

## Fear of Theory

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*Legal Reasoning and Political Conflict*. Cass R. Sunstein. Oxford University Press 1996. Pp x, 220.

Fourteen years after he published *A Theory of Justice*,<sup>1</sup> John Rawls surprised his many readers by announcing that he no longer believed his celebrated theory to be true.<sup>2</sup> Not that he believed it was false either: rather, he had come to think that any such theory must refrain from taking a position on its own validity. To claim the “truth” for one’s own point of view, Rawls worried, might be construed as excessively partisan. Liberal theories of justice must not only preach tolerance for other ways of life, but for other theories as well.

Rawls was led to this self-effacing agnosticism by his new vision of political philosophy. The philosopher’s role was no longer the traditional one of advancing grand metaphysical theories. In our society, reasonable people differ considerably on metaphysical matters and, in Rawls’s opinion, the philosopher could do little to end such contentious disputes. The philosopher must therefore lower her ambitions and settle on the more modest task of seeking consensus at the level of practice. She must show that rival political factions can accept the same principles of justice, even though they may have different, and indeed incompatible, reasons for doing so. This happy convergence Rawls termed the “overlapping consensus.”<sup>3</sup>

According to Rawls, the appeal to metaphysics is not only futile, but also unwise. The philosopher must take great pains to avoid invoking any unnecessary theoretical claims, for such positions might prove controversial and endanger the hoped-for consensus. Rawls dubbed this non-committal strategy the “method of avoidance” and insisted that the political philosopher follow it rigorously. A reasonable political theory must remain as disinter-

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<sup>1</sup> John Rawls, *A Theory of Justice* (Harvard 1971).

<sup>2</sup> See John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *Phil & Pub Aff* 223, 225 (1985).

<sup>3</sup> *Id.*

ested as possible—even to the seemingly perverse extent that it profess neutrality about the truth of its own assertions.

To many, this description of philosophical reasoning was at once unrecognizable and unappealing. The task of the political philosopher, it is commonly thought, is to argue for the truth of certain political doctrines; a philosophical theory is normally not abandoned simply because some cannot be persuaded of its validity. This is not to say, of course, that Rawls's conciliatory approach has no appeal whatsoever. It would be great if an overlapping consensus could be found and, insofar as political philosophers can pitch their ideas to bring this about, so much the better. The problem lies with Rawls's claim that any political theory incapable of generating an overlapping consensus must fail as a philosophical analysis. Philosophy is supposed to be about truth, not consequences.

In *Legal Reasoning and Political Conflict*, Cass Sunstein takes up Rawls's method of avoidance and cleverly applies it to the case of legal reasoning. As Sunstein sees it, lawyers have developed a special strategy for dealing with the fact of pluralism. Instead of answering specific legal questions by applying controversial moral or political theories to particular fact patterns, legal reasoners rely on rules and low-level principles of law to settle controversies. The law seeks to establish what Sunstein calls "incompletely theorized agreements." For example, the right of workers to unionize can be grounded in many different ways (p 5). It can be seen as protecting the basic rights of workers, as fostering democratic objectives or ensuring industrial peace. While each theory is controversial, each nonetheless supports the right of workers to form unions. A judge presiding over a labor case should therefore try to resolve any dispute on the basis of legal principles that command consensus, rather than invoke an unnecessarily divisive justification for unionization. By avoiding abstractions and high theory, the law attempts to paper over alienating differences and play up unifying similarities.

While the "incompletely theorized agreement" is a clear analogue of the Rawlsian "overlapping consensus," Sunstein wisely does not follow Rawls in his meta-ethical agnosticism. Sunstein sees nothing wrong with endorsing the legitimacy of his own account:

There is, however, an exception to the general claim that I have made throughout this chapter. In order for participants in law (or democracy) to accept that general claim, they must accept at least one general theory: The theory that I have at-

tempted to defend. This is the theory that tells them to favor incompletely theorized agreements (p 60).

