[2] So far, however, most of these assertions,

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** Anthony D'Amato is a Professor of Law at Northwestern University.

1. *See* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). For a critical review of the indeterminacy thesis, see Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). *See also* A. HUTCHINSON, DWELLING ON THE THRESHOLD (1988); Balkin, *Deconstruction Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

2. W. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE (1974); S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); C. NORRIS, DECONSTRUCTION: THEORY AND PRACTICE (1982); Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777 (1988); Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987); Fish, *Still Wrong After All These Years*, 6 LAW & PHIL. 401 (1987); Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983); Fish, *Interpretation and the Pluralist Vision*, 60

although forceful, have been unsystematic.[3] In this Essay, I will present a spectrum of types of legal theories in order to demonstrate, with concrete examples, that the position of the more radical group of writers is correct—that legal theory is inherently incapable of identifying which party should win any given case. I will try to show that no matter how broadly or narrowly legal theories are conceived, no matter whether they are aggregated or otherwise combined with other theories, and no matter whether legal theories are claimed to resolve specific disputes or just to influence broad legal trends, legal theory is incapable of constraining judicial practice.

II. THE SINGLE ALL-ENCOMPASSING THEORY

Let us take as a first example the tip of the inverted pyramid of economic analysis that Judge Richard Posner has urged us to adopt as the theoretical basis for all decisionmaking: that wealth should be maximized.[4] My argument is that in any imaginable case, acceptance by the court of the wealth maximization principle cannot point to a decision for either side. I concede that if any case can be found where the wealth maximization principle compels the result for one side and not the other, then the entire thesis—that theory does not constrain results—would be invalidated.

Because I know of no case where the wealth maximization principle compelled a particular result, I must imagine a "strong" case to indicate how the theory can be deconstructed. Consider a testator who has ordered his executor to burn an original Cézanne painting in his estate.[5] If the heirs ask for an injunction against the executor,

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TEX. L. REV. 495 (1982); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 538 (1984).

3. For critiques of deconstructionism, see, *e.g.*, A. AARNIO, THE RATIONAL AS REASONABLE: A TREATISE ON LEGAL JUSTIFICATION 158 (1987) (If there is more than one "right answer," we are close to arbitrariness.); Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986); Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1208 (1985); Schwartz, *With Gun and Camera Through Darkest CLS Land*, 36 STAN. L. REV. 413 (1983). Some scholars have attempted to portray Fish's deconstructionism as the equivalent of a nihilist theory. *See* Fuller, *Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549, 562-63 (1988); Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 345 n.46 (1986). To me such attempts are the equivalent of postulating a non-apple and then theorizing how it would taste.

4. For his most recent statement of the matter, with citations to the earlier writings, see Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J. L. ETHICS & PUB. POL'Y 85 (1985).

5. Or similarly, Max Brod's decision not to burn his friend Franz Kafka's books, contrary to Kafka's dying request. *See* W. BISHIN & C. STONE, LAW, LANGUAGE, AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD 1-9 (1972). The problem with using a literary example, instead of a recognized painting, is that the latter has obvious worth,

what result? Most people probably would grant the heirs' motion for an order enjoining the executor from carrying out the testator's wish.

Our intuition that such an injunction should issue may be presented as an application of wealth maximization theory as follows: (1) the utility that the testator derived in contemplation of depriving the world of the experience of enjoying the Cézanne is outweighed by the aggregate utilities of the rest of the world and future generations in enjoying the painting; (2) even if we can not engage in interpersonal comparisons of utility, by any measure the utility of the testator's pleasure is overwhelmed by the aggregate utility of all other persons in the present and future generations; (3) any doubt on this score is erased by noting that the testator's utility is sunk—he has already experienced it—and hence serving present and future generational utility deprives the testator of nothing; (4) the cheapest means of cost avoidance consists of not destroying the painting—the alternative involves the cost of time, labor, matches, lighter fluid, and ash disposal. Of course, an effective presentation of the preceding four points would involve a display of appropriate charts, graphs, diagrams, mathematical paraphernalia, and mandatory references to Coase,[6] Calabresi,[7] and Posner.[8] Assuming that I do so, the conclusion is nigh inescapable—that issuing the injunction maximizes wealth.

With all that cumbersome apparatus marshalled to prove the obvious, is the reader forced to conclude that wealth maximization compelled the result that I reached? Not if an equally complicated wealth maximization argument is given that reaches the opposite result. Once again we would begin with an array of appropriate graphs, formulae, and references, this time to *critics* of Coase, Calabresi, and Posner, and then argue as follows: (1) destroying the painting would increase the value of all the other Cezannes in existence, which in the aggregate may add more wealth to the world than would have been taken away; (2) issuing the injunction would diminish the scope of private property rights and hence devalue, to a limited but in the aggregate an enormous extent, all the property in the world, such aggregate devaluation more than exceeding the value of the destroyed Cézanne; (3) issuing the injunction would mean that paintings as a

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whereas the former is not well-recognized. Think of how many draft novels are destroyed—probably several hundred for each novel that is published—and out of all the published novels, very few have any value. Moreover, failure to publish all these bad novels maximizes wealth from the point of view of the forest and forest-lovers.

6. *See, e.g.*, Coase, *The Problems of Social Cost*, 3 J. L. & ECON. 1 (1960).

7. *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

8. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986).

whole would fetch lower prices due to the fact that their owners would then realize that they will not be acquiring absolute testamentary rights over the paintings, and that this lowering of prices would exceed the value of the lost Cézanne; (4) the ensuing lower prices paid for paintings would encourage fewer persons to become artists and hence eventually lead to a significant loss in the world's output of art, thus diminishing the artistic wealth of the world more than the value of the diminution that would accompany the destruction of the Cézanne. Q.E.D.

In short, at least in the strongest case that I can imagine for applying the wealth maximization principle, that very principle can be employed to justify the opposite result. But I did not reach this result by any claim that the law itself contains opposing principles—a claim early made by some legal realists and more recently adopted by some critical legal studies scholars. Note that the "principles" I invoked were invented by me for the occasion. Nor have I claimed that in opposition to the "wealth maximization" principle there is a competing principle of "wealth minimization." Rather, I assert that neither a theory nor its opposite is capable of constraining the result in any given case. However, maybe I should not be allowed to invent my own case and then deconstruct it. I therefore tried a different selection method and asked my colleagues on the Northwestern faculty who are working in the law and economics area[9] to cite a case where the result seemed to be dictated by the wealth maximization principle. Only one case was suggested (although I was pointed to many law review articles)—the classic case of *Vincent v. Lake Erie Transportation Co.*[10] In looking at that famous case, I concede that the majority's opinion in *Vincent* seems consistent with the principle of wealth maximization—but, I contend, the dissent is equally consistent with that same principle.

In *Vincent*, the plaintiff dock-owner sued for $500 worth of damages to his dock that were caused by the defendant's steamship, which was lawfully moored to the plaintiff's dock, being buffeted against the dock by an unanticipated, violent storm.[11] Although conceding that it would have been imprudent for the defendant to have attempted to cast his steamship off from the dock, the Supreme Court of Minnesota affirmed the verdict for the dock-owner.[12]

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9. Professors Ian Ayres, John Donahue, Victor Goldberg, and Mark Grady.

10. 109 Minn. 456, 124 N.W. 221 (1910). The suggestion came from Professor Mark Grady.

11. 109 Minn. at 457-58, 124 N.W. at 221.

