

Can Practice Do Without Theory: Differing Answers in Western Legal Education*

by Richard Stith**

The demise of the Soviet bureaucratic state and the rebirth of laissez-faire economics worldwide—as well as the scholarship of people such as Richard Rorty¹—have created a crisis not only for planning but for theory itself. Is it still desirable to think thoroughly about what we see and do?

With regard to the study of law, two of the most powerful world cultures provide sharply different answers to this question. Legal education in the United States of America is far less theoretical² than it is in European nations. The aim of this paper is two-fold: first, to summarize briefly some of the more salient differences between the American “Common Law” educational system and the Romano-Germanic “Civil Law” educational systems, and, second, to offer reasons which can help account for these differences.

Let me begin with a translation of an actual dialogue that took place between a young woman about to receive her doctorate in law in Spain and this author. These few sentences depict both the sharp contrast between these two legal cultures and the resulting lack of mutual comprehension.

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1. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).
2. An American reader will better understand this paper if the word “doctrinal” is here and elsewhere joined to the word “theoretical.” I will contend, for example, that certain forms of legal practice require legal theory in the sense of principled legal doctrine. I do not deny that many American law scholars are engaged in theory of a non-doctrinal sort. For further discussion, see *infra* note 24 and accompanying text. See *infra* note 27 for the broader claim that non-doctrinal forms of theory are also generated by certain concrete concerns.

Spanish doctoral candidate: "Here in Spain we have begun to use American-style practical training. After a semester of theory, students must take a semester of practice in which they apply theory to the solution of particular cases."

American professor: "That's not our method. From the first day of law school, we begin by applying legal theory to particular cases—though we never consider them 'solved'."

Spanish doctoral candidate: "How can you begin with application and only later have something to apply? Do you mean that you begin with simple cases and move gradually, by induction, to more general theory of law?"

American professor: "No, we begin with application and stay there. We rarely ascend to, or descend from, legal theory, except in the context of particular cases."

Spanish doctoral candidate: "But then you're not doing *science!*"

American professor: "Our students never even hear that word."

As can be seen from this interchange, law in Europe is considered an academic field of study. Students of law, like students throughout the university, aspire to "scientific" understanding—not in the sense of experimental science but in the older sense of systematic knowledge (*Wissenschaft* in German). Practice is not neglected; in addition to practically-oriented courses at the universities, law graduates must ordinarily spend considerable time as interns before they can be considered full jurists. But, as in all other academic fields—from medicine to historical research—it is thought that theory must precede practice.

So it is that the European law student is first introduced broadly, by means of treatises and lectures, to the basic concepts, scope, and history of the field of law and of its various subfields. The novice curriculum will include systematic survey courses such as "Introduction to Law" or "Theory of Law," which will focus on the civil law code as archetype. Even apparently more specialized courses, such as "Penal Law," will begin with an overview of fundamental doctrinal theory, with some attention to major schools of thought and historical context. Only after the student has begun to master relevant legal principles and rules will he or she be asked, in a practical course, to apply these rules to "solve" cases.³ The word "solve" has a flavor of mathematics,

3. Wilhelm Karl Geck, in *The Reform of Legal Education in the Federal Republic of Germany*, 25 AM. J. COMP. L. 86, 87 (1977), notes that German students have traditionally had to participate successfully in "practical courses, solving cases."

with the accompanying implication that there exist correct solutions to cases—or at least that the search for such solutions is to animate the student's endeavors.⁴

The professorate in Europe, too, is deeply imbued with an academic ethos. A lengthy dissertation-based doctorate is virtually always regarded as a prerequisite to full-time professorial appointment. Sub-disciplinary specializations, likewise, are jealously guarded, as they are elsewhere in the academy.

The American law school world is strikingly different. Although usually joined to a university, legal study is often called "professional" rather than strictly "academic." While the word "vocational" is resisted, most law professors are quite willing to say they teach an "art" or a "craft"⁵—words which conjure up the apprenticeships with which legal education in the United States began. We like to say that our emphasis is on process, on "how to think like a lawyer," on legal skills rather than on abstract legal doctrine. We do not speak of "legal science" at all, except in courses on comparative law or, perhaps, on legal history.