Nor does Sunstein ever claim that a legal argument that fails to command universal assent is incorrect. Consensus is an ideal to strive for, not a definition of legal validity.

Sunstein's application of the method of avoidance to legal reasoning also sidesteps another difficulty associated with Rawls's position. Given that the Rawlsian overlapping consensus must relate to the principles governing the basic structure of society, the search for such universal assent has to take place at a highly theoretical level. Rival political, religious and cultural groups must be shown that their conceptions of the Good, Right and Personality share enough elements in common. However, such a discourse would be impossibly abstract. To think that even a tiny fraction of the populace can participate in an overlapping consensus is, at best, extremely optimistic.

Unlike philosophical analysis, legal reasoning generally takes place at a significantly more concrete level. Legal controversies are usually resolved by reference to specific rules and low-level principles whose content can be understood by the general public. It is therefore not unusual for the local and national news to report on recent court decisions. Indeed, if legal reasoning were as dense and impenetrable as philosophical reasoning, it is unlikely that the O.J. Simpson criminal trial would have been the media sensation that it was. Consequently, the claim that legal reasoning can generate consensus on particular outcomes does not seem hopelessly utopian.

Because Sunstein's proposal inherits the appeal of Rawls's idea while avoiding its problems, *Legal Reasoning and Political Conflict* should be read by all those who are interested in the relationship between law and political diversity. It is an ambitious and provocative attempt to understand the structure of legal reasoning in general and to situate legal practice within the institutional context of modern democratic society. In an era of divided government, an ideologically unstable Supreme Court, and a ridiculously politicized confirmation process, the book offers an alternative vision of law which sees in it the potential to minimize our differences and express our shared aspirations.

The book itself is an amalgam of three previously published law review pieces,<sup>4</sup> and the dovetailing unfortunately is rough:

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<sup>4</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv L Rev 1733 (1995); Cass R. Sunstein, *Problems with Rules*, 86 Cal L Rev 953 (1995); Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv L Rev 741 (1993).

the final product has a choppy, "cut-and-pasted" feel to it. Given these origins, however, I found the book remarkably accessible. It quite skillfully avoids technical language and is studded with dozens of helpful and well explained examples. Sunstein admirably succeeds at his general aim, mentioned in the Preface, to write a book on legal theory intelligible to those with no formal training in law (p ix).

*Legal Reasoning and Political Conflict* neatly divides into two main themes. The first attempts to explain why judges shy away from theory when deciding cases. Having developed his account of incompletely theorized agreements, Sunstein goes on to ask whether judges should decide cases based on rules or on more open-ended norms, such as standards, guidelines, and factors. Sunstein's answer is that the rule of law allows for the exercise of casuistry, which is the practice of settling disputes in a ruleless, case-by-case fashion (pp 121-35).

In this short review, I concentrate exclusively on the first theme, that of the incomplete theorization of the law. I do this primarily because the idea challenged in the second theme—that rule-bound adjudication is always desirable—has been effectively rebutted by others in the past, and Sunstein adds little to this debate.<sup>5</sup> Besides, Sunstein's account of incompletely theorized legal agreements is, by itself, sufficiently novel and interesting to merit a sustained discussion.

After sketching his account of incompletely theorized agreements, I suggest that Sunstein has it backwards: legal reasoning is incompletely theorized because theory is generally *irrelevant* for the resolution of controversies. The application of Rawls's method of avoidance to law is, therefore, ultimately misguided, despite its initial promise. For according to this alternative explanation, judges should not be seen as concealing the true bases of their decisions in the name of social unity; rather, it is the fact that theory is usually inapposite that accounts for the reticence of judges to pontificate on the foundations of the law.

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<sup>5</sup> See, for example, Frederick F. Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 167-74 (Oxford 1991); Joseph Raz, *The Rule of Law and its Virtue*, in *The Authority of Law: Essays on Law and Morality* 210, 223-29 (Oxford 1979). On the choice between rules and standards see Scott Jonathan Shapiro, *Rules and Practical Reasoning* 286-92 (unpublished PhD dissertation, Columbia University) (1996) (on file with U Chi L Rev); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557 (1992); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22 (1992); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L J 65 (1983).

