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CONCEPTIONS OF LEGAL "THEORY": A Response To Ronald Dworkin

Richard A. Posner*

The editors have kindly invited Professor Sunstein and me to comment on Ronald Dworkin's article *In Praise of Theory*.¹ The article is critical of what Dworkin calls the "Chicago School" of "anti-theorists,"² to which he has consigned both Sunstein and me despite the palpable differences between our views. I do not want to paper over those differences, but I do want to point out that Dworkin has committed the identical error in his criticisms of both of us, as well as mischaracterizing our views. That error is to announce a parochial definition of "theory," then define anyone who does not subscribe to it as an "anti-theorist." I shall explain this error and argue that it deforms Dworkin's analysis of my own conception of theory and that his own conception is inadequate as a guide for judges or others engaged in practical legal tasks.

I.

Dworkin's idea of "theory," specifically of the kind that should guide judges faced with difficult cases, requires that judges "justify legal claims by showing that principles that support those claims also offer the best justification of more general legal practice in the doctrinal area in which the case arises."³ The best (or better) justification is the one that "fits the legal practice better, and puts it in a better light."⁴ In determining fit, the judge may find himself swept up in a process that Dworkin calls "justificatory

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1. Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997).
2. Roughly two-thirds of Dworkin's article is devoted to the "Chicago School."
3. Dworkin, *supra* note 1, at 355-56.
4. *Id.* at 356.

ascent.”⁵ The judge finds himself challenged to consider how the justification that he has seized upon coheres with ever broader swatches of legal doctrine as questions are raised about its consistency with this or that legal—or moral—rule or principle. The concept of justificatory ascent is Dworkin’s acknowledgment that judges more often reason upward from particular cases and arguments than downward from an overarching principle—such as egalitarianism, or utilitarianism, or Mill’s conception of liberty—that makes the whole body of the law consistent. But he insists that through justificatory ascent a judge may be lofted to a high level of generality. So Cardozo, he says, “felt that [justificatory ascent was] necessary in *MacPherson v. Buick Motor Co.*, and he changed the character of our law.”⁶ “[L]egal reasoning presupposes a vast domain of justification, including very abstract principles of political morality,” and we must always be prepared “to reexamine some part of the structure from time to time”⁷ If judges are, as in our system, given the task of interpreting a constitution, they will have to undertake “a very considerable ‘excursion’ into political morality”⁸ or, equivalently, a “deep expedition into theory.”⁹ The judge who refuses to confront philosophical issues is an “ostrich.”¹⁰

What Dworkin claims to be describing is not one theoretical approach among many, but “theory,” so that Sunstein and I, who do not subscribe to Dworkin’s conception of how judges should decide cases, are members of “the anti-theory army,” along with “the post-modernists, the pre-structuralists, the deconstructionists, the critical legal students, the critical race scholars, and a thousand other battalions” of that army.¹¹ Dworkin says that my battalion of the antitheory army is that of the antimetaphysicians and pragmatic instrumentalists, and Sunstein’s that of the “professionalists.”¹²

The labeling of his critics and antagonists as antitheorists is not a new tactic for Dworkin. His polemic against Robert Bork accused Bork, an

5. *Id.* at 357.

6. *Id.* at 358 (citing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)). A curious example, as Cardozo’s opinion does not explain the overarching principle in light of which privity should no longer be required for products liability (the holding of the case). The opinion is notable for its ingenious (or disingenuous) manipulation of precedent rather than for frank confrontation of the issues of principle or policy that the case raised. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-27 (1949); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 107-09 (1990).

7. Dworkin, *supra* note 1, at 360.

8. *Id.*

9. *Id.* at 371.

10. *Id.* at 375.

11. *Id.* at 361.