Although our "case method" (focusing on written appellate court opinions) was initiated in the nineteenth century as a means of introducing students, inductively, to theoretical "legal science," today we use cases more for the destruction of theory than for its construction.⁶ The majority and the dissenting opinions in cases assigned to students often seem to have equal cogency or to contain internal contradictions. Textbooks may carefully select related cases which come to opposite conclusions. And our so-called "Socratic" method of teaching in pure form requires that the professor always ask further questions, never providing "the answer" nor endorsing one particular student response.

4. Mirjan Damaška's classic *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363, 1369 (1968), indicates that in Europe the "moving spirit of analysis is . . . the quest for the 'right' answer to the problem at hand."

5. At the small number of high prestige American law schools, many professors would consider themselves to be "academics" doing "theory," but they would mean almost exclusively the non-doctrinal types of theory discussed toward the end of this paper.

6. Professor Harold J. Berman (then of Harvard Law School) has written; "We go on using cases as the primary material of instruction, but we hardly even teach the doctrine of precedent. We go on offering basic courses in contracts and torts in the first year, but many teachers of these subjects spend a good deal of time proving that there really is no such thing as a 'law of contracts' or a 'law of torts'." *The Crisis of Legal Education in America*, 26 B.C. L. REV. 347, 350 (1985).

Most good reasons seem to the student finally to entail highly arguable and even absurd conclusions. Students emerge from this multi-front assault with a mistrust of generalization⁷ and often of reason itself. They learn to be adept at legal argument but not to take it very seriously.

Rather than a European-style introduction to the scope and theory of law, in addition to more specialized courses, the American beginner is more likely to take a course with "Legal Writing," and, perhaps, "Oral Argument" in its title—implying that the law is held together by techniques rather than by principles, and that these techniques can be used without much prior substantive study. In recent decades American students have insisted that even the traditional case method, with its factual focus, is insufficiently practical. New curricular offerings have been introduced which move the law school somewhat back toward apprenticeship education, such as client counselling, externships with public agencies or private lawyers, and legal aid clinical work.

American law professors are highly unlikely to have obtained any advanced law degree at all, not even a master's, much less a doctorate, unless for some reason they wished to supplement a first degree at a lesser school with another degree at a more prestigious school. The standard academic doctorate, the Ph.D., is not even offered in law in America. Only the S.J.D. (or J.S.D.) is awarded, which may require as little as one more year beyond a one-year LL.M., with neither a preliminary examination, nor a foreign language, nor an oral defense required. Few are willing to make even this much effort; in 1990-91 only sixteen of these doctoral degrees were granted in the whole country.⁸ Nearly all American professors, especially at the most prestigious schools, will have only one degree in law, the J.D. (formerly called LL.B.), which is the same three-year degree possessed by almost every lawyer. Nor will most professors have spent years in specialized research after appointment. Books are rare, though articles are common, while pro-

7. MARY ANN GLENDON, *COMPARATIVE LEGAL TRADITIONS* 124 (1985).

8. Telephone Interview with the Office of the Consultant on Legal Education to the American Bar Association in Indianapolis, IN (Oct. 14, 1992). In 1991-92, there were seventeen doctoral degrees awarded. A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, Fall 1993 A.B.A. Sec. Legal Education and Admissions to the Bar 66. I would suspect that most of these doctoral degree recipients are not U.S. nationals and that few plan to teach law in America.

Yale Law School's S.J.D. appears among the easiest to obtain, at least formally. By contrast, Harvard Law School's S.J.D. requirements approach those of the typical Ph.D., in that both an oral preliminary examination and an oral dissertation defense normally must take place.

motions are relatively rapid—requiring as few as three to five years for the achievement of full rank with tenure. What most distinguishes professors at the best schools is not wide or profound academic understanding acquired through graduate or postgraduate study, but brilliance. They were at or near first rank in their law school classes, served as editors of the school's law review, and, probably, clerked for a year for a justice of the United States Supreme Court. They possess not knowledge but intelligence and, often, wit.

