1997

Explanation and Legal Theory

Brian Leiter

Explanation and Legal Theory

*Brian Leiter**

I am not going to say much about the most interesting new argument developed in the article that is the premise of this Symposium[1]: namely, that the moral value of integrity does not justify appeal to legal principles when these principles are otherwise morally sub-optimal.[2] The argument seems to falter on the largely tacit, but false, assumption that there are no significant epistemic limitations on determining moral optimality. Other participants in this Symposium, however, will have more to say about this. I want to concentrate, instead, on the philosophical posture that informs the Essay, and what it might mean for legal theory.

On the very first page of *Against Legal Principles*,[3] Larry Alexander and Ken Kress attempt to situate their attack on "legal principles" within a broadly naturalistic philosophical program, one that seeks to purge from our best picture of the world those properties and events that do no *explanatory* work. Thus, Alexander and Kress write:

> Just as the nineteenth-century physicists invoked the ether to explain past observations and predict future ones, traditional legal reasoning and theories of interpretation invoke legal principles to explain the outcomes in past cases and to justify conclusions about how future cases should be decided. And like the invocation of the ether, the invocation of legal principles is misguided.[4]

Although there is much to be said in favor of honoring naturalistic scruples,[5] this appealing analogy strikes me as being, nonetheless,

---

* Assistant Professor of Law and Philosophy, The University of Texas at Austin. Originally presented to the Jurisprudence Section of the Association of American Law Schools at the annual meeting in San Antonio, Jan. 7, 1996. I have made only minor revisions for publication.

1. Larry Alexander & Ken Kress, *Against Legal Principles, in* Law and Interpretation: Essays in Legal Philosophy 279 (Andrei Marmor ed., 1995), *reprinted in* 82 Iowa L. Rev. 739 (1997).

2. There are other interesting, but not new, arguments revisited in this Essay, including, for example, Kress's seminal discussion of the problem of retroactivity in Dworkin's theory. *See* Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 Cal. L. Rev. 369 (1984). There are also, I think, other new, but less interesting, arguments which other contributors to this Symposium will take up.

3. Alexander & Kress, *supra* note 1, at 279, *reprinted in* 82 Iowa L. Rev. 739, 739 (1997).

4. *Id.*

5. In particular, naturalistic scruples constitute our best defense against a promiscuous, pre-Enlightenment ontology—as is readily apparent from the work of philosophers who too readily disparage such scruples, such as John McDowell and Hilary Putnam. *See* John McDowell, Mind and World (1994); Hilary Putnam, *Are Moral and Legal Values Made or*

wrongheaded in the case at hand. To start, as I read it, the paper by Alexander and Kress is actually devoid of any arguments against the *existence* of legal principles, and consists entirely of *normative* arguments against employing legal principles in either legal reasoning or jurisprudential theories about legal reasoning. Indeed, much later on, Alexander and Kress concede as much—though, strangely, they bury the point in a footnote.[6] But to concede this point is to vitiate utterly the force of the analogy: ether was dropped from our best naturalistic picture of the world precisely because it did no *explanatory* work, not because it was normatively sub-optimal.[7]

The analogy breaks down at an even deeper and more illuminating level. We may see this if we recall the precise language Alexander and Kress employ in sketching the analogy: Ether, they write, served "to explain past observations and predict future ones" while legal principles serve "to explain the outcomes in past cases and to justify conclusions about how future cases should be decided."[8]

Notice the subtle, but significant, shift in language: ether was invoked to "explain" the past and "predict" the future, while legal principles are invoked to "explain" the past but "justify" the future. But plainly

---

Discovered?, 1 Legal Theory 5 (1995); Hilary Putnam, *Replies*, 1 Legal Theory 69 (1995). In the latter piece, Putnam wrongly calls me a "scientific imperialist" for insisting that naturalistic scruples about explanatory power be brought to bear on values. *Replies*, *supra*, at 70. For my original argument, that provoked Putnam's accusation, see Brian Leiter, *The Middle Way*, 1 Legal Theory 21 (1995). "Imperialism," however, implies an unjustified and wrongful extension of hegemony. Yet Putnam gives no account of why such scruples are misplaced in the evaluative context (except for the facile, but mistaken, argument that such a naturalistic position is incoherent because of its being predicated upon epistemic values). Following Quine, I take the justification for naturalism to be thoroughly pragmatic: naturalistic norms—like the norm demanding explanatory power—have simply worked the best. They helped depopulate our world of gods and leprechauns and the ether, and repopulated it with the predictively powerful entities constitutive of the modern scientific worldview. From this pragmatic standpoint, the burden is entirely on the opponent of naturalistic scruples to tell us why they should be suspended in some domain, despite their success elsewhere. Typically, the only reason forthcoming is the patently question-begging reason that by suspending such scruples we can admit that philosopher's favorite (but naturalistically suspect) properties into our ontology!