12. 109 Minn. at 460, 124 N.W. at 222.

The critical fact that apparently resulted in the court's decision for the plaintiff was the court's perception that the defendant "deliberately" held the steamship to the dock.[13] The court found, as a factual matter, that the "lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one."[14] The court therefore concluded that "having . . . preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted."[15]

In what sense does this decision maximize wealth? Wealth would appear to be maximized if one compares the result in the case to a hypothetical alternative that no one argued—that the vessel was obliged to cast off in the middle of the storm, with possible total loss of the vessel. Compared to that hypothetical alternative, wealth was maximized by allowing the vessel to remain in the dock and charging the owner of the vessel for the $500 worth of damage to the dock. But such a hypothetical case was not the real alternative before the court. No one argued that it was a serious alternative possibility, because no matter what the costs in damage to the dock, no vessel-owner would risk losing the entire vessel if the worst damage to the dock would be less than the risk to the vessel of casting off. No one in *Vincent* argued that the owner should have cast off; indeed, the court found the ship-owner's decision to remain fastened to the dock to be *prudent* even though it assessed him the maximum penalty—liability for the damage to the dock.[16]

The only reasonable alternative to the court's actual decision was the one contended by the defendant—that the owner of the dock should absorb the $500 loss.[17] As to that alternative, the dissenting opinion provided a theory that is at least as convincing as the majority's:

> In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had

13. 109 Minn. at 459, 124 N.W. at 222.
14. 109 Minn. at 457, 124 N.W. at 221.
15. 109 Minn. at 459, 124 N.W. at 222.
16. 109 Minn. at 458, 124 N.W. at 221.
17. 109 Minn. at 458-59, 124 N.W. at 221.

used the stronger cables, there would be no liability.[18]

Clearly the dissent's view is just as wealth-maximizing as the majority's. Economic theory does not concern itself with *whose* wealth is maximized. Rather, after Coase, it is only concerned with maximizing aggregate wealth.[19] Thus the only fact "noticed" by economic analysis is the value of saving the vessel. But *this* value is conceded by both sides. It follows, then, that wealth is maximized irrespective of which party is charged for the damage to the dock.

For those whose economic theories favor "policy" arguments, we may also speculate as to the future wealth-producing effects of holding the dock-owner liable for the damage to the dock. Future dock-owners will have to take into account the possibility that if a boat is lawfully moored to the dock and a storm comes up, the dock-owner will have to absorb any damages that result from the boat crashing against the dock. Hence dock-owners will have to raise their rents to discount for the possibility of such losses. Raising rents may encourage them to mitigate future damages. For example, the dock-owners might construct docks that are not easily damaged in a storm, and they might provide extra ropes and cables so that vessels can be securely moored, minimizing the chances that vessels will crash against the dock. Thus dock-owners may indeed be in a better position to mitigate damages—and hence maximize future wealth—than owners of vessels.

At this point the reader might well object that I may have trumped my own argument—that wealth maximization does not point to a victory for either side— by indicating that the dissent has the better position in the *Vincent* case. But a little theory-speculation can touch up the situation and either tip the balance back to the majority side or install—if it is desired—equilibrium. For instance, a court can speculate that vessel-owners are in a better (cheaper) position to choose the docks at which they want to moor than dock-owners are to choose which vessels may moor at their docks. Hence wealth can be maximized by putting the loss-reducing incentive to select the most suitable dock—the dock least likely to be damaged in the event a storm comes up—on the vessel-owner. Thus different vessel-owners will self-allocate their ships to the docks best equipped for mooring their ships to in the event of a storm, reducing the need for all docks to engage in improvement construction so as to be able to service a large range of vessels. Even so, some dock-owners will be motivated to improve their docks so as to attract a wider range of

18. 109 Minn. at 461, 124 N.W. at 222.

19. *See* Coase, *supra* note 6, at 15-16.

risk-averse vessels, and also to advertise their improved facilities to the shipping community. Economists noticing these activities post hoc may construct theories that tip the legal balance back to the way the majority had it in the *Vincent* case.

In the *Vincent* case, as well as in my hypothetical Cézanne case, wealth-maximization can be used to justify—I'd prefer to say, as does Stanley Fish, "present"[20]—a decision in favor of either side. For this reason alone (leaving aside issues of vagueness and ambiguity), the theory of wealth-maximization does not constrain the judicial decision.[21]

III. A LARGE THEORY WITH ACCOMPANYING SUBSIDIARY THEORIES

Obviously, for many observers, maximizing wealth is a hypothesis that contains so many degrees of freedom that applying it to any set of facts will be highly problematic.[22] Perhaps if subsidiary theories can be added to it, the goal of constraining a particular result might finally be reached. Consider one such subsidiary theory: maximizing wealth entails the desirability of minimizing transaction costs.[23] Have we now fashioned a theory that can ever indicate to a court which side must prevail?

The term "transaction costs" depends on how we define a transaction. If we define the term narrowly as a kind of waste, we might say that money paid to lawyers, for example, is a transaction cost. In that case, awarding the decision to the side whose position in general would entail paying less money to attorneys might then be indicated.

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20. *See* Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1790 (1987).

21. I am not taking the Critical Legal Studies position that there is a fundamental contradiction in the wealth maximization principle itself, and therefore that our applications of it will be inconsistent. It seems to me that the CLS critique of theorizing—that it embodies fundamental substantive contradictions—elevates the idea of theory to implausible heights (even as some CLS scholars deconstruct established theory). Marxist dialectic materialism, of course, is the classic attempt (using non-Aristotelian logic) to set up reifications of theory that embody contradictory norms (thesis and antithesis). *Cf.* M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 142 (1987) ("The CLS claim, quite simply, is that there is absolutely no politically neutral, coherent way to talk about whether a decision is potentially Pareto efficient, wealth maximizing, or whether its benefits outweigh its costs.").

22. Judge Posner, however, has contended that the very simplicity of an economic theory is a sign of its strength, because the simpler the theory, the more hypotheses it is likely to yield. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 281-87 (1979). This may be an implied, though inadvertent, admission that the real utility of such theories is that they yield numerous publication opportunities for legal scholars.

23. *See* R. POSNER, *supra* note 8, at 45, 436; Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 777-78 (1975); Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1, 12 (1972); Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 11 J. L. & ECON. 233 (1979).

But we can always view "transaction" more broadly. Having lawyers in the deal might result in their spotting other problems that can be avoided, whereas if lawyers are not involved—the transaction cost for lawyers is zero—the parties may wind up spending a great deal more money in litigating unclear contractual terms than they would have spent had lawyers been involved in the first place. Hence it is not a wasteful transaction cost so much as a prudent way to do business. No matter what the case, one side can plausibly argue that transaction costs be defined narrowly and the other side that it be defined broadly.