I just mentioned that our best students edit our legal scholarship. Students, not faculty, decide what will be printed in university law journals. Students who have studied law for only a couple of years sit in judgment over the work of professors of thirty years. Of course, faculty advisors are available and are regularly consulted by student editors, but Europeans are nevertheless incredulous when they learn that our students are entrusted with so much power over the future of legal research. Clearly we are far from the ordinary academic outlook, dominant in European law schools, that only experienced specialists have sufficient knowledge to be able to judge the quality of scholarly work. We think, rather, that a good legal mind can recognize well-researched and well-argued legal writing without much need for prior understanding of the deep theoretical structures of the field in question.⁹

In the remainder of this paper I suggest two reasons which may help explain the extraordinary educational distance between the two sides of the Atlantic Ocean. My initial thesis is this: European law professors are more theoretical because they seek to guide and train judges. American law teachers are less theoretical because they need not guide and cannot train judges. Of course, neither this reason nor the one I shall append to it later are intended to explain fully the

9. In support of the American law review, one law school dean has claimed that "once a person of superior intelligence learns to read the cases, acquires the vocabulary and becomes acquainted with legal materials, he is in a position to deal effectively with legal theory in almost any field, provided that he will devote to it the requisite amount of time." Harold C. Havighurst, *Law Reviews and Legal Education*, 51 NW. U. L. REV. 22 (1956). For a thorough recounting of the emergence of American law reviews, see Michael I. Swygert and Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L. J. 739 (1985). These authors argue that the disintegration of natural law doctrinal assumptions encouraged the more reportorial style of the new student reviews. *Id.* at 747, 790. The rise of non-doctrinal theory in the more prestigious law schools has resulted in some recent movement toward professor-controlled journals. See, e.g., Roger C. Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1 (1986) and accompanying responses.

American-European difference in educational methods and goals. For example, it may well be that in a single national European jurisdiction it is simply much easier than in the American federal context to discover systematic unity of doctrine. But I do think that the thesis stated above and developed below would have to be part of any complete understanding.

Throughout the history of the Civil Law in Europe, judges have rarely held positions of independent political power or prestige. Consequently, they have often turned to legal scholars for advice and legitimation. In ancient Rome, the untrained judge (*iudex*) relied on the wisdom of the *jurisconsult*. There were times and places in the late medieval period in which judges could even be punished for wrong interpretations of the law; naturally, they sought the protection of scholarly doctrine. The great Commentators, who elaborated the theoretical structure of the rediscovered Roman law, were also judicial consultants.¹⁰ Indeed, in what was the medieval university law school at Bologna engaged, if not in the presentation of a supplementary basis for judging? The Italian exponents of Romanist theory did not see any need to follow the law applied by the weak and disparate courts of their day. They were promoting a higher kind of justice and, through the process called "reception," judges all over Europe came gradually to acquiesce in this newly common law (*jus commune*).

The relatively greater role of scholars and lesser role of judges continued. The story of the *Aktenversendung* has often been told: how at one time German courts would send off their entire case dossiers to university law faculties for a decision, which would then be applied by the courts. The great nineteenth century codifications were the work of scholars attempting to provide, as nearly as possible, a complete and sufficient theoretical basis for case decisions—thus minimizing judicial discretion and creativity.¹¹

Turning to the world today, we see that the European judge is a respected civil servant but has by no means the prestige of the law

10. "Many of their theories and dogmatic constructions were born out of the pressures of actual cases." MAURO CAPPELLETTI ET AL., *THE ITALIAN LEGAL SYSTEM* 22 (1967).

11. GLENDON, *supra* note 7, at 160, comments upon European developments this way: "The idea of the judge as a legal actor without inherent law-making power, who applies the will of the sovereign and looks outside for advice, is thus quite deeply rooted. When French judges . . . began to break out of this traditional judicial role and behave more like English judges, . . . they became the targets of revolutionary fury and post-revolutionary reaction."

professor. Each pays attention to the other, to be sure, but when a German speaks of "the dominant opinion" on a point of law, the majority of scholars is referred to. In America, the same phrase would always be taken to refer to the majority of courts.

In the European university classroom, the professorial duty to promote good judging is especially clear. A substantial minority of law students in Germany and other European countries plan to become judges.¹² Immediately after leaving law school, they will enter upon a step-by-step career of advancement first to lower and then to higher courts, depending on seniority and ability. In Germany, the legal system with perhaps the greatest prestige and influence in the Civil Law world, even public prosecutors and private attorneys must first be qualified to be a judge.¹³

European scholarship and teaching, therefore, have always had to keep in mind their usefulness for judging. Paradoxically, the very weakness of judges, their dependence on scholars for advice and training, has put the needs of judges in the center of European legal thought.