## I. BETTER TO REMAIN SILENT AND THOUGHT THE FOOL

The stated aim of *Legal Reasoning and Political Conflict* is to dissolve, at least partially, the perceived mystery of legal reasoning (p vii). Unfortunately, Sunstein never quite tells us what he takes the mystery to be. My sense is that he is not concerned with the fact that the law can be hard to understand if one is not a lawyer. There is nothing mysterious about this—the law responds to complicated social phenomena and, by necessity, has developed an intricate, and sometimes baroque, framework and vocabulary. In this regard, the law is no different from chemistry or accounting.

I take it that Sunstein is focusing on something else which makes the law unique. While other disciplines, such as physics, economics, and philosophy, constantly strive towards greater systemization and rigor, the law has no such pretensions. The law is not particularly seduced by theory: judges exhibit little desire to be either moral philosophers or social scientists. The law's limited ambition is puzzling and cries out for an explanation.

As I have mentioned, Sunstein thinks that incomplete theorization is a good thing. Although not against theory per se, Sunstein wants theory-mongering to remain the province of academia. The virtues of theory for the practicing lawyer and judge are usually outweighed by its vices.

At first glance, Sunstein's claim may seem perverse. For he is not just against bad theory, but also against *good* theory. But what could be troubling about good theory? Wouldn't a good theory allow a judge to justify her rulings by showing how they are well reasoned and not the products of rank intuition, bias or caprice?

Sunstein, however, sees many pitfalls in highly theorized legal practice. First and foremost, a good theory can be problematic when others do not agree that it is a good theory (pp 38-41). Given that we live in a heterogeneous society where there is a lack of consensus with regards to large-scale social issues, agreement on general moral and political principles is very unlikely. The law compensates for this "social dissensus" (p 39) by refusing to provide deep justifications for its judgments, relying instead on low- and mid-level principles to marshal the required support. If, for example, a court wishes to impose a rule of strict liability for certain ultrahazardous activities, it may prefer to be silent about some of the tendentious justifications often invoked on that doctrine's behalf, such as economic efficiency, protection of basic rights, and distributive justice. The court should instead appeal directly to the strict liability principle because nearly everyone

can agree that the rule is sound, though for very different reasons. This "constructive use[ ] of silence" (p 39) avoids the social instability that would result from a fully theorized, but potentially controversial, judgment.

Incompletely theorized agreements may not command unanimity but they can go a long way towards minimizing conflict. Opponents of abortion rights may never be comfortable with *Roe v Wade*.<sup>6</sup> Still, courts reaffirming that decision ought not invoke in its support the idea that the fetus is not a person (p 40). To do so might further antagonize those who believe that abortion is murder. As Sunstein argues, those who lose a given decision lose much more when that decision invokes a large-scale political theory at odds with their own convictions. "If judges disavow large-scale theories, then losers in particular cases lose much less. They lose a decision, but not the world. They may win on another occasion." (p 41).

Sunstein believes that minimally theorized legal practice can also help foster mutual respect (pp 39-40). In those situations where incompletely theorized agreements are possible, the advancement of a controversial legal theory can do nothing but insult and antagonize the losing parties. The refusal to challenge another's strong convictions shows respect for, and affirms the reasonableness of, that person's theory of the Good.

Despite the strong liberal themes running through his work, Sunstein does not place the same degree of faith in the courts as does much of contemporary liberalism. He is wary of any attempt by a court to articulate and defend abstract principles of political morality, liberal or otherwise. Sunstein therefore argues that complete theorization by unelected judges is presumptively undemocratic and offends the rule of law (pp 44-46). In general, the only place for high theory outside the academy is in the domain of democratic politics, where citizens can decide for themselves which comprehensive theory of the Good they find most appealing.