12. *Id.*

influential although controversial constitutional theorist, of lacking “any constitutional philosophy at all. . . . [H]e believes he has no responsibility to treat the Constitution as an integrated structure of moral and political principles. . . .”¹³ Dworkin equates theory to philosophy to treating the entire Constitution, and through justificatory ascent the entire body of American law, as “an integrated structure of moral and political principles.”¹⁴ Anyone with a more modest conception of the role of constitutional interpretation is not a theorist.

This is persuasive definition with a vengeance. Far from bearing only the meaning upon which Dworkin insists, “theory” is a word with no fixed or definite meaning, at least in normative discourse. Scientists, including social scientists (or at least economists), generally understand by “theory” an abstract, logically consistent model of causal relationships, applicable to some domain of physical reality or social practice, from which hypotheses can be deduced that can be confirmed or refuted (in some versions only refuted) with objective data generated by experimental or other systematic observation. The successes of the natural sciences have induced practitioners of other disciplines to describe their own work as “theory.” Yet what should count as, say, a *moral* or a *legal* theory, or more precisely what these terms exclude, is completely unsettled. Some moral theories have the approximate form of the scientist’s hypothetico-deductive conception of theory. They set forth and defend a logical model that has implications for specific moral issues, and they use the moral intuitions of the theorist, or of the theorist’s moral community, as the data to confirm or refute the hypotheses. Some moral theorists insist that even our most deeply intuitive moral principles should, if necessary, be changed to conform to the theory. A typical *legal* theory is far more modest—a mere generalization that is claimed to subsume the leading cases in a particular field or subfield of law. More ambitious legal theories, such as Bork’s theory of free speech that Dworkin found insufficiently theoretical, use principles drawn from other fields of discourse, such as economics or political theory, as criteria for evaluating specific legal doctrines and decisions. Some degree of generality or abstraction, and an insistence on consistency, are the bedrock requirements of “theory.” Beyond this it does not seem possible to specify preconditions for what is to count as a moral or a legal theory.

13. Ronald Dworkin, *The Bork Nomination*, N.Y. REV. OF BOOKS, Aug. 13, 1987, at 3, 10, reprinted as RONALD DWORKIN, *Bork: The Senate’s Responsibility*, in FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 265, 267, 273 (1996).

14. DWORKIN, FREEDOM’S LAW, *supra* note 13, at 273.

Were this all that Dworkin meant by “theory”—an effort to achieve consistency and generality—he could not accuse Bork of lacking a constitutional theory, or Sunstein and me of being antitheorists. By “theory” Dworkin means his own, highly specific conception of legal theory. This conception is in the line of descent¹⁵ from Wechsler’s influential article on “neutral principles,”¹⁶ which in turn has affinities to the “legal process” school and to natural law, to both of which Dworkin has fairly direct links,¹⁷ and on the side of philosophy to the approach of Kant (as refined by Rawls), as contrasted with that of Aristotle. The heart of Dworkin’s conception, as earlier the conception of legal theory held by Wechsler and by Hart and Sacks, is the imposition of master themes, such as democratic legitimacy, or federalism, or relative institutional competence, or equality, on the particulars of the law. The professors propose, and the judges impose—“integrating” the Constitution, for example. That is why justificatory ascent is so important; it is the only way the judge who does not start with a master theme can end up with one.

Justificatory ascent should not be confused with induction. After the judge has reached the top, he kicks away the ladder. He accepts, by being forced to climb the ladder, that he cannot decide the case without adopting a master principle, but once it is adopted it decides the case. The top-down quality of the approach is shown by its practitioners’ lack of serious, sustained interest in legal particulars from either a doctrinal or an empirical standpoint. As illustrated by the *Philosophers’ Brief* that so strikingly fails to engage the many difficult institutional issues raised by its proposal of a constitutional right to physician-assisted suicide,¹⁸ there is little texture to

15. See David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373, 376–81 (1997) (review of Dworkin’s book *Freedom’s Law*, *supra* note 13). “In nearly every respect, Dworkin’s ‘moral reading’ [of the Constitution] was anticipated by the scholars of the late 1950s and early 1960s.” *Id.* at 376.

16. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

17. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205-299 (1995); LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 119-21 (1987); Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 ARIZ. L. REV. 413 (1987); see also Ronald A. Dworkin, “Natural Law” Revisited, 34 U. FLA. L. REV. 165 (1982). The classic of the legal process school is Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tentative ed. 1958) (published in 1994 with an introduction by William N. Eskridge, Jr., and Philip P. Frickey).

18. See Brief for Ronald Dworkin et al. as Amici Curiae, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) [hereinafter Dworkin, Brief], reprinted as Ronald Dworkin et al., *Assisted Suicide: The Philosophers’ Brief*, N.Y. REV. OF BOOKS, Mar. 27, 1997, at 41 [hereinafter Dworkin, *Assisted Suicide*]. The brief lists Dworkin as the lead counsel for the philosophers (Rawls and others, as well as Dworkin himself) who are the amici. Regarding the question whether a right to physician-assisted suicide might in practice result in involuntary deaths, the brief is content to argue

Dworkin's analysis of legal issues, just as there was little texture to Hart and Sacks', or to Wechsler's. Dworkin operates with "ideal types" (in Weber's sense) of affirmative action, pornography, and abortion, just as Hart and Sacks operated with ideal types of the court, the legislature, and the administrative agency, and Wechsler with an ideal type of apartheid, in which the harm to blacks from being prevented from associating with whites is exactly balanced by the harm to whites from being forced (if apartheid were prohibited) to associate with blacks. Dworkin's principles are different but the approach is the same, except that Dworkin evinces even less interest than Hart and Sacks or Wechsler in how a legal system actually works, in the practical capacities and political constraints of judges,¹⁹ in the text and history of particular enactments, in the difference between holding and dicta (and hence in the scope of particular precedents), in the data and theories of the social sciences that relate to the issues that arise in the legal cases that interest him, or in the effects of legal rules. Dworkin's is one possible way of "doing" law, but it is not the only way that can claim to be theoretical or theorized.

II.

Thus, Dworkin's major claim, that because Sunstein and I do not share his approach to law we are antitheorists, fails; but his specific objections to our positions have still to be considered. Professor Sunstein can fend for himself, so in the remainder of this reply I shall confine myself to Dworkin's criticisms of me. He believes that I am a relativist and

that "the case law contains no suggestion that such protocols [for example, requiring two nonattending physicians to agree] are inevitably insufficient to prevent deaths that should have been prevented." Dworkin, Brief, *supra*, at *14; Dworkin, *Assisted Suicide*, *supra*, at 45. The adequacy of *case law* to resolve such an issue is not discussed. The brief contains no references to any materials other than cases, statutes (one), and law review articles.

The reprint of the brief in the *New York Review of Books* comes with an introduction by Dworkin that cites several empirical studies, but they are not cited in the brief itself. *Assisted Suicide*, *supra*, at 41-42. Dworkin at least is a lawyer; the willingness of the other signatories of the brief, who are not lawyers, to sign a legal brief on a difficult issue of constitutional law is a striking illustration of philosophers' hubris.

19. How strange of him to say, "I agree with the critics that not *all* judges are trained in philosophy." Dworkin, *supra* note 1, at 375 (emphasis added). I have never met a *single* judge of whom it could be said with a straight face that he had been "trained in philosophy." It is true that Learned Hand had studied philosophy at Harvard, and Holmes certainly had a philosophical bent; but these were judges who had been educated in the nineteenth century. The term "trained in philosophy" would have to be given a very special meaning to be descriptive of such Dworkinian judicial heroes as Warren, Brennan, and Blackmun, though doubtless some of the law clerks who ghostwrote the opinions that Dworkin admires had philosophical training.