What, then, does a conscientious judge need? Certainly not the mistrust of reason, the arguability of every point, taught by the American law school. A judge needs to learn more than "how to think like a lawyer." She needs to know "how to think like a judge." She needs to know how to do justice, how to reach the most nearly right answer in a case.¹⁴ Granted that good arguments could be made both for

12. According to Richard Abel, "the ratio [of judges to private practitioners is] . . . generally many times higher [in the civil law world than in the common law world]." Abel, *Lawyers in the Civil Law World*, in *LAWYERS IN SOCIETY* 1, 6 (Richard L. Abel & Philip S. C. Lewis, eds., 1988). Germany has the highest *per capita* number of judges among countries with developed formal legal systems. Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, in *LAWYERS IN SOCIETY* 124, 133. Private practitioners do not constitute the core of any civil law legal profession. Abel, *Lawyers in the Civil Law World*, at 4. It should also be noted that many law students in Europe after graduation become notaries, bailiffs, police chiefs, and other civil servants who, like judges, are called upon to act as impartial law appliers rather than as advocates.

13. "All German lawyers have to earn the 'Befähigung zum Richteramt.'" Jutta Brunnée, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399, 400 (1992). Objections to the centrality of the judicial role model are currently being pressed in Germany. *Id.* at 419.

14. "While the case method of North American law schools encourages the development of argumentation and rhetoric, German students are always asked to render impartial opinions on 'the legal situation' presented. From the very beginning of their university course, they are trained in the demeanor of the judge rather than that of the advocate or private practitioner." *Id.* at 403.

plaintiff and for defendant, who should win? Which argument will be perceived as correct by the judge's superiors, on whom a future promotion may depend, and by the judge herself?

As Ronald Dworkin has well shown, a "serious" attempt to judge people's rights correctly can be a task of Herculean legal theory.¹⁵ I would put the matter this way: A judge's authority rests on the law which supposedly speaks through her mouth. Hence both conscience and convenience lead the judge to search the law for the solution to each case. But no body of law can be followed if it is internally inconsistent. A judge cannot obey contradictory commands. Apparent contradictions in the law must be overcome by discovering some additional legally-approved principle which tells the judge how to choose among them. Moreover, if the law is to provide solutions to new fact patterns, it must contain hidden principles beyond the specifics already contemplated by the legislator. For both these reasons a judge must use theory and, unless she is Judge Hercules, she turns naturally for interpretive assistance to the scholarly traditions of her legal culture.

Thus we can offer an initial answer to the question posed by the title of this paper: "Can Practice Do Without Theory?" At least one kind of practice, the practice of judging, requires theory. The Commentators at Bologna were theorists because of, not despite, their concern for practice. Because they viewed Roman law as living, binding authority, they had to interpret it in ways that would resolve its contradictions and uncover its principles. Otherwise, it would have remained useless in practice for the resolution of concrete cases. So, too, the European teacher-scholar of today: as long as his work is relied upon by an audience of judges or of potential judges, he cannot just make and destroy arguments. He must provide the doctrinal theories which make it possible to see through the jungle of rules to a unified interpretation of what the law requires.

The American judge possesses a pedigree far different from that of the European judge. Anglo-American judicial history can be seen to add constantly increasing weight to the claim "the law is whatever the judges say it is." Moreover, to the degree to which this claim is accepted, it would be futile for a professor to preach the law to them. In other words, the ever-increasing discretionary power of judges has removed the problem of good judging from the law school classroom, and with it has gone the need for serious legal theory.

15. Dworkin, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81, 105-30 (1978). Dworkin is here referring to Anglo-American judges.

The Norman kings' judges after Henry II were protected by centralized political power and by the claim to express what was "common" in the myriad customs of medieval England. Consequently, they had little need for the high Romanist scholarship coming from Bologna¹⁶ and, later, from Oxford. They were "oracles" of the law, in Blackstone's phrase, rather than mere appliers of law elaborated by university theorists. And English judges supervised the education of their own successors, in cooperation with the practicing bar, eliminating any practical dependence on academics.

The development, from customary law, of the English doctrine of *stare decisis* (formally absent on the European continent) added a normative force to the earlier political claims of judges. What a judge has decided in a case is now law itself, no longer merely evidence thereof, and so it must be followed by subordinates and successors. How can a professor presume to teach judges how to avoid mistakes, if all their decisions become *ex post facto* infallible? How can theory ever be finished or coherent if it must treat every new misapplication as correct?