Having touted the many benefits of incompletely theorized agreements,<sup>7</sup> Sunstein goes on to argue that the law's characteristic forms of reasoning are particularly well suited to producing them. For example, rules are advantageous to a legal system, according to Sunstein, in large part because they make it unnecessary for legal actors to theorize (pp 44-46, 110-11). A policeman

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<sup>6</sup> 410 US 113 (1973).

<sup>7</sup> Sunstein mentions several more mundane benefits of incompletely theorized agreements. For example, he rightly points out that theorizing is costly and often not worth the effort. Moreover, it takes talent to theorize well, a talent not all judges have (p 42).

need not invoke a theory of criminal punishment in order to give a driver a ticket for going over 55 miles per hour.

Not surprisingly, Sunstein is also a big supporter of the much-maligned "argument by analogy" (pp 62-70). While critics have complained that analogical reasoning is insufficiently rigorous, Sunstein thinks that its strength lies precisely in its theoretical modesty. If parties agree that case A is similar to case B, they need not invoke a grand theory to explain the similarity. They can rest content with their agreement and some low-level accounting for that consensus. People can agree that sexual discrimination is like racial discrimination and should be treated similarly without having to provide a full-fledged theory of discrimination to justify the analogy.

## II. IS PLURALISM REALLY TO BLAME?

Sunstein's observation that the law is incompletely theorized is hard to challenge. The standard judicial opinion bears little resemblance to the standard philosophical treatise. But what is the explanation for this phenomenon? Sunstein thinks that it is primarily a reaction to pluralism.

I don't think, however, that this hypothesis withstands closer examination. The chief benefit of incompletely theorized agreements, according to Sunstein, is that they stave off political conflict. This motivation is appropriate for public law controversies—political constituencies have concrete opinions in these areas, opinions which are often theorized. On major political issues, many people are able to identify themselves as liberals, libertarians, communitarians, or fundamentalists. If a court of law took a position on one of these comprehensive views, it would undoubtedly cause dissent and friction.

By contrast, very few people have any idea which principles underpin their views about private law. Although people can agree that under most circumstances contracts should be enforced, negligent tortfeasors held liable, and property rights protected, virtually no one has any clue whether these practices are best explained or justified by Kantian, utilitarian, Aristotelian, or economic principles. If a court took a position on any of these views, the political culture would very likely remain unaffected. Theoretical conflict at this level is the stuff of tenure battles, not social revolutions.

It is disturbing that the strongest reason Sunstein can muster for incompletely theorized agreements does not apply to private law. This substantially weakens the claim that the notion of an incompletely theorized agreement is "a key to understanding

legal reasoning" (p 191). At best, it can illuminate the methods of argumentation in public law contexts, areas in which, perhaps revealingly, Sunstein has concentrated most of his past efforts.

It is even doubtful whether the avoidance of conflict can be an appropriate explanation for the incomplete theorization of public law. If theorization were thought valuable but for its divisive potential, judges could have opted for "multiple," as opposed to "incomplete," theorization. A judge could show how a given ruling can be justified from a number of perspectives, thereby skirting the political conflict that Sunstein believes would follow from judicial theorization. Indeed, multiple theorization might be more effective than incomplete theorization in avoiding conflict because it would demonstrate to all interested parties that a consensus should form with respect to the legal principles being invoked. The fact that the law does not opt for multiple theorization shows, I think, that, with regard to the decision about whether to theorize, it is not particularly concerned with the avoidance of political conflict.

Sunstein's claim that incompletely theorized agreements foster mutual respect is also suspect. Clearly Sunstein would be right if multiple theories could each account for the entirety of the law. In such circumstances, very little would be gained if a judge gratuitously offered her opinion about which theory she thought to be the correct one. However, if one theory is manifestly superior to another in justifying the law and can be seen as animating its development, wouldn't it be fraudulent not to tell the losing party that this theory was the basis of her decision? Sunstein's incompletely theorized agreement bears an unflattering resemblance to Plato's "noble lie":<sup>8</sup> it may be well intentioned insofar as its aim is to promote social stability, but it is still a paternalistic whitewashing of the truth.