Sometimes transaction costs are invoked to justify awarding a factory an entitlement to pollute on the theory that giving the entitlement to the public could necessitate enormous transaction costs for the factory if it wanted to purchase pollution rights (the holdout problem).[24] Yet the contrapositive is also true: the public could suffer enormous transaction costs in attempting to purchase the entitlement from the factory (the free-rider problem).[25] Thus the transaction cost factor gives us no guide as to which party should be awarded the entitlement. In general, Coase's theorem—which says that (in the absence of transaction costs) the social result comes out the same no matter which party gets the entitlement[26]—by its own terms fails to give judges a guide as to whom the entitlement should be awarded, while at the same time not defining transaction costs (and thus we return to the previous problem of broad versus narrow definition). Nor can the avoidance of transaction costs be transmuted into a "policy" argument, because ultimately a transaction cost is such only in the eyes of the beholder. What looks like a transaction cost to the parties looks like the entire point of the transaction to the attorneys—a house in the country, golf course privileges, and a college education for the children. Who can say that the parties are worse off in a regime in which there are readily available attorneys, even if some of the cost of that ready availability is to pay the lawyers "transaction costs"?[27]

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24. *Cf.* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For a nontechnical discussion, see generally A. D'AMATO, HOW TO UNDERSTAND THE LAW (1989).

25. *See* Calabresi & Melamed, *supra* note 24, at 1095 & n.13.

26. Coase, *supra* note 6, at 15.

27. *See* D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 44 (1983) (What is waste to one person (e.g., a client who pays attorneys' fees or brokerage costs) might be a livelihood to another (attorneys, brokers).). In a letter published in the *Wall Street Journal* I claimed: "The number of lawyers in a country is almost directly proportional to the amount of personal freedom each individual enjoys in that country. The more lawyers there are, the more are available to champion a client's cause against the government, the bureaucracy, the police, the secret police." D'Amato, Letter to the Editor, Wall Street Journal, June 19, 1986, at 31, col. 1

IV. A COMBINATION OF THEORIES

If one theory about law doesn't constrain results, whether or not accompanied by subsidiary theories, can several theories taken together do the job? Think of a theory as a large gray translucent circle; a second theory overlaps the first circle; a third overlaps the first two, and so on. Perhaps with enough overlapping a given area is defined more sharply; pretty soon the area becomes black. Do theories work together in this fashion to define any given area with greater and greater precision?

It follows from the Skolem-Lowenheim proofs of the early 1920s that no amount of multiplication of indeterminate theories can yield determinate results.[28] Consider as an example from the law the three theories of the first amendment listed in Professors Brest's and Levinson's constitutional law casebook: protecting representative government, advancing knowledge and promoting truth, and protecting individual autonomy.[29] Do these three theories, taken together, yield black-letter results in any possible concrete case? For instance, does the combination of all three theories result in a rule giving (or denying) pickets a right to block the sidewalk? To glare menacingly at people who cross the picket line? To raise their fists at people who cross the line? Or consider "commercial speech"—does our knowledge of all three theories point to a rule that protects (or exempts) commercial speech under the first amendment? How about pornography? (If pornography appears to be a function of "individual autonomy," an advocate for suppression could argue that it degrades the people who are used as models for the pornography and hence reduces their individual autonomy, or even tends to destroy the viewer's ability to be an autonomous person by elevating her passions above reason.). As to any of these questions, enlightenment is not furthered if you use one, two, or even all three of the Brest-Levinson

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(commenting on a series of articles entitled *The Litigation Explosion*, Wall Street Journal, May 16, 20, 23, 29, and June 3, 1986).

28. Leopold Lowenheim and Thoralf Skolem published a series of papers in the early 1920s and generally proved that, for any set of axioms that one chooses for characterizing any branch of mathematics, an infinite number of other interpretations are available that are drastically different and yet satisfy the chosen axioms as well. *See* M. KLEIN, MATHEMATICS: THE LOSS OF CERTAINTY 271-74 (1980). What is true of mathematical formulae is a fortiori true of words. *See* R. SMULLYAN, FOREVER UNDECIDED (1987). Anything that we are given—whether it is a set of axioms, a description of facts in a legal dispute, a collection of statutes, a shelf full of precedents—can be interpreted in an infinite number of radically different ways in which each interpretation fits all the data exactly. *See* S. KORNER, THE PHILOSOPHY OF MATHEMATICS 154 (1960).

29. P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1092-96 (2d ed. 1983).

theories—even though the game of theorizing may itself be furthered by piling on more theories.

Of course, a free-speech case may seem so obviously to fall within the first amendment that piling on the Brest-Levinson theories only serves to confirm the obvious. Yet if we take as given a "no prior restraint" theory that many feel is the bedrock of first amendment protection, and add to it the three Brest-Levinson theories, there are nevertheless whole categories of cases that challenge the applicability, either way, of the entire pile of theories: a judge ordering jurors not to talk about the case when they go home at night;[30] "gag rules" generally;[31] the "fairness doctrine";[32] Rule 11 of the Federal Rules of Civil Procedure, which places a prior restraint upon the filing of frivolous papers in court; national security secrets; and treason and espionage. Whenever the judiciary and society as a whole seem ready to tolerate and prefer an exception to a theory such as "prior restraint," they call it an "exception" and retain the theory. If the day comes when most people realize that there have been so many exceptions that talking about the rule has become worthless, then "no prior restraint" will be downgraded from a theory to one of many "policies." Or, if it really becomes unpopular—as the "separate but equal" theory of the fourteenth amendment[33] had become unpopular by 1954[34]—then a judge might "overrule" the theory entirely.[35] Such cases do not mean that the theory was in force until the moment the judge decided to overturn it, nor that the theory had already outlived its usefulness and that the contrary theory was waiting to be articulated in an appropriate opinion. Rather, all those cases mean is that the theory (of prior restraint or of separate but equal) became increas-

30. *See, e.g.*, United States v. McGrane, 746 F.2d 632 (8th Cir. 1984); United States v. Lemus, 542 F.2d 222 (4th Cir. 1976); Winnebrenner v. United States, 147 F.2d 322 (8th Cir.), *cert. denied*, 325 U.S. 863 (1945).

31. *See, e.g.*, Capital Cities Media, Inc. v. Toole, 463 U.S. 1303 (Brennan, Circuit Justice 1983) (affirming in part and denying in part application for stay of gag order in homicide trial); Levine v. United States District Court for the Central District of California, 764 F.2d 590 (9th Cir. 1985) (restraining order on attorneys' comments permissible remedy to avoid pretrial publicity, but overbroad as worded).

32. *See, e.g.*, Federal Communications Commission v. League of Women Voters of California, 468 U.S. 364, 377 (1984); Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 389 (1969).

33. Plessy v. Ferguson, 163 U.S. 537 (1896) (public transportation).

34. *See* Sweatt v. Painter, 339 U.S. 629 (1950) (law school); McLaurin v. Oklahoma Board of Regents, 339 U.S. 637 (1950) (graduate school); Sipuel v. Oklahoma Board of Regents, 332 U.S. 631 (1948) (law school); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (graduate school).

35. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

ingly out of fashion as a mode of presenting judgments, and hence new theoretical rationalizations were needed for those persons in the legal community who have a psychological need for theoretical rationalizations. When the rationalizations become too strained to the ears of those who like them, and when the exceptions become too numerous in the eyes of those who enjoy rules, the time finally comes for an overruling opinion. By 1954, "separate but equal" in education was already moribund;[36] and I've argued elsewhere that the psychological aftermath of the overruling decision in *Brown v. Board of Education*[37] might have been far more favorable to the goal of integrating schools if the Court had avoided overruling the separate but equal theory.[38]

Stanley Fish might say that the question is never whether a particular theory *applies*, since it always applies! As he put it: "[T]heories always work and they will always produce exactly the results they predict, results that will be immediately compelling to those for whom the theory's assumptions and enabling principles are self-evident. Indeed, the trick would be to find a theory that *didn't* work."[39] The reason theories work is that we expect them to work. But the subtlety here is that we can at best expect them to "work" as *theories*; it is irrational for us to expect them to work in the sense of constraining practice (for all of the reasons that I am suggesting in this Essay).