The American practice of judicial review of statutes made the judiciary superior even to the legislature. According to Tocqueville's early analysis,¹⁷ it is above all because of her power to strike down unconstitutional legislation that the American judge is more powerful than the European judge. Because of the difficulty of amendment to the U.S. Constitution, Supreme Court assertions of unconstitutionality are virtually unanswerable. Masters through both the lower law and the higher law, through both the case and the Constitution, judges in the New World attained power and prestige unimagined in the Old.

Yet, until the twentieth century, there still remained the possibility that judges could be mistaken, that they could interpret the law incorrectly. Scholars of the Constitution could still tell the justices what that document in theory required, even if the latter were free in practice to ignore that advice with impunity and success. The twentieth century ascendancy of the American school of thought called "Legal Realism" eliminated this last way to hold judges accountable to some higher legal standard.

"Realism" is, ironically, a kind of nominalism. It teaches, fundamentally, that concepts cannot be true or false. Words are only labels. They do not express anything real. Since there is no correct

16. GLENDON, *supra* note 7, at 160, calls "the existence of a powerful English legal profession an important, perhaps the crucial, factor in preventing an English reception of the Roman law brought back by English scholars from Bologna"

17. ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA 98-103 (1984).

meaning for the concepts used in legal rules, it is fallacious to assume that any particular set of facts comes necessarily under a given rule. Moreover, in a mature legal system, the rules will often or always be so vague and contradictory that a judge can easily rationalize a judgment for either side. The judge's own conscious or unconscious personal or political biases, and not the law, determine the outcome of cases.

But if legal texts have no inherent meaning—if what they say is, even in theory, up to the reader—then the very idea of legal interpretation collapses. It is impossible for a law to be misinterpreted if it has no meaning to begin with. It is impossible to tell a judge what the law requires, and a scholar's attempt to do so is likely to be perceived as amusing at best and as laughable at worst. In America today, "the law means whatever the judges say it means," because of their political power, because of *stare decisis*, because of judicial review, and above all because it cannot mean anything else according to Legal Realism and its contemporary heirs.

While the weakness of the European judge makes appropriate a vertically ascending judicial career along civil service lines, the power of the American judge means that a horizontal shift from other legal professions makes more sense. Only after proving herself as a lawyer or as a law professor will someone be appointed (or sometimes elected) to an important American judgeship. Only those politically well-connected or otherwise well-regarded are likely to be made judges. Thus neither in the eyes of the public nor, especially, in her own eyes, is a judge's opinion legitimated only by being an expression of preexisting legislatively-approved law. Judges are respected in part because they are proven leaders or scholars, not just because they are said to speak the law.

Most important for our purposes here is the effect the American method of choosing judges has on legal education. There is no way to enter upon a rising judicial career right out of law school.¹⁸ There is no way to aim specifically at a life of judging. All early hope to become an important judge, if it exists, depends upon first becoming a well-known lawyer or professor¹⁹ and then being lucky. The vast majority

18. Minor, often specialized, judgeships can be obtained by recent American law graduates. But because the ordinary entry to higher positions in the judiciary is lateral, these low-ranked judgeships are rarely seen as the first steps of an aspiring judicial career. See generally Robert P. Davidnow, *Law Student Attitudes Towards Judicial Careers*, 50 U. CIN. L. REV. 247 (1981).

19. "[O]f course, all common law judges have been private practitioners, government lawyers, or law professors" Abel, *supra* note 12, at 8.

of students in an American law school plan to be lawyers, a few plan to be law teachers, and virtually no one thinks seriously about learning to be a judge. Therefore, their professors rarely teach law from a judicial point of view.²⁰ The very strength of the American judge, her lack of dependence on scholars for legitimation, advice, and training, tends to remove the need to find the right answer from legal education and research in America.