At this point Sunstein might want to trade platonic pejoratives. A herculean judge who completely theorized every opinion would be akin to a "philosopher-king" who spins out high-minded and high-brow accounts of the Good for the rest of us to follow. Yet, Sunstein would argue, in a democratic society, a judge's job is not to inquire into the form of the Good and then report his findings to the poor benighted souls shackled to the walls of the cave; it is to implement the will of the people. The rule of law must prevail over the rule of men, even if they happen to be very wise men.

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<sup>8</sup> See Plato, *Republic* Book III, 414b-415c (Basic 1968) (Allan Bloom, trans). I thank David Carlson for this analogy.

But is complete theorization inimical to democratic self-rule? It is only inimical, it seems to me, when the theory is not a good interpretation of the law. In such cases, a judge would be substituting his own sense of right and wrong for the will of the people or the judgment of previous courts. However, if the theory can be seen, in some suitable sense, as explaining and justifying the case law and statutory materials, then the advancement and application of the theory would be in the service of democracy, not in derogation of it. Philosopher-kings are objectionable not because they are "philosophers," but because they are "kings." Philosopher-kings don't care about what the workers, auxiliaries, or past philosopher-kings may think. A philosopher-judge, by contrast, need not, and indeed must not, be so arrogant.

### III. THE HISTORICAL CLAIM

Sunstein offers his account of incompletely theorized agreements not only as a vision of how the law ought to decide particular controversies but also as a descriptive thesis about why the law reasons in the manner that it does. He claims that judges tend to shy away from abstractions because they recognize that complete theorization would lead to social instability.

What historical evidence does Sunstein offer for this claim? None, as far as I can tell. Nor does he seem to think that a historical case needs to be made. Sunstein's argument for the descriptive claim seems to be derived exclusively from his normative position: since legal reasoning is incompletely theorized and incomplete theorization is an appropriate response to the problems of pluralism, then the law must have chosen this route because of its virtues.

Although this reasoning is not fallacious, the second premise is false. As I have argued, the virtues of incompletely theorized agreements cannot lie in their tendency to cabin political conflict. The failure of Sunstein's normative thesis, therefore, undermines his descriptive argument.

Moreover, even if Sunstein had tried to mount an historical argument, I doubt that he would have met with much success. For if Sunstein were correct that judges generally refrain from theorization in order to avoid exacerbating the problems of pluralism, one would expect legal reasoning to be more completely theorized in more homogeneous societies. In fact, the degree of theorization does not seem to increase with the level of a society's cultural homogeneity.<sup>9</sup>

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<sup>9</sup> If anything, the reverse is true—theorizing decreases as homogeneity increases. See

Consider the case of the common law. For many centuries English society was significantly more homogeneous than that of twentieth-century America. One would have thought, if Sunstein were correct, that English common law judges would have taken the opportunity to theorize at will. But this does not seem to have been the case. The common law judges used the same basic techniques of legal reasoning that American courts now employ: they relied on rules, standards, and analogies. English judges were neither social scientists nor philosophers and generally expressed very little desire to be either one. Lords Cairns and Cranworth, for example, did not justify the rule of strict liability in *Rylands v Fletcher*<sup>10</sup> by reference to economic efficiency or a full-blown Kantian account of personal responsibility. They cited authority, analogized the holdings from past cases, and offered some vague and passing thoughts about the justice of strict liability in order to justify their ruling. The opinion itself is remarkably under-theorized. As A.W.B. Simpson has explained, the common law never was the bastion of high theory that some legal academics tend to think it is:

Today, and indeed for many centuries, the common law system has been the product of a prolonged exercise in casuistry, an activity more generally associated with moral reasoning. . . . High theory has never caused much anxiety to practical lawyers, and since Chaucer's time, and indeed long before, the study of cases has been the principal mechanism whereby a person came to rank as a truly learned lawyer . . . .<sup>11</sup>

The same might be said for the Mishnah and Gemara, the written records of the Hebrew oral tradition as it existed circa 200 A.D. and 600 A.D., respectively, in Palestine and Babylonia. Legal disputes were resolved using many of the same tools we use today: the pharisees cited authority, argued by analogy, and offered *reductiones ad absurdum*. Rarely was theology introduced to settle particular questions of law.<sup>12</sup> Indeed, the Mishnah<sup>13</sup> and Ge-

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text accompanying note 14.