(inconsistently) a utilitarian. I am neither. But if I were both (if that were possible, which it is not), this would not make me an “antitheorist,” for relativism and utilitarianism are themselves theories. It would make me an anti-Dworkinian, and this can help us see in what a *special* sense Dworkin uses the words “theory” and “antitheory.”

A.

Dworkin accuses me of flirting with postmodernists who believe “that there is no objective truth about political morality,” that “all our convictions on these matters—and more fundamental issues, including, for example, whether genocide is wicked . . . —are simply creatures of . . . ‘language games.’”²⁰ He claims to find this “flirtation” in my book *Overcoming Law*. All he cites in support of this claim, however, is a discussion of pragmatism that concludes that pragmatism “is *not* epistemological or moral skepticism, or scientific or moral relativism.”²¹ Moral relativism, as he uses the term, is the idea that all moral beliefs are matters of mere “opinion,”²² rather than of right and wrong. This would mean that if someone said to me that it was okay to torture children, all that I could say in reply was that I disagreed but that every person is entitled to his own opinion. That is not my view, though I do not think that the moral wrongness of the practices that we abhor can be demonstrated by the sort of procedures that we would use to show that no human being has ever eaten an elephant at one sitting, or that when rational members of a society disagree profoundly about the morality of a particular practice, as they do in our society about abortion, their disagreement can be resolved by arguments that will prove one side’s position “true” and the other’s “false.” Such issues get resolved, sometimes by force, sometimes by experience, sometimes by displacement of interest to new problems, but rarely if ever by argument. Moral argumentation is too weak an intellectual tool to dislodge moral convictions. (Here may be where Dworkin and I crucially disagree.) Twenty-five years of inconclusive debate about the political morality of anti-abortion laws illustrate the limitations of argument in settling moral debate. This does not show that there are no moral truths, for there are unresolved scientific debates older than the abortion debate, yet undoubtedly (or so I

20. Dworkin, *supra* note 1, at 361.

21. RICHARD A. POSNER, *OVERCOMING LAW* 10 (1995) (emphasis added); *see also id.* at 36; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 77 (1990) [hereinafter POSNER, *JURISPRUDENCE*].

22. Dworkin, *supra* note 1, at 362-63.

would argue) there are scientific truths. The seeming interminability of the abortion debate—not only the lack of resolution but the lack of any progress toward a resolution (I mean an intellectual, not a political, resolution)—shows only that either the morality (or immorality) of abortion is not one of the moral truths or that we lack the tools for determining whether it is one of them.

That I do not have Dworkin's faith in the cogency of his kind of moral reasoning does not make me a relativist. Nor does my belief that most moral truths, unlike scientific truths, are local truths. They are specific to particular societies, rather than being universal. Often they are specific to particular constellations of culture-laden facts—a specificity in which Dworkin, emphatically a “big picture” man, a universalizing rationalist, has no interest. The same physical act—killing another human being, for example—may be unquestionably moral in some circumstances and unquestionably immoral in others. Abortion is abortion whether the mother's life is endangered or she just does not want to have another girl baby, but it does not follow that the morality of abortion is the same in the two cases. Making slaves of captives when the only alternative would be to kill them does not have the same moral valence as a system of chattel slavery. Infanticide has a different moral valence in a society on the edge of starvation than in one that has the material resources to support all infants.

Dworkin might argue that unless moral principles are universal, there is no ground for pronouncing a society's practice either moral or immoral, so that without universal moral principles morality really does become just a matter of opinion. (This is related, as we are about to see, to his criticism of pragmatism.) I do not agree. Often it is possible to show that a society's practice is inconsistent with its premises—the practice might be to sacrifice virgins in order to prevent drought, and it might be shown that the sacrifice had no effect on the likelihood of a drought. If this were shown, and if the society had a norm against the gratuitous slaughter of its members, and yet it continued the practice even after being forced to admit that it was inefficacious, the society would be acting immorally. If it turns out, as I believe it would on examination, that all societies have a norm against the gratuitous slaughter of their members, this would be a universal moral norm—an absolute, if one likes the term.