6. Alexander & Kress, *supra* note 1, at 303 n.96, *reprinted in* 82 Iowa L. Rev. 739, 762 n.96 (1997) ("Our case against legal principles is primarily a normative case. Legal principles are either normatively unattractive or superfluous."). Alexander and Kress go on to claim, however, that the reason they are making no ontological claim about legal principles is because of their "normative character." *Id.* But this seems manifestly irrelevant—we can, of course, ask about whether norms (legal, aesthetic, moral) deserve a place in our best picture of the world. *C.f.* Richard N. Boyd, *How to Be a Moral Realist*, *in* Essays on Moral Realism (Geoffrey Sayre-McCord ed., 1988); Peter Railton, *Moral Realism*, 95 Phil. Rev. 163 (1986).

7. A naturalistic worldview is, of course, predicated on an epistemic *norm*: namely, only believe in those entities that figure in the best explanation of experience. In that sense—but in that sense only—we could describe the "ether" as normatively sub-optimal. But the Alexander and Kress argument supposes that legal principles are normatively sub-optimal by reference to non-epistemic norms.

8. Alexander & Kress, *supra* note 1, at 279, *reprinted in* 82 Iowa L. Rev. 739, 739 (1997).

justification is not necessarily symmetrical with prediction—the result that ought to be reached may not be the result actually reached. This difference should alert us to a further possibility: that the sense in which ether explains and legal principles "explain" may not be the same, since only the former explanation licenses a prediction.

Justification takes place within what the philosopher Wilfrid Sellars aptly called "the space of reasons." Explanation takes place, we might say, within the space of causes.[9] I *justify* my belief that the ether analogy is inapt by giving reasons for the claim. I *explain* why the window broke by appealing to a cause: the baseball that crashed through it. Some justifications can be explanations and vice versa. If a rational agent would be justified in believing that *P*, then we can probably explain a rational agent's belief that *P* in terms of the justification for *P* (since rational justifications "cause" rational agents to hold beliefs). Conversely, the best explanation for a belief that *P* is sometimes simply that a belief that *P* is justified.

Not every explanation of a belief, of course, constitutes a justification of that belief. That is one way of understanding what the debunking explanations of Marx, Nietzsche and Freud have in common (and also why such explanations are so bitterly resisted). Someone might think, for example, that the oxymoronic "Republican revolution"[10] of 1994—and the shift in "beliefs" it generated—is best explained by the congruence of two factors: first, the increasing extent to which both major parties have adopted the same basic economic platform, responding to the same special interest constituency (namely, the corporations and their managerial and ownership classes who bankroll the parties and the elections); and second, the disproportionate share of 1994 voters drawn from these classes. But surely it would constitute no *justification* of the policies promoted by Newt Gingrich and company that their triumph is best *explained* by the fact that they serve the short-term interests of the economic elite who have a stranglehold on the political process!

But more important for our purposes is the converse proposition: not every justification of a belief provides an explanation of it. This is one way

---

9. This way of putting it commits one, of course, to taking a position on the metaphysics of explanation. It is distinctive of twentieth-century empiricist theories of explanation—the most famous being Carl Hempel's—that they seek to account for explanation solely in terms of its logical form, not in terms of its identification of causes. I would think most philosophers today have been persuaded, however, that you can't distinguish genuine from pseudo-explanations purely in terms of logical structure, and that some talk about cause is essential. (The classic counter-examples to Hempel's empiricist account of explanation are rehearsed in Paul Humphreys, *Scientific Explanation: The Causes, Some of the Causes, and Nothing but the Causes, in* Scientific Explanation 300-01 (Philip Kitcher & Wesley Salmon eds., 1989).) Whether a satisfactory philosophical account of causation is to be had is a larger question. For two representative accounts—broadly, Humean/empiricist versus realist—see the classic papers by John Mackie and David Lewis *in* Causation (Ernest Sosa & Michael Tooley eds., 1993).

10. "Oxymoronic" in the sense that a re-entrenchment by the status quo cannot be revolutionary.

of understanding the moral of the debates generated by Edmund Gettier's famous counterexamples to the analysis of "knowledge" as "justified true belief."[11] One way of explaining what Gettier showed is this: a belief can be both justified and true, but we won't regard it as *knowledge* unless its being justified figured in the genesis (that is, the explanation) of the belief.[12] Justification, in other words, had better also be explanatory if the resultant true belief is to count as knowledge.

