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Linking the Visions

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I'm a political theorist. My specialty is Anglo-American theory, from the 16th century to today. (Or, if you prefer, I'm a dilettante with poor foreign language skills.) I've had ongoing interests in liberalism and its critics, in democratic theory, in pragmatism, and for many years now in constitutionalism and legal theory. (I cut my teeth in graduate school trying to persuade Ronald Dworkin that his objections to H.L.A. Hart depended on misconstruing Hart's position. I didn't succeed, but I still think I'm right.)

At the Law School, I've been teaching First Amendment. Does a grasp of liberal democratic theory help me — and my students — get a grip on free speech, free exercise, and establishment? I confess I'm skeptical. True, the courts sometimes nod to highly stylized accounts of censorship of the press in early modern Europe, or religious oppression in England and the settling of the colonies. It would be easy enough to make fun of this lawyer's office history, threadbare from a scholarly point of view. But I'm not sure what the point would be, unless one had a decidedly eccentric account of originalism.

Surely the theory gives us no traction on the wonderfully detailed hard questions the law routinely has to resolve. The theory is too abstract, fluffy, even flaccid. The Court has had to decide, for instance, whether the University of Virginia may withhold funding from a religious student publication while funding nonreligious student publications. Or whether the University of Wisconsin may compel its students to contribute to a student activities fund that in turn funds student groups to which some students have pronounced political objections. I know of nothing in Mill, in Rawls, or anywhere in political theory that really helps out here. And you don't need any heavy artillery from theory to understand the basic contours of the problems, either. Not that “doctrine” and “theory” are antithetical categories or enterprises. They're mutually supportive, I think. But the theory required has to be closer to the ground than the stuff political theorists routinely traffic in, worked up out of the cases, in a way appealing to my pragmatist sensibilities.

Political theory has lots more to say, though, about ongoing debates about the law. Not because the traditional canon is wiser or more incisive about the very issues that today's law professors and politicians wrestle with, though now and again that's true. But because it gives a richer context for grasping what's at stake in the debates. In a seminar on constitutional