The position that I have sketched is not moral relativism; at least it is not the position that Dworkin attributes to me, that moral beliefs are entirely a matter of opinion. Where we surely differ is on whether it is possible to derive answers to concrete moral issues such as the morality of abortion or infanticide from moral norms sufficiently abstract to claim universal or

absolute validity—though I do not deny the *political* value of appealing to universal moral values (the “brotherhood of man,” for example) as a bulwark against the kind of aggressive ethnocentrism epitomized by Carl Schmitt’s slogan “all right is the right of a particular *Volk*.”²³ I would add that we distinguish between cultures whose presuppositions are so foreign to our own that they seem to belong to a different moral community and efforts of particular societies within our own Western culture to secede from the moral community, as Germany tried to do in the Nazi era. Even if moral principles are local, the “localities” within which they bind may be extensive.

B.

Dworkin’s more sustained criticism is of the pragmatic approach to law, which he considers a rival to “theory,” that is, to Dworkin’s conception of theory. He begins by claiming for his own conception what I had described as the pragmatic virtues. He challenges the statement in *Overcoming Law* that “the adjectives that . . . characterize the pragmatic outlook—practical, instrumental, forward-looking, activist, empirical, skeptical, antidogmatic, experimental—are not the ones that leap to mind when one considers [Dworkin’s] work.”²⁴ He discusses two of these adjectives—“forward-looking” and “experimental”—embracing the first and implying that the others (all but “experimental”) describe his work as aptly as that of any pragmatist.

This is a surprise. Dworkin an “activist”? His critics might describe him as one, but his own view is that judges who *refuse* to do law in the grand Dworkinian manner are the lawless ones, the activists.²⁵ Empirical? That is not the impression conveyed by the *Philosophers’ Brief* or the discussions in Dworkin’s books and articles of abortion, affirmative action, civil disobedience, defamation, pornography,²⁶ and the environment. Practical? Instrumental? Skeptical? Antidogmatic? Dworkin is a high

23. Quoted without an indication of its source in Mark Lilla, *The Enemy of Liberalism*, N.Y. REV. OF BOOKS, May 15, 1997, at 38.

24. POSNER, *OVERCOMING LAW*, *supra* note 21, at 11. Dworkin modestly omits the next sentence: “Not that his work does not have many virtues, but they are not those picked out by my list.” *Id.* I was not trying to be polite. I consider Dworkin’s work to have great merit, *see, e.g.*, RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* vii, 10–20, 36–37 (1996), and his position as our leading living philosopher of law to be deserved.

25. *See* POSNER, *JURISPRUDENCE*, *supra* note 21, at 22–23.

26. He has, however, glanced at the empirical question of whether pornography incites violence against women. *See* DWORKIN, *FREEDOM’S LAW*, *supra* note 13, at 375 nn.20–21, 378 n.4.

rationalist with (as it seems to me²⁷) a weak sense of fact; not one of these terms fits him.

1. About “forward-looking,” Dworkin says that if it means “consequential,” then his approach *is* forward-looking because “[i]t aims at a structure of law and community that is egalitarian”;²⁸ only if “forward-looking” is equated to utilitarian is he not forward-looking. But the term is not used in *Overcoming Law* to denote either consequentialism or utilitarianism. It is used to contrast an approach, the pragmatic, that aspires to make things better for the present and the future and cares about the past only insofar as the past provides guidance to the present and the future, with an approach that values the past for its own sake—as in “the past must be allowed some special power of its own in court, contrary to the pragmatist’s claim that it must not.”²⁹ This is neither consequential nor forward-looking.