<sup>10</sup> LR 3 HL 330 (1868).

<sup>11</sup> A.W.B. Simpson, *Leading Cases in the Common Law* 1 (Oxford 1995).

<sup>12</sup> See, for example, Aaron Kirschenbaum, *Equity in Jewish Law: Beyond Equity: Halakhic Aspirationism in Jewish Civil Law* 199 (Yeshiva 1991).

<sup>13</sup> See Menachem Elon, *3 Jewish Law: History, Sources, Principles* 1072-73 (Jewish Publication Socy 1994) (Bernard Auerbach and Melvin J. Sykes, trans) (stating that the Mishnah is drafted in a casuistic, non-rule-like manner, in contrast to contemporary statute books).

mara<sup>14</sup> are significantly more casuistic in approach than current American legal practice. If Sunstein were correct, one would have thought that the relative homogeneity of Palestinian and Babylonian culture would have permitted the pharisees to show how their rulings were, in many instances, part of God's master plan. This, however, they did not do.<sup>15</sup>

#### IV. OTIOSE, NOT ODIUS

If Sunstein is wrong and pluralism is not the theory-retarding force that he claims it to be, then why are judicial opinions incompletely theorized? Let me suggest the following explanation: judges rarely proffer general theories to support their rulings because such theories are scarcely relevant in adjudication. This is so for several reasons.

First, judges usually occupy positions *within* chains of command and are thereby precluded from challenging the propriety of rules issued by those of greater authority. If a judge determines that a statute or ruling in a higher court applies in a given case, she is duty-bound, by virtue of her institutional position, to apply it. It is simply irrelevant whether the judge thinks that the rule is a good one or that the decision in the case produces, all things considered, the best result; what legally matters is the fact of the rule's applicability, not its rationality. Sunstein therefore misunderstands the reason why judges do not invoke philosophical or economic analysis when applying the rules of strict liability in, say, products liability cases. Given a determination that the rules apply, the attempt to justify the rules themselves is otiose, not, as Sunstein thinks, odious.

It is not surprising, therefore, that in civil law countries, where the value of legislative supremacy is paramount, judicial opinions are conspicuously less theorized than those in common law countries. The average French decision, for example, contains three hundred words and the average German decision consists of

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<sup>14</sup> Adin Steinsaltz, *The Essential Talmud* 198-200 (Basic 1976) (Chaya Galai, trans) (arguing that the Talmud avoids abstractions in favor of reasoning from concrete models).

<sup>15</sup> It is possible that there were unique factors present in both the common law and Talmudic traditions which, despite the relative uniformity of their respective societies, made theorization unattractive. This would allow Sunstein to claim, in perhaps a somewhat ad hoc fashion, that the incomplete theorization of legal reasoning in twentieth-century America is a reaction to pluralism, whereas the incomplete theorization of legal reasoning in pre-twentieth-century England and Babylonia were responses to other issues particular to those systems. My argument in the text should therefore not be taken as a decisive refutation of Sunstein's descriptive thesis, but rather as a shifting of the burden of proof.

two thousand words, compared with the eight-thousand-word average for majority opinions of the United States.<sup>16</sup>

Second, even in situations where judges are not so constrained, foundational ruminations may be just as unhelpful, given that moral theories tend to be couched in highly abstract terms and difficult to apply in particular cases. Kantians, for example, admonish us to treat people as “ends in themselves,” not merely as “means.” We know what this prescribes in model cases: one is treated merely like a means rather than an end when one is assaulted or swindled. But is it a violation of the categorical imperative to prevent someone from suing a sitting president for sexual harassment? It would be futile for a judge to invoke *Foundations of the Metaphysics of Morals* to answer that question.<sup>17</sup>