Let's return to the analogy between ether and legal principles. Ether was supposed to have figured in the *causal* explanation of past events, and the prediction of future events *by identifying their causes.* Ether failed on both counts. Legal principles, by contrast, explain past decisions, *at least in the sense of providing justifications for them.* And thus Alexander and Kress are correct when they say, not that legal principles enable us to *predict* future decisions, but rather that they enable us "to justify conclusions about how future cases should be decided."[13]

So legal principles figure in *justifications* of past and future decisions, and as such they exist in the space of reasons. The ether, by contrast, was supposed to figure in the *causal* explanation of past and future events, not their justification. But even if we accept explanatory (or causal) power as a criterion of the real—and thus purge the ether from our best picture of the world—this would simply have no bearing on legal principles, which exist in the justificatory space of reasons, not the explanatory space of causes. If this is right, then the analogy with which Alexander and Kress begin is profoundly misconceived.

Or is it? I noted earlier the familiar point that sometimes reasons that justify can also explain. To get legal principles into the space of causes, we need to understand legal principles as not simply justifying past decisions but as providing the causal explanation for these decisions: the judges decided as they did *because of* legal principles (for example, because they were "moved by" the persuasive force of those principled reasons). In that sense, reasons would become causes and could figure in explanations. And then the question whether legal principles are real would just be the question: do legal principles figure in the best explanatory account of judicial decisions?

Alexander and Kress, however, simply do not pose this question. Happily, other writers in jurisprudence do—notably, the American Legal Realists. Their answer to this question is surely familiar: legal principles do not figure centrally in the best explanation of past decisions; the best explanation of past decisions must appeal to non-legal reasons and causes

---

11. Edmund L. Gettier III, *Is Justified True Belief Knowledge?*, 23 Analysis 121 (1963). For representative examples of the literature this paper engendered, see Alvin I. Goldman, *A Causal Theory of Knowing*, 64 J. Phil. 357 (1967) and Brian Skyrms, *The Explication of "X knows that p,"* 64 J. Phil. 373 (1967).

12. A nice articulation of this point can be found in Philip Kitcher, *The Naturalists Return*, 101 Phil. Rev. 53, 60 (1992).

13. Alexander & Kress, *supra* note 1, at 279, *reprinted in* 82 Iowa L. Rev. 739, 739 (1997).

(for example, considerations of "fairness" and "policy," as Holmes and Llewellyn would have it; or unconscious desires as Frank would have it). If the Realists are right, then that might give us a real explanatory argument against legal principles on a par with the explanatory argument against the ether.[14] Admittedly, with the exception of Underhill Moore (whose orthodox behaviorism drove him to eliminate the mental altogether), most Realists did not think that legal rules and reasons played no explanatory role in judicial decisions.[15] But legal principles are, of course, only a subset of the total class of legal reasons,[16] and it is possible that a satisfactory explanation of judicial decisions might dispense at least with them. This remains an open question. But as John Mackie remarked many years ago—in what remains one of the most penetrating attacks on Dworkin's jurisprudence of principles: "There is a distinction—and there may be a divergence—between what judges say they are doing, what they think they are doing, and the most accurate objective description of what they actually are doing."[17] It is precisely in the gap created by this divergence that a real explanatory argument against legal principles might gain a foothold: the best "objective description" of what judges are "actually" doing might, indeed, turn out to make no reference to legal principles, even though such a description would diverge from what judges say they are doing. Moreover, if Mackie is right, as I suspect he is, that "[s]uch a divergence is not even improbable,"[18] then we may yet find legal principles—and perhaps a jurisprudence dependent upon them like Dworkin's—"explained away."[19]

---

14. I am assuming, of course, that explanatory considerations will not purge, for examples, norms and mental states from our ontology as well.

15. *See* Brian Leiter, *Legal Realism, in* A Companion to Philosophy of Law and Legal Theory (Dennis Patterson ed., 1996), and also my review essay, Brian Leiter, *Is There an "American" Jurisprudence?*, 17 Oxford J. Legal St. (forthcoming 1997) (reviewing Neil Duxbury, Patterns of American Jurisprudence (1995)).

16. On the notion of a "class of legal reasons," see Brian Leiter *Legal Indeterminacy*, 1 Legal Theory 481 (Dec. 1995).

17. John Mackie, *The Third Theory of Law, reprinted in* Ronald Dworkin and Contemporary Jurisprudence 161, 163 (1983).

18. *Id.*

19. I take up these, and related, issues in several papers: *Rethinking Legal Realism: Toward a Naturalized Jurisprudence* (unpublished manuscript, on file with the author); *Objectivity, Morality, and Adjudication, in* Objectivity in Law and Morals (Brian Leiter ed., forthcoming 1998); *Naturalism and Naturalized Jurisprudence, in* Analyzing Law: New Essays in Legal Theory (Brian Bix ed., forthcoming 1998).