Even if the Brest-Levinson theories individually or in combination cannot constrain any given case, may we not at least say that in a casebook they perform the useful function of organizing the case materials for students? And if our answer is in the affirmative, then must we not conclude that "theory" has at least this *teaching* effect upon the law—minimal though that effect may be?

I have elsewhere questioned whether the organization of casebooks into subject-matter categories might itself be inimical to the

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36. *See supra* note 34.

37. 347 U.S. 483 (1954).

38. S.L. WASBY, A. D'AMATO & R. METRAILER, DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES 92-130 (1977).

39. S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 68 (1980). Minsky would agree that whatever theories our cerebral cortexes come up with, those are the theories that require us to explain satisfactorily to ourselves what is happening and what we are experiencing. *See* M. MINSKY, THE SOCIETY OF MIND (1986). This view, incidentally, would contradict the older theory-laden view of Leon Festinger, who argued that people are impelled to resolve conflicting mental theories. L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE 263-66 (1957). The better view, I think, is that if someone's theories appear to be conflicting, we may simply have failed to articulate accurately what those theories are. Further investigation might discover an accommodation-theory that the person really uses instead of the dissonance-theories that we thought the person was using.

goal of training good lawyers.[40] It is part of the seductiveness of "theory" that, when we use it as a organizing principle, the cases collected thereunder seem to be well-organized. But this apparent organization is an illusion; the same cases would appear to be poorly organized if we used a different theory, and hence the apparent coherence of the organization is a function of the (arbitrary) theory that was chosen as the organizational principle. (The theory only *seems* non-arbitrary because we are accustomed to it—from previous casebooks.)

Perhaps one of the most important examples of the use of theory in organizing law-study materials is the division of first-year courses into "contracts," "torts," and other subjects. Yet Grant Gilmore, among others, has persuasively shown that some "contract" cases have more affinity to "torts" cases than they do to other "contract" cases.[41] If he is right,[42] then he has in effect suggested an organization superior to the one that divides part of a curriculum into "contracts" and "torts."[43] My point is simply that large organizing theories such as "contracts" and "torts" have no constraining effect upon the way judicial decisions are or should be reached, and hence their use in law schools can best be explained in terms of habit, convenience, and "teaching slots."

V. AGGREGATE EFFECTS OF THEORIES

Is it possible to assert that large theories affect large numbers of cases even if they do not constrain particular cases?[44] (This would be akin to a quantum-theory argument: that any individual quantum

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40. D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 485-87 (1987).

41. G. GILMORE, THE DEATH OF CONTRACT (1974). This is true even if Gilmore's account as a whole is or is not "exaggerated." *See* J. DAWSON, GIFTS AND PROMISES 3 (1980). *See also* R. Posner, *supra* note 8, at 231 ("almost any contract problem can be solved as a tort problem").

42. A more recent, and even more persuasive, demonstration than Professor Gilmore's is Professor J.M. Balkin's deconstruction of the element of "will" in contract promises that builds upon the work of Jacques Derrida and P.S. Atiyah. *See* Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 767-72 (1987).

43. A radically different first-year curriculum might someday in the future consist of Common Law, Equity, Legislation, Justice, Forms of Action, Interests, Entitlements, etc., as I suggested in an earlier article. *See* D'Amato, *supra* note 40, at 492 n.58.

44. *See, e.g.*, B. D'ESPAGNAT, IN SEARCH OF REALITY 25-50 (1983); W. HEISENBERG, THE PHYSICAL PRINCIPLES OF THE QUANTUM THEORY 10-12, 55-65 (1930). The reason that it works in quantum mechanics is that the "laws" of quantum mechanics are mathematical formulae that correspond to the empirical evidence, but which make no sense to us as observers. There are formulas for the "wave" and the "particle" aspects of electrons, and these formulas predict the location of an electron (Born's "probability wave"), but no human being has ever explained what the electron can possibly be, or what it can look like, or what it can behave like. All that quantum mechanics has been able rigorously to show is that certain

interaction is totally indeterminate, but that statistically a large number of interactions can be predicted to considerable precision by the laws of quantum mechanics.) My colleague Mark Grady has objected: "Surely you don't mean to assert that the vast changes in antitrust law over the past twenty years that have led to drastic reduction in verdicts for antitrust plaintiffs has not been the result of the theories produced and promoted by the Chicago school of economic analysis of law?" I replied that that is precisely the proposition I defend. What really happened is that over the last two or three decades the American public has largely lost the anti-big business fervor that animated the era of the Sherman and Clayton Acts. We have seen a precipitous decline in the power of the national labor union movement. We have seen an increase of fear that we may not be able to compete with Japan and Korea and the Common Market. These are real, historic changes in perception to which politicians have responded by calling for larger and more efficient business aggregations. Conveniently and coincidentally for the Chicago school, their writings on economic analysis of law were published contemporaneously with these societal changes of perception. When courts looked for ways to justify judgments that departed from antitrust precedents, they invoked the new theories handily supplied by the Chicago school. And the Chicago school, for its part, was not bashful about claiming credit for the shift in judicial decisions. But that does not mean that there was any substantive causal connection between the writings of the Chicago school and the trend of judicial decisionmaking. We can well imagine that if the courts had not changed their attitude toward plaintiffs' antitrust actions, the Chicago school would today look like an idle academic curiosity—as indeed it looked several decades ago. If the political pendulum had swung in favor of increased antitrust enforcement, other economists would have rushed in to fill the need for modernist justifications for aggressive antitrust prosecutions, and today we might have a reigning "Berkeley school" or a "Minnesota school." But that didn't happen, and instead the change in public perceptions brought into visibility the "Chicago school."

I would even venture to predict that the pendulum will swing back. In the 1990's, politicians and the public will increasingly realize that bigness does not equal efficiency, and that American industry might well be able to compete more effectively abroad if it is characterized by small, efficient firms having tight managerial control. If

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experiments, when repeated, yield the same results. Those results can be characterized by—but not explained by—certain formulas.

this new perception sinks in, I venture to say that antitrust law will enjoy a comeback. And if it does, it will be accompanied by a new school of economic rationalization that gets its academic visibility by "trashing" the Chicago school. Theories do not change the real world, and the real world does not change theories. The only interaction between theory and reality is that, when one is engaged in theorizing, one achieves credibility and presentability by invoking the theories that at the moment of invocation seem to explain the real world.[45] The most popular theory is invariably the one that seems to have the highest explanatory power; it certainly gives more writers employment explaining it to each other and to the public.

Let us briefly consider the aggregate effects of a noneconomic theory. Suppose that all the federal district and appellate court judges who were appointed by the incumbent President regard themselves as "strict constructionists." Suppose another group of district and appellate court judges who are appointed by the successor President regard themselves as "noninterpretivists." Over time we observe that the first group, the "strict constructionists," are very "tough" on "law-and-order" cases; that is, they convict and uphold the convictions of, say, 99% of all criminal defendants. We also observe that, over time, the second group of judges, the "noninterpretivists," convict and uphold the convictions of only 90% of all criminal defendants. We might conclude that "strict constructionists" are tougher on crime than "noninterpretivists." Indeed, the media will have come to that conclusion even before any evidence is in. And the incumbent President's party will campaign for the next election on a law and order platform by promising to appoint only "strict constructionist" judges.