I do not mean that Dworkin is unconcerned with consequences. But he is less concerned with them than I am. Although he denies that pornography contributes to crime or to discrimination against women, he would give much less weight than I would to any bad consequences of pornography even if they could be proved beyond a reasonable doubt, because he attaches great importance to the nonconsequential principle that people ought to be allowed to read what they please, which to me is simply one value to be weighed against others. For him, the fact that government “insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions”³⁰ is a far more important justification for free speech (including the right to read pornography) than any instrumental justification that might be offered.

2. With regard to my suggestion that he is not “experimental,” Dworkin says that I must mean that he rejects the idea that “[l]awyers and judges should try different solutions to the problems they face to see which work, without regard to which are recommended or endorsed by some grand theory.”³¹ This is restated a bit later as the judge is “not to worry about what is really true but just to see what works.”³² This is said to be useless advice if the question the judge has to decide is whether to hold drug companies in DES cases liable for the harm done by their defective product

27. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 376–77 (1981); see also POSNER, *OVERCOMING LAW*, *supra* note 21, at 187–88.

28. Dworkin, *supra* note 1, at 364.

29. RONALD DWORKIN, *LAW’S EMPIRE* 167 (1986).

30. DWORKIN, *Why Must Speech be Free?*, *FREEDOM’S LAW*, *supra* note 13, at 200.

31. Dworkin, *supra* note 1, at 366.

32. *Id.*

even if it cannot be determined which drug company's DES pills were taken by which plaintiff's mother;³³ or if the question for the judge is whether abortion should be forbidden. The advice to experiment is useless in these cases, Dworkin argues, because judges would have no standard for what counts as "working," and thus for evaluating the results of the experiment, unless they thought through the underlying issues, such as collective versus individual responsibility for harms, or the human status of the fetus.

He is right that judges need rules or standards to guide them; but I had not denied this in commending experimentalism. I had said that the pragmatist "is drawn to the *experimental* scientist, whom [the pragmatist] urges us to emulate by asking, whenever a disagreement arises: What practical, palpable, observable difference does it make to us?"³⁴ Scientific experimentation does not proceed in a theoretical vacuum. The quoted passage is advising judges and other legal thinkers not to become entangled in disputes that have no practical significance, disputes such as whether judges "make" or "find" law. It is not recommending the creation of rules of law by trial and error. To attempt to decide cases without a sense of what the purpose of the applicable law is—and so in the DES cases without asking whether the deterrent and compensatory objectives of tort law would be served by collective responsibility in the circumstances of irremediable uncertainty presented by those cases—would be unpragmatic.

Yet the example of abortion shows that even the trial and error version of experimentalism has a legitimate place in the legal process—so here is another place where there is more than a semantic disagreement between Dworkin and me. A telling criticism of *Roe v. Wade* is that the Supreme Court prematurely nationalized the issue of abortion rights. Had the Court either ducked the issue completely or based the decision on a narrow ground (such as that the Texas law at issue did not contain enough exceptions), the states would have been free to experiment with different approaches to the abortion question and eventually an answer might have emerged that would have commended itself to the Court, and the nation, as both principled and practical. It is to such a possibility, with its undoubted element of trial and error, that Dworkin the antipragmatist is blind; and the blindness impoverishes his theory.

33. As in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), holding that in such a case the court should apportion liability among the manufacturers in proportion to their market shares when the drug was sold, that is, in accordance with the probability that a given manufacturer's pills were the ones taken by the plaintiff's mother.

34. POSNER, *OVERCOMING LAW*, *supra* note 21, at 7.

III.