Without the need for cognitive closure provided by the presence of would-be judges, legal argument easily becomes an end in itself. An excellent student is one who can argue either side of a case with equal facility, who is trained to be a "hired gun"—to use the common term of (self-critical?) caricature. Surely the word "Socratic" is inappropriate for this rhetorical training for success, since it more nearly approximates the methods of Socrates' great opponents, the Sophists. Once the need to judge with justice is removed from law, what but sophistry remains? The teaching of advocacy seems to do well without taking doctrinal theory seriously.²¹

And yet, can a good advocate do without any theory? How can a lawyer respond coherently to the challenges of her opponent, or of the judge, if she has no sense of the text and texture of the law surrounding her case? How could law teaching, even for advocacy, ever be more than a miscellaneous assortment of facts and anecdotes if it were not informed by theory to some degree? Furthermore, few American lawyers are only advocates, though almost all are partisans. Would not theoretical mastery of legal rules and principles help the client counsellor to predict the decisions at least of many judges? Oliver Wendell Holmes, Jr. (no friend of authoritative theory) once recommended the casebook of his opponent, the nineteenth-century U.S. legal scientist Christopher Columbus Langdell, by pointing out that a "professor must start with a system as an arbitrary fact, and the most which

20. Robert Stevens' comprehensive book *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983) would appear to say nothing about the education of judges. Nor does the recent, lengthy American Bar Association study seem to say anything about judicial training. *Legal Education and Professional Development - An Educational Continuum* (July 1992). Past, present and future American legal education is assumed to be lawyer education, not judge education.

21. Richard Abel has, in passing, put forward a thesis similar to that stated above. He notes that "paradoxically, the full-time academics in common law faculties offer a fairly vocational training, whereas [even] the full-time practitioners who teach part time in civil law faculties are intensely theoretical (perhaps because the former see themselves as preparing for private practice, whereas the latter educate students for the magistracy and civil service)." Abel, *supra* note 12, at 13.

can be hoped for is to make the student see how it hangs together, and thus to send him into practice with something more than a rag-bag of details."²²

It seems to me, therefore, that the surprising lack of doctrinal theory in American legal education cannot be fully explained by the absence of potential judges and the presence of potential lawyers in the law school classroom. Among other factors must be included, paradoxically, the fact that since the rise of Legal Realism, our better law schools have been dominated by a peculiar brand of academics, namely, amateur social scientists.

Many of the Realists were impressed by the newly-conceived sciences of society.²³ They sought to describe the "real" (whence their name) behavioral operations and effects of law, rather than the internal interrelations of concepts and rules. Although often also advocates for progressive legislation and court decisions under Roosevelt's New Deal, they sought first and foremost, as "value-free" social scientists, impartially to describe the actual workings of legal institutions. They were not really against theory, but they wanted theory "about" law, not theory "of" law.²⁴ They and their successors have wanted not legal science, but social science: sociology of law, psychology of law, economic analysis of law, behavioral analysis of judges, and the like.

Unfortunately, the Realists' drive to make the law school into another social science department has been both a great failure and a great success. It has failed in that few law students are graduated with anything more than a smattering of sociology or of economics, nor do most of today's law professors have more than a smattering to impart. But if the Realists have largely failed to bring serious social theory into American law schools, they have succeeded in driving out most serious legal theory.

22. Book Review, 14 AM. L. REV. 233, 235 (1880). See also his *The Path of the Law*, 10 HARV. L. REV. 457, 474-75 (1897) for similar remarks favoring "clear ideas" about basic jurisprudential concepts.

23. EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 78-79 (1973). Purcell's book contains extensive descriptions of the new Realists, and of the crisis of theory and of legitimacy provoked by them, in chapters five and nine. See also STEVENS, *supra* note 20, at 131-71.

24. "[T]heories about law . . . facilitate comparisons through time and across community boundaries . . ." HAROLD LASSWELL & MYRES MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY* 5 (1992). "Theories of law are those that are employed for guidance and justification by participants in the process of decision." *Id.*, at 5 n.7 (emphasis in original).