But our question is whether there is any actual link between "strict constructionism" and being tough on crime. We can answer that question by a simple thought experiment. Suppose there is another group of federal judges, group G, who get together and decide that it is unrealistic to suppose that 99% of all criminal defendants were, either substantively or procedurally, fairly indicted. Suppose the G group feels that 90% is the better general result. The

45. For a good dose of common sense about theory-rationalizations in economics, see M. BLAUG, THE METHODOLOGY OF ECONOMICS, OR HOW ECONOMISTS EXPLAIN (1980). The theory that we choose will be the one that seems to explain the real world. This doesn't mean that the theory really explains the real world. Rather, it only means that our choice of theory is based on our current belief that the only good theories are the theories that explain the real world. We would not deliberately choose an "unreal"-sounding theory over a realistic one. Personally, I prefer the Italian saying (roughly translated): It doesn't have to be true if it's well contrived (ben' trovato).

group then discusses whether it should use the "strict constructionist" or the "noninterpretivist" theory to justify its intended result. They decide that, at the present time, judicial decisions wrapped in "strict constructionist" labels will be better insulated against eventual reversal by the Supreme Court and better accepted by both the politicians and the general public. Yet some judges are afraid that strict constructionist theory is "tough" on crime and won't work for group G. One of the judges says:

> No problem. If we want to achieve the 90% general result, strict constructionism is actually the better theory! If we adhere to the exact letter of the Constitution and the statute, we will vastly increase our chances of finding police irregularities, because sooner or later the letter of the law will be violated in the process of discovering and apprehending the defendant. Moreover, we will increase our chances of reversing convictions on substantive grounds for roughly the same reason—people's actions rarely fit exact textual language, and so what might look like a criminal act if we interpret the text loosely might fall outside the text if we interpret the text strictly.

The other judges applaud and unanimously decide to be strict constructionists; they have found a way to have their cake and eat it too.

"Strict constructionism" may be a theory, but as such it works on the level of propaganda and rhetoric. It produces no specific results in a single case or in a huge number of cases. The public opposition to Judge Bork was said to be a reaction against his overly strict constructionism; this is nothing but the overwrought imagination of legal pundits. My own reading of Judge Bork's cases demonstrated to me that his strict constructionist arguments were practically boilerplate; he came out any way he wanted to, and simply added the usual justificatory strict constructionist arguments.[46]

VI. PROCESS THEORIES

Broader still would be a theory of law that suggests no substantive content but purports to show how judges are (to a greater or lesser extent) constrained in the decisional process. Ronald Dworkin has provided such a process theory, arguing that judges, over time, operate like serial writers in a chain novel:

> Suppose that a group of novelists is engaged for a particular project

46. For an analysis of one such case, see D'Amato, *Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985), *reprinted with minor changes in* A. D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 204-19 (1987). My opposition to the Bork appointment had nothing to do with his theories but a lot to do with his judgments.

> and that they draw lots to determine the order of play. The lowest number writes the opening chapter of a novel, which he or she then sends to the next number who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then sends the two chapters to the next number, and so on. Now every novelist but the first has the dual responsibilities of interpreting and creating, because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is. He or she must decide what the characters are "really" like . . . . Some novels have in fact been written in this way (including the soft-core pornographic novel *Naked Came the Stranger*), though for a debunking purpose . . . . But in my imaginary exercise the novelists are expected to take their responsibilities seriously and to recognize the duty to create, so far as they can, a single, unified novel . . . . Perhaps this is an impossible assignment . . . . I am interested only in the fact that the assignment makes sense . . . . Deciding hard cases at law is rather like this strange literary exercise.[47]

Stanley Fish counters that the chain-novel idea does not work as a constraint upon judges:

> When a later novelist decides to "send the novel further in one direction rather than in another," that decision must follow upon a decision as to what direction has already been taken; and *that* decision will be an interpretive one in the sense that it will not be determined by the independent and perspicuous shape of the words, but will be the means by which the words are given a shape.[48]

It is rather surprising that with both Dworkin and Fish speculating about how such a chain novel would come out, coupled with their many citations of the works of Agatha Christie,[49] neither of them have cited Agatha Christie's own contribution to a serious chain novel, *The Floating Admiral*.[50] No better light can be thrown on the Dworkin-Fish controversy over the chain novel than to quote por-

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47. Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 542 (1982).

48. Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 553-54 (1982).

49. Fish wrote, in reply to Dworkin, "Let me begin by returning to the case of Agatha Christie, whose books, whatever they may have been, are now a fair way to becoming contested texts in contemporary interpretive theory." Fish, *Wrong Again*, 62 TEX. L. REV. 299-300 (1983) (responding to Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk about Objectivity Anymore*, in THE POLITICS OF INTERPRETATION 287 (W. Mitchell ed. 1983).

50. A. CHRISTIE, THE FLOATING ADMIRAL (1932). The other well-known contributing novelists were G.K. Chesterton, Canon Victor L. Whitechurch, G.D.H. and M. Cole, Henry Wade, John Rhode, Milward Kennedy, Dorothy L. Sayers, Ronald A. Knox, Freeman Wills Crofts, Edgar Jepson, Clemence Dane, and Anthony Berkeley.

tions of Dorothy L. Sayers' introduction to that book. She explained the operative rules as follows:

> Each writer must construct his installment with a definite solution in view—that is, he must not introduce new complications merely "to make it more difficult." . . . . [T]o make sure that he was playing fair in this respect, each writer was bound to deliver, together with the manuscript of his own chapter, his own proposed solution of the mystery. These solutions are printed at the end of the book for the benefit of the curious reader.
>
> Secondly, each writer was bound to deal faithfully with *all* the difficulties left for his consideration by his predecessors. If Elma's attitude towards love and marriage appeared to fluctuate strangely, or if the boat was put into the boat-house wrong end first, those facts must form part of his solution. He must not dismiss them as caprice or accident, or present an explanation inconsistent with them.[51]

Dworkin himself could hardly ask for a more constrained set of rules for the writers in the chain, nor for a better set of controls, than to ask each writer to submit a solution that would also be printed when the whole novel was completed. If Dworkin were right, a fairly coherent detective mystery story would be the result. Instead, the result accords with Fish's speculation. In Miss Sayers' words:

> Naturally, as the clues became in process of time more numerous, the suggested solutions grew more complicated and precise, while the general outlines of the plot gradually hardened and fixed themselves. But it is entertaining and instructive to note the surprising number of different interpretations which may be devised to account for the simplest actions. Where one writer may have laid down a clue, thinking that it could point only in one obvious direction, succeeding writers have managed to make it point in a direction exactly opposite. . . . [W]e detective-writers may have succeeded in wholesomely surprising and confounding ourselves and one another. We are only too much accustomed to let the great detective say airily: "Cannot you see, my dear Watson, that these facts admit of only one interpretation?" After our experience in the matter of *The Floating Admiral*, our great detectives may have to learn to express themselves more guardedly.[52]

Indeed, the book bears out Miss Sayers' candid assessment. I would have preferred Agatha Christie's chapter (chapter 4) leading to her proposed solution, but right away the next novelist, using everything Miss Christie wrote, took the story in an entirely different direction. The novel as a whole is not worth reading as a detective story; it zigs

51. *Id.* at 3.
52. *Id.* at 3-4.

and zags from chapter to chapter to the point of utter distraction. Yet each author's proposed solution demonstrates his or her fidelity to the rules and to achieving a good product. The novel is eminently worth reading if one is interested in chain-gang theories of judicial decisionmaking.