Often, then, judicial opinions are incompletely theorized because theory cannot affect the legal outcome (either because of the peremptoriness of legal rules or the vagueness of ethical models). However, even in those situations where a general theory can be applied in a particular case, it is unlikely that it will be relevant for the resolution of the litigation. This, I claim, follows from the very same factor that requires courts to exhibit their reasoning in the first place: without providing reasons for their rulings, courts could not legitimate their potentially coercive actions. Judges, unlike juries, have a legal responsibility to justify their actions to those affected. But in order to create the impression of legitimacy, it is unnecessary for them to show how each of their decisions can be derived from first principles. They need only demonstrate the soundness of their legal conclusions against the challenges of the losing party to the dispute.<sup>18</sup>

Will the parties to a suit raise highly theoretical challenges in litigation? Most probably not. First, most reasonable ethical theories generally produce the same results. Utilitarians, Kantians and Aristotelians all think they can explain why we should keep our promises, give to charity, and refrain from murder. This “overlapping consensus” is hardly surprising—if any of these theories conflicted with a large number of our moral intuitions, we would have rejected it long ago. Consequently, litigants will

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<sup>16</sup> See Michel Troper, Christopher Grzegorzczuk, and Jean-Louis Gradiès, *Statutory Interpretation in France*, in D. Neil McCormick and Robert S. Summers, eds, *Interpreting Statutes: A Comparative Study* 171, 172 (Dartmouth 1991).

<sup>17</sup> Immanuel Kant, *Foundations of the Metaphysics of Morals* (Bobbs-Merrill 1969) (Lewis White Beck, trans).

<sup>18</sup> Unofficially, of course, courts may have other audiences in mind. They may wish to persuade other judges to adopt their positions, or, in unusual cases, to quell public unrest that they fear might arise because of their rulings.

rarely gain an advantage by invoking one grand theory rather than another in their legal challenges.

Second, very few lawyers have either the talent or training to raise such theoretical objections. As Sunstein himself notes, legal actors sometimes find disagreements about basic principles "deeply confusing" (p 191). Hence, even when fundamental theories give differing results in particular cases, challenges couched in philosophical or economic terms will rarely find their way into briefs. Because judges are only required to respond in kind, they will justify their rulings solely in standard legal terms, by reference to rules, principles, or general policy considerations. These methods of argumentation do command consensus and, therefore, do not have to be further justified.<sup>19</sup>

This discussion suggests that as soon as consensus about the appropriate legal methods or principles breaks down, foundational issues will become more important in deciding cases and judicial opinions will tend to be more theorized. Not only is this correlation intuitively plausible, but it seems to be borne out by the historical record. According to Professor Simpson, discussions about the appropriate rule of recognition for the common law began as soon as the homogeneity of the bench ended.

In a tightly cohesive group there will exist a wide measure of consensus upon basic ideas and values as well as upon what views are tenable. Argument and discussion will commonly produce agreement in the end, and so long as this is the case there will be little interest in how or why this consensus is achieved. . . . When however cohesion has begun to break down, and a failure to achieve consensus becomes a commoner phenomenon, interest will begin to develop in the formulation of tests as to how the correctness of legal propositions can be demonstrated.<sup>20</sup>

Simpson believes that the law of citations and stare decisis was developed only as recently as the last century. Given shared agreements, justifications of those practices were considered unnecessary. When consensus disappeared, however, the need to address the foundational issues became pressing. This result is hard to reconcile with Sunstein's position. If Sunstein were right,

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<sup>19</sup> Not that judges themselves are in love with theory. Indeed, lawyers are generally not trained as theorists because judges aren't either. With the advent of a more academic bench, however, we should expect to see more completely theorized opinions and briefs. To a large extent, this has already happened in antitrust cases, as Sunstein himself notes (p 55).

<sup>20</sup> A.W.B. Simpson, *The Common Law and Legal Theory*, in A.W.B. Simpson, ed, *Oxford Essays in Jurisprudence (Second Series)* 77, 98 (Oxford 1973).

legal reasoning should have become less theorized as consensus broke down, not more.