The reason for the departure of doctrinal theory is not hard to discern. The very adoption of a disinterested, value-free social scientific point of view excludes legal theory and, indeed, all statements about legal obligations. For the law is a normative discipline. As H.L.A. Hart has demonstrated,²⁵ only those "internal" to law, only those willing to speak as though they were bound by it, can talk of its rights and duties. Any lawyer's brief can say what the Constitution demands, but no amount of social science research can ever do so.²⁶

Consequently, the assumption of a social scientific perspective by law teachers makes doctrinal theory seem unfounded. From a sociological viewpoint, contradictions in the law can only be reported, not resolved. Thus all attempts by judges to find hidden harmonizing principles seem fraught with delusion or pretense. American students and professors alike make the mistake of thinking that radical skepticism about the claims of judges and legal theorists has been somehow proven, whereas in fact such skepticism is simply an appropriate accompaniment to the stance of a social scientist. There is no reason to think it appropriate for someone, such as a judge, who must remain internal to the legal system. If a judge thinks the law binding, she must think it principled. If a Realist chooses not to be bound by the law, neither will he discern the hidden ways it binds itself together. Because many of today's leading law teachers have chosen to be unconcerned with the practical viewpoint even of lawyers, much less of judges, they have cut themselves off from doctrinal theory. By contrast, at many less prestigious American law schools, the social scientific perspective is less present, and the purpose of training lawyers is greater. The result is that legal rules and arguments are taken more seriously and attempts are made to find and teach doctrinal principles.²⁷

25. THE CONCEPT OF LAW 55-56, 99 (2d ed., 1972).

26. I mean here that social science cannot generate normative premises. It can, of course, often be helpful in developing factual premises within normative arguments. Thus it merits a place in legal education, but only a subordinate one if the law is to remain principled and coherent.

27. STEVENS, *supra* note 20, at 273. The metatheory behind this paragraph and this article can be stated briefly as follows: Insofar as only one concrete reality can exist at a given point, contradictory prescriptions or descriptions regarding that reality cannot be admitted. Contradictory legal imperatives must be resolved by legal theory because only plaintiff or defendant, not both, can win. Contradictory sociological data must likewise be harmonized by social theory, insofar as nothing can both be and not be in the same way at a concrete point. Thus, I submit, it is the singularity of the real (or, if you will, the singularity of our discourse regarding the real) that engenders both doctrinal and social theory, not the assumption of a single commander or creator

Once before, in Europe, something similar happened to law teaching. Adherents of the French "Humanist" school of legal education (the *mos jura docendi gallicus*) adopted a purely historical, descriptive approach to the study of the rediscovered Roman law. Consequently, they saw it merely as a collection of often incoherent and inconsistent statements expressed over a thousand years of Roman civilization. They ridiculed the anterior Italian law teaching (the *mos jura docendi italicus*) for supposing that legal theory could and must discover a principled unity in Justinian's sixth century compilation. But of what possible use could the French perspective have been to the professors at Bologna, who were attempting to provide living authority for judging? A set of unprincipled and possibly contradictory opinions cannot tell a judge how to decide cases. It is worth noting both that the advent of the French approach was an important step toward the eventual dissolution of the systematically-developed *jus commune*,²⁸ and that the new approach was resisted by the French courts. Concerned as they were with practical ends, the French judges remained long faithful to Italian legal theory.²⁹

What of American judges? Bereft of law school education in the achievement of justice, without any training except in advocacy and, possibly, in social scientific description, they find themselves called upon to decide cases according to law. Many, I think, want to respond to this call, for reasons of conscience as well as of legitimacy and public acceptance. What do they do? For the most part, they do theory. They try seriously to resolve contradictions and to find overriding harmonies in the law. A well-written opinion by an American appellate judge is a mini-treatise of legal theory. It is limited, to be sure, by the time available and by the case at hand, and so it cannot approach the systematic quality of European doctrinal scholarship, but it pushes in that direction.³⁰ Because American judges care about legal practice, they, too, cannot do without legal theory.

(who could, after all, decide to be inconsistent). By contrast, theory is not essential to human imagination or desire. Poetry and other forms of fiction need have no theoretical unity. Instrumentalist advocacy can use means based on contradictory theories, provided that the resulting desired experience is thereby made more likely.

28. GLENDON, *supra* note 7, at 48.

29. K. W. RYAN, *AN INTRODUCTION TO THE CIVIL LAW* 19 (1962).

30. For further reflection on this point, see Ronald Dworkin's later *LAW'S EMPIRE* (1986), in which he challenges the Realist sociologist to take a seat on the judicial bench and discover, often after diligent theoretical inquiry, that there is indeed a right answer for nearly every case. See also the criticism of Dworkin found in Richard Stith, *Will There Be a Science of Law in the Twenty-First Century?*, 22 *REVUE GÉNÉRALE DE DROIT* 373 (1991).