I said earlier that Dworkin's was one way of doing law. But it is not the best way. It is too abstract for a case-based legal system. It might do better in a regime of "abstract review" such as one finds in the constitutional courts of central Europe and occasionally in U.S. state supreme courts. Courts do abstract review when they determine the constitutionality of statutes before the statutes are applied—before there is a case in other words. The strength of the case system is its sensitivity to the particulars of a specific legal dispute. Attention to them at once educates the judges and deflects them from overgeneralization. The weakness of the case system is that the education is incomplete because the "facts" revealed by the record of a lawsuit are often inaccurate and rarely systematic. But the cure is not high theory. The theory to which Dworkinians ascend on their justificatory ladders is too abstract to decide cases. What judges *mainly* need is a better understanding of the practical consequences of their decisions. I also agree with Sunstein that a lot of theoretical disagreement in law can be elided by a search for low-lying common ground.³⁵ I add only that common ground is easier to find if the judges know the practical stakes of their decision. Most Americans, including most American judges, are pragmatists rather than ideologues, but to come up with pragmatic solutions they have to understand the empirical dimensions of the legal disputes that come before them for resolution. The well-known differences between male and female judges in their assessment of cases of sexual harassment are not due to theoretical differences. These judges are neither male chauvinists nor radical feminists. Their differences stem from different perceptions of the incidence and the psychological and other effects of such harassment.

It also helps in doing law to know a great deal of law rather than just a handful of exemplary cases. Law is like a language. It is as difficult to write well about law at the operating level without an intimate knowledge of it as it is to write well about China without knowing Chinese. It is no criticism of our most distinguished philosopher of law (save as he wishes to be more) that his legal palette is meager. Rarely does Dworkin venture outside the highly politicized domain of constitutional rights, and when he does the results are unimpressive. I mentioned his peculiar discussion of the *MacPherson* decision.³⁶ His article returns again and again to the DES cases, finally asking challengingly, "Should the judge try to decide whether

35. See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-61 (1996) ("Incompletely Theorized Agreements"); see also his reply to Dworkin in this issue, Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389 (1997).

36. See *supra* note 6.

the drug manufacturers are jointly liable without asking whether it is fair, according to standards embedded in our tradition, to impose liability in the absence of any causal connection?"³⁷ Any genuine legal insider would consider this a strange question, and not only because the issue was not joint liability in the technical legal sense of the term.³⁸ We regularly impose *criminal* liability—for example, for failed attempts that cause no harm, or conspiracies nipped in the bud, or schemes to defraud that do not defraud anybody, or "victimless" crimes that cannot be shown to cause any harm, or drunk driving where no accident results—without worrying about the absence of a causal connection between the defendant's conduct and the harm that the law is trying to prevent. In the law of torts, liability is standardly imposed on negligent persons whose acts are merely sufficient and not necessary conditions of harm and so do not fit the usual definitions of cause; is usually imposed on employers of the persons who cause the harm of which the plaintiff is complaining (under the doctrine of respondeat superior); is sometimes imposed on persons who merely fail to avert a harm (as in "crashworthy" products liability cases and cases of attempted but failed rescue); is imposed on persons who conspire with injurers; is imposed on the estates, that is, the heirs, of injurers; and is sometimes imposed (as in "loss of a chance" cases) on an injurer despite the victim's inability to prove causation by a preponderance of the evidence. The question whether it is "fair" to impose liability on a manufacturer of DES who cannot be shown to be the actual "cause" of the plaintiff's injury is thus naive. It is also unhelpful. It will not move us an inch closer to the intelligent evaluation of these cases.

I do not want to be thought a philistine judge, just as I do not want to be thought a postmodernist antitheorist. Apart from my obvious partiality to economic theory, I do not deny that philosophy can be helpful in clarifying certain legal issues, such as intent and, yes, causation.³⁹ But to think that it can be helpful by telling us to reflect on the fairness of imposing liability without proof of causation is to reveal an ignorance of the relevant terrain and the thinness—the essentially rhetorical character—of Dworkin's invocation of "theory."

37. Dworkin, *supra* note 1, at 371.

38. Joint liability would mean that all the drug companies were fully liable for all DES injuries. The issue resolved in favor of the plaintiffs in the *Sindell* case was whether the liability of each company should be proportioned to its market share. *Sindell*, 607 P.2d at 936-37.

39. See POSNER, JURISPRUDENCE, *supra* note 21, at 168-84 (intent), 324-25 (causation).