## V. NORMAL SCIENCE AND NORMAL LAW

The mysterious nature of legal reasoning turns out to be no mystery at all. Judges rarely theorize because it is rarely helpful to do so. Sunstein, therefore, has offered a special explanation for a phenomenon which needs no special explanation. It is not as if judges have compelling reasons to theorize which are nevertheless outweighed by even more compelling reasons not to theorize. The incomplete theorization of judicial opinions is a result of the absence of any pressing need to theorize in the first place.

The problem with Sunstein's presuppositions runs even deeper than this. The motivation for his account, one might recall, is to explain the law's limited theoretical ambitions. However, legal reasoning is not unique in this regard. Scientific reasoning, for example, is itself usually incompletely theorized.

Consider Thomas Kuhn's characterization of normal scientific practice.<sup>21</sup> According to Kuhn, before research achieves the status of "normal science," those who engage in scientific debates must completely theorize their arguments.<sup>22</sup> Given the absence of any established paradigm, researchers cannot assume that others either know of their starting points or agree with them. Laying out their assumptions is necessary to justify their particular point of view on the issue at hand. The emergence of a paradigm, however, changes all that. "When the individual scientist can take a paradigm for granted, he need no longer, in his major works, attempt to build his field anew, starting from first principles and justifying the use of each concept introduced. That can be left to the writer of textbooks."<sup>23</sup>

One of the distinguishing characteristics of normal science, therefore, is that its researchers are free to engage in incompletely theorized argumentation. Given that the paradigm is known and accepted by all, there is no need to invoke it in justifying one's position. Complete theorization is, according to Kuhn, not indicative of standard scientific practice, but is rather a sign of confusion or revolution within the research community.

With respect to theorization, therefore, normal legal practice is no different from normal scientific practice. Given the general irrelevance of foundational issues to settling controversies in

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<sup>21</sup> See Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago 2d ed 1970).

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* at 19-20.

these fields, general theories will seldom be invoked to justify competing points of view. To be sure, the reasons why foundations are generally immaterial in court differ from those that apply in the lab. In the case of normal science, the invocation of the paradigm is generally unhelpful because, given its near universal acceptance, every respectable position is consistent with it. No scientist can gain an advantage by wheeling out the basic theory in his polemics. By contrast, there may be no deep consensus about the theoretical underpinnings of the law. Nevertheless, this does not mean that most legal arguments hinge, or are perceived to hinge, on foundational issues. In fact, as we have seen, it is rare that a litigant can gain, or realizes he can gain, leverage in a legal argument by invoking an abstract philosophical theory; hence, legal opinions will also tend to be incompletely theorized.

#### CONCLUSION

Although I have disagreed with Sunstein's explanation of the law's incomplete theorization, at a more abstract level we agree. According to both of our outlooks, legal reasoning is not exclusively preoccupied with demonstrating *that* a certain legal proposition follows from a set of justified premises. It is also deeply concerned with justifying the proposition *to* specific audiences. Given the need to legitimate its actions to those affected, the law will necessarily invoke certain premises to support its conclusions and take others for granted. What the law decides to invoke will depend on which ideas and values are shared in the target community and which will be challenged.

Ultimately, I think the strength of *Legal Reasoning and Political Conflict* lies in its emphasis on this "pragmatic" aspect of adjudication. If we forget that judges are interested not only in showing that their rulings are correct but also in justifying them to those who agree in part and disagree in part, we will fail to appreciate the actual structure of legal reasoning.

Past this point, however, our "overlapping consensus" collapses. Sunstein thinks that judges refrain from justifying those beliefs which are shared for fear of invoking those which are unshared. I have argued that judges rarely need to probe past the level of consensus. When beliefs are uncontroversial, no one will think that they have to be justified. It is only when consensus breaks down that justification becomes pressing. When that happens, instead of fearing theory, judges will begin to embrace it.