If Miss Sayers and her fellow writers learned a lesson about detective stories, we should learn the quite counterintuitive lesson that an elaborate text no more constrains the next text than would a brief text or even a few words. Does an elaborate, well-reasoned Supreme Court case on, say, aid to sectarian schools, tell us how the next Supreme Court case on the subject is likely to come out? Professor Choper doesn't think so; he writes that "subsequent decisions have produced a conceptual disaster area."[53] It is true that the next case in the line may bear a *theoretical* resemblance to the prior case; the theory-talk will be largely cited and repeated, giving as much of an appearance of continuity as any two successive chapters in *The Floating Admiral*. But the *decision* in the next case is no more constrained by the previous judge's opinion than the *solution* envisaged by an author in the book is constrained by the previous chapter.[54]

VII. FORMULAIC THEORIES

All the exemplary theories that I have used so far may be criticized on the grounds of overbreadth and vagueness. Let us next consider a representative theory that seems quite specific if not mathematical. The "negligence formula" suggested by Judge Learned Hand states that the defendant is negligent "if the loss caused by the accident multiplied by the probability of the accident's occurring

53. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5, 6 (1987). In part, the reason may be that Professor Choper's expectations were too high; he regarded the *Lemon* case (as did the Supreme Court) as having handed down a three-part "test." *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). But it was no "test" at all; rather, it was simply theory-talk of the most ambiguous sort. Consider just the second of the three "tests"—that the challenged program must have a primary effect that neither advances nor inhibits religion. *Id.* at 612 (citing *Board of Education v. Allen*, 392 U.S. 236, 243 (1968)). If you're a religious fanatic-optimist, everything on earth has the primary effect of advancing religion. If you're an atheist, nothing can possibly do that. If you're anywhere in between, you can come out anywhere you want by "applying" this "test."

54. I am not claiming that precedent has no force. The real question is "what is precedent?" For me, it is the array and selection of facts in the previous case. Precedent, therefore, has force to the extent that those facts are similar to the ones in the present case. I have attempted to develop this theory by constructing a multiple regression analysis that can be programmed with the reported facts of all the judicial precedents within a jurisdiction; the result is a statistical determination of the degree of "fit" between the precedential facts and the facts of the case at hand. *See* A. D'AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 169-77 (1984).

exceeds the burden of the precautions that the defendant might have taken to avert it."[55] To show that this formula does not constrain any judicial result in any imaginable case is harder than my previous examples of wealth maximization or freedom of speech, but the effort is worth taking because theories that seem specific, like Hand's, seem to carry considerable weight in the legal literature these days. In fact, it is the application of specific theories like Hand's that convinces many lawyers, judges, and scholars that they are really doing legal thinking.

My demonstration begins with as hard a case that I can think of for the other side. A driver of a car in a city consults his map of the city while driving and, in the process, fails to see where he is going, runs his car up on the sidewalk, and hits a pedestrian. On these facts, anyone might say that applying the Hand formula constrains the judicial result that the defendant was negligent: the driver's burden of precaution was extremely slight and the consequence extremely damaging. To answer this, I will not resort to fabricating additional facts that might show that this is a very rare and justifiable exception to our feeling that the defendant was negligent; rather, I will confine myself to the hypothesized facts. My argument is that instead of Hand's formula constraining the result in the case, the result in the case produces Hand's formula.

I contend that the result in the case is a direct function of the interpretive community in which we live, and would be different in a different interpretive community. For instance, replace the driver of the car with a driver of a chariot in ancient Rome. If the driver was reading something while driving and the chariot went off the street and hit a pedestrian, there was no liability under Roman law. This result is often summed up by saying that there was no tort of negligence in Roman law.[56]

Now I contend that applying Hand's formula to the Roman case would not have led to a different result. The very first phrase of the formula "loss caused by the accident" would have been interpreted

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55. R. POSNER, ECONOMIC ANALYSIS OF LAW 122 (2d ed. 1977) (paraphrasing the test of United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.)); *see* R. POSNER, *supra* note 8, at 148 & n.2; Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

56. *See, e.g.*, M. KASER, ROMAN PRIVATE LAW § 36, at 152-54 (R. Dannebring trans. 1965). Under Roman law, negligence (*culpa*) was linked to positive acting. *Id.* at 153. *See also* W. GORDON & O. ROBINSON, THE INSTITUTES OF GAIUS 391 (trans. 1988) ("[N]o liability is imposed on someone who inflicts loss without either fault or malicious intent, but by some accident."); L. MIRAVITE, HANDBOOK FOR ROMAN LAW 356 (1970) (For an act to be wrongful, it must (1) be voluntary (done with intent to injure or with culpable negligence), (2) not be in exercise of a legal right, and (3) cause a loss.).

under Roman law as a loss of zero. This interpretation could proceed on either or both of two grounds. First, "accidents" do not "cause" losses in the legal sense in the Roman context of no-negligence; accidents are like acts of god—they just happened and had no legal consequences. Hence, whatever loss the pedestrian suffered was neither legally caused by nor the legal result of the accident. Second, the pedestrian had no legally cognizable or measurable "loss" at all. If the pedestrian had gotten sick, he would have had no legally cognizable loss; similarly, he has no legal basis to complain against the chariot driver for his injuries.[57]

We see that there is a fundamental circularity in the Hand formula (just as there is, I venture to suggest, in every legal formula that has ever been articulated). All the numbers that have to be plugged into Hand's formula—costs and probabilities—can only be computed given the existence of a legal system that is consistent with the formula.[58] The numbers thus are functions of the negligence system. If a state does not have a negligence system—as in Roman times—then the numbers will be zero. If the state has a primitive negligence system, the numbers will be lower than the numbers that would be assigned in the United States today. Perhaps the driver's slight cost in not consulting the road map when he drives would outweigh the slighter legal assessment of costs inflicted upon the injured pedestrian. In the nineteenth century, Hand's formula would probably have had lower costs for the victim's damages and higher costs for the defendant's burden of precautions. The fact that Hand's formula has numbers in it should not impress us; in fact, its boundless variability is a direct function of the legal system that it unsuccessfully seeks to constrain.

Even if we are dealing only with the legal system currently in place, the Hand formula begs the question. This is because the costs

57. We might explain this by observing that, under Roman law, pedestrian life was cheap. Indeed, more consideration was given to the convenience of chariot drivers than to victims. H.G. Wells speculated that in the distant future, if longevity is greatly increased, we may revive the Roman system as a way of disposing of surplus pedestrian population. *See* H.G. WELLS, THE TIME MACHINE (1895).

58. The legal system therefore can never be an *alternative* to an accident or risk-prevention scheme because it must be part of the context within which we define accidents and risks. Professor Huber has condemned judges, lawyers, and legal scholars for focusing on "public risk" and ignoring the increasing amount of "private risk" that results from legal disincentives to produce new aggregate, risk-reducing technology. *See* Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 278 (1985). Professor Huber may or may not be right, but the only way to find out would be to set up a controlled empirical experiment. No amount of law review analysis, however, can possibly separate what is to count as "risk" or "accident" (or, *pace*, "acceptable" risk) from the legal system that defines those terms and assigns monetary values to them.

of accident avoidance and damage to the plaintiff are a function of the awards given in negligence lawsuits, including the very lawsuit that is taking place when the Hand formula is applied.

Apart from the circularity paradox, there is the larger self-confirming hypothesis that the Hand formula, which purports to be a test for negligence, only works once negligence has been determined. For example, a child darts out into the street from between two parked cars and is hit by a passing motorist. Assuming that there are two lanes in the driver's direction—that the driver could have chosen to drive in the left lane, but instead drove in the right lane—then if the driver had driven in the left lane, the darting child would have become visible to the driver in time for the driver to have avoided hitting the child. Yet due to the general traffic rule that requires driving in the right lane except when passing or preparing for a left turn,[59] the driver chose to drive in the right lane. Applying Hand's formula, the cost to the driver of driving in the left lane would be trivial, whereas the cost to the victim was overwhelming. Hand's formula would then require that the driver be held legally liable to the child. But the courts will not apply Hand's formula in this case, because they would not find the driver negligent in the first place. How could a court of law disregard the dictates of a traffic statute? (But the darting child disregarded the statute and paid dearly for it.) No "formula" for negligence will apply to this or to any other case unless it is felt that the driver should be liable; but if and when society gets around to feeling that the driver should be liable, then what the driver did in this hypothetical case will be called "negligence" and the Hand formula will be trotted in to "prove" it.[60]

A brief mention should be made of "factors" as components of a formulaic theory. Take, for example, their use in deciding whether corporate debt instruments should qualify as debt or equity for tax purposes. Courts and commentators have proposed a large number of factors[61]—a count of thirty-eight specific factors has been said to be inadequate[62]—and yet outcomes seem to become more unpredictable

59. *See, e.g.*, FLA. STAT. § 316.081 (1988); ILL. REV. STAT. ch. 95 1/2, § 11-701 (1988); MINN. STAT. § 169.18 (1988).

60. If one rejoins here that what is really being applied to all these cases is a theory called "negligence theory," my reply is that this theory "applies" only in those cases in which we want to find the defendant liable and not in all the other cases. It is true that there will be a shifting standard over time. Someday, perhaps, all drivers will be held liable for all accidents to darting children, and then that liability will be said by commentators to be an application of some legal theory, such as "strict liability" or "negligence."

61. Holzman, *The Interest Dividend Guidelines*, 47 TAXES 4 (1969).

62. *See* Slappey Drive Indus. Park v. United States, 561 F.2d 572, 582 n.16 (5th Cir. 1977); Tyler v. Tomlinson, 414 F.2d 844, 847 (5th Cir. 1969).

and indeterminate as more factors are prescribed and taken into account.[63] Moreover, the *ejusdem generis* problem becomes increasingly acute as new factors are added: do we imply additional factors that seem to be needed to fit the case at hand on the theory that the listed factors were meant to be representative of others like them, or do we rule out any additional factor on the ground that the list of identified factors creates an expectation of being exclusive and exhaustive? In general, any theory that spawns subsidiary theories or factors creates only the illusion of certainty, because at best the "sons of theory" cannot add up to anything more determinate than the parent theory, while at worst the parent theory is degraded by the additions.

VIII. THE MINIMAL FORMULAIC COMPONENT AS THEORY

Every formula has basic terms that appear "factual" rather than "theoretical." In any economic formula, the terms "utility," "utile," "cost," "optimality," and the like, seem to be non-problematic measurable factual components of economic theory. Let me focus upon the term "cost."[64] In tort law, the idea of "cost" seems to be a factual component of formulas such as "cheapest cost avoider" and "the cost of precaution." We tend to look at the term "cost" as if it can routinely and non-problematically be filled in with a dollar amount. A "cost" is found lurking in nearly every theory and every formula relating to the economic analysis of law.

What exactly is a "cost"? First, let us consider this problem in the context of a situation that could lead to litigation. Hospitals incur a very slight cost in "tagging" patients about to be led into surgery; the tag is usually a tight plastic bracelet on the patient's wrist. Before hospitals undertook the practice of tagging patients, there were a few cases of patients in busy hospitals being wheeled into the wrong operating room where the wrong organ was removed from their bodies. It is easy to say that the precaution costs of tagging are far lower than the horrendous costs of the accident; it is the least problematic example of a disparity in "costs" that I can think of. Yet these "costs" are only costs in light of the legal context in which they occur. In a totalitarian state, where doctors as well as the state hospitals in which they work are immune from liability, the slight cost of tagging the patient might seem higher than the zero cost—to them—of accidents. Tag-

63. *See* Gibson, *The Intractable Debt/Equity Problem: A New Structure for Analyzing Shareholder Advances*, 81 NW. L. REV. 452, 464-65 (1987). I made the same point earlier with respect to the law becoming increasingly dense and fine-meshed. *See* D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983).

64. I have benefited from conversations about costs that I had with Professor David Gray Carlson when I visited Cardozo Law School as a Visiting Professor in the fall semester of 1986.

ging might never be introduced in such hospitals, a handy justificatory "theory" being that patients are lucky to get a chance of recovery in a hospital and therefore anything that might go wrong is the patients' assumed risk. Tagging, or any other accident-prevention device, would be introduced into such systems only by virtue of the sense of professionalism or responsibility—if any—of the doctors and administrators in the hospital. Whether or not they do so, the underlying fact is that the legal system recognizes no tort liability, and hence the "cost," as far as the legal system is concerned, remains zero.[65]

Indeed, any use of "costs" in any legal context begs the question, because the legal question is the specification of that cost—and yet we can't specify the cost until we know the legal result. We have reached the same result as in the previous section's analysis of the Hand formula.

But perhaps there are "costs" that can be ascertained wholly outside the legal system, so that problems of question-begging do not arise. Here is one possibility: George Stigler is said to have remarked, "if you've never missed a plane, you've been spending too much time in airports." Clearly the "cost" here is one that is not normally thought of as occurring in a legal context.[66] Yet I suspect that Stigler's notion of cost "rings true" primarily to audiences such as those who would read or write an Essay such as this one. For us, wasted time in airports is clearly a cost that we try to minimize even at the expense of an occasional missed flight. Thus we think there is something objective about the "cost" of wasting time in airports. But for many other people, missing a flight is a panicky situation to be avoided at all costs. Getting to an airport comfortably ahead of time is, for these people, a trivial cost in comparison to their apprehension of missing a flight. They would say, "if you've ever once in your life missed a plane, you've been spending too little time in airports." Moreover, there are some people for whom waiting in airports is exciting—they like the hustle and bustle of modern airports. They look forward to their trip, in part, because of the excitement of getting on and off planes. Their version of the Stigler aphorism would be: "if you ever get a chance to fly, be sure to allow enough time for enjoying the airport." Far from being a cost, to them the delay is a reward. A "cost" is thus the way we interpret something that we do or some-

65. A simpler example is that the present legal system does not take into account the "cost" to a cow or a pig of being slaughtered as a food animal.

66. Theory cannot limit the domain of law. It is possible to imagine a context in which a group of passengers might sue an airline for leaving on time when the airline knew that there was a tremendous traffic jam on the roads leading to the airport.

thing that happens to us; different people interpret it in different ways.[67] A cost is not a factual component of a theory; rather, it is a mini-theory in itself. Like any theory, it does not determine our evaluation of any situation. We cannot know whether Dorothy is objectively spending "too much time" in airports by simply knowing whether or not she has ever missed a plane; rather, we have to know whether Dorothy *believes* she has spent "too much time" in airports.[68] A cost is, at bottom, not objective at all. It follows, then, that despite elaborate appearances of objectivity, any economic formula or theory that uses that term cannot be objective. I suggest that every component of economic formulae can be deconstructed in a manner similar to the argument here about costs.[69]

IX. THE DREARY THEORY

The dreary-theory is the most effective rhetorical use of theory. It is an example of one-upmanship.[70] The proponent simply clothes her arguments in whatever appears to be the most formidable, forbidding, scientific, and neutral theory-talk that is available and fashionable on the current scene. The less the audience understands it, the more they will be impressed by its power, neutrality, and persuasiveness.

When used by judges it lends an aura of legitimacy to their rulings. The psychology was best explained by H.C. Anderson in his important paper "The Emperor's New Clothes."[71] Serious people never want to admit that they lack the intelligence to comprehend what others are talking about. The ideal theory trades on this simple

67. A traditional example is labor. To many people, work is a job that they would prefer to avoid. To some (maybe to many), work is a fulfilling aspect of life. Consider how many teachers hate to retire.

68. If any large amount of money turned on the question (as it might in a lawsuit), we would have to know whether we can credit Dorothy with telling the truth when she tells us that she has spent too much time in airports. But how can we ever know whether someone is telling the truth? We ask the jury, and they decide whether the amount of time Dorothy spent in airports would, if they were Dorothy, seem excessive.

69. Interestingly economists acknowledge the impossibility of interpersonal comparison of utilities, but then they proceed with their analyses as if this impossibility has no relevance to everything they do. It does, however, have across-the-board relevance. There is no such thing as a "cost"; a cost is inherently an interpersonal comparison of utilities. There is nothing objective about a "risk"; there are risk-preferrers who seek out risk even where there is nothing to gain (e.g., Russian roulette players). Similarly, what counts as a "reward" is in the eyes of the beholder (some like medals and trophies, while others prefer cash).

70. *See* S. POTTER, ONE-UPMANSHIP (1952). The classic Italian comedy on the theme is Machiavelli's *Mandragola*.

71. Anderson, *The Emperor's New Clothes*, 1 U. COPE. L.J. 1 (1868). *See also* P. BROOK, EMPTY SPACE (1978) (Opera as "deadly theater" is commercially successful because opera goers cannot admit that they are bored.).

fact of human psychology. The theory, however, must obey certain parameters; it cannot be pure gobbledygook. The weavers who presented the Emperor with new clothes exclaimed as they "dressed" him how magnificently he wore the extraordinary raiments, one attribute of which was their invisibility. If for a moment the couturiers winked at each other and the Emperor caught the wink, the jig would have been up. Instead, their repeated exclamations about the beauty of the new clothes were repeated by the courtiers in the immediate audience, and the enlightenment gradually spread throughout the kingdom. Not to see the clothes would have been an admission that one was a fool.

Legal theory-talk must pass the couturier-courtier test. There must be at least a few other scholars who either understand the theory or say that they do. For instance, an economic theory of law must first pass muster with other economists of law; only then will its acceptance pass ever more rapidly through the ranks of those who understand less and less of it. But there is even an advantage in legal scholarship over the Anderson fairy tale. There the courtiers at least professed to see the "same" invisible clothes that the weavers were displaying; no one said that the clothes were ugly.[72] In the domain of legal scholarship, one economist can take sharp issue with another economist, disagreeing right down the line about every point in the presentation, and yet the original theory will be reinforced, for readers outside the courtier group will no more be able to understand the critic than they were able to understand the original proponent. Instead, in true academic fashion, the fact of dialogue and controversy will potently advertise the new approach,[73] speeding its acceptance. Eventually the proponent can lead a public parade with everyone applauding (except for a little boy who has secretly read certain dirty deconstructionist books).

Judges are well served by dreary-theory, whether or not they understand it, because they simply pass it on in their opinions so as to convey to the parties and to the legal community the sense of inevitability of judicial impartiality. The economic and philosophical jargon that is beginning to characterize appellate court decisions is today's manifestation of twelfth century Latinisms and fourteenth century

72. Actually, the story might have been *improved* if at least one courtier had said that he did not like the style of the new invisible clothes, with everyone else immediately shouting him down.

73. This repeats a point I've made in a lighter vein in D'Amato, *The Ultimate Critical Legal Studies Article: A Fissiparous Analysis*, 37 J. LEGAL EDUC. 369, 371 (1987).

labyrinthian forms of action.[74] The solemn intoning of abstruse theory—lightened these days with a sprinkling of folksiness in some judicial opinions to reassure litigants that the judge is human too—serves as an effective veneer for the fact that the decision derives its true authoritativeness from the brute fact that the state will enforce it.

If a judge is sincerely convinced of the magical neutrality and decision-forcing ability of economics, a lawyer has little choice but to appeal to that judge with arguments, charts, diagrams, and partial differentials. And those arguments might just work—for that judge. If another judge is underwhelmed, she could nevertheless conclude that the parties (and ultimately the legal community and the public) will be snowed by those arguments,[75] and thus she will simply employ the jargon of theory to dress up the result she wanted to reach anyway.[76] Hence, theory can be very powerful in adversary debate—not for the predeconstruction reasons, but rather because it is rhetoric that, in the immortal phrase of The Shadow, has the power to cloud men's minds.

I predict that if the legal profession should become more committed to theory—that is, if deconstruction fizzles out—what lies in store is ever-increasing dreary theory. The "leading" academicians will invariably be the ones whose theories are unfathomable. Those who can use ordinary words in convoluted sentences within even more complex paragraphs will be favored.[77] We will be seeing greater use of sophisticated mathematical symbols, chemistry equations, graphs, topological demonstrations, fractals, and other imports from the "hard sciences" to fill up the pages of the law reviews.

X. CONCLUSION

Threats of a less interesting legal future will not dissuade those whose careers thrive upon the spinning of theories. But I think this Essay has added to the deconstructionist movement a formal, specific, and systematic demonstration that no matter how broadly or narrowly conceived, nor how simplified or aggregated, theories do not

74. Rabelais effectively satirized the situation in GARGANTUA AND PANTAGRUEL, bk. 3, ch. 10 (Urquhart & Motteux trans.).

75. Wall Street pundits call this the "next sucker" theory.

76. Her downside risk is that she will encourage future advocates to discuss economics excessively with her, causing her life as a judge to become intolerably boring.

77. Dworkin, for instance, eschews polysyllabic logorrhea, but achieves even better effect by simple words whose meanings seem to shift as they make their way through complex nestings of clauses, sentences, and paragraphs. *See* Fish, *supra* note 49, at 308 (1983) ("the feeling, as one reads him, that the terms of the discussion and the levels on which it is proceeding are continually shifting, although no shift is ever announced").

constrain judicial results. This does not mean that theorizing is not an interesting pursuit. (I myself have spent many fascinationg hours . . . !). But in legal study, theorizing is only a way of talking about the consistency of theories. Such theorizing takes place on a plane above the real world; it is not connected to the real world, and does not change anyone's decision in the real world. Theories are consistent if they meet certain verbal tests for non-contradiction. A consistent theory may well be an intellectually satisfying achievement. But it does not constrain the decisions judges make because it is inherently incapable of constraining those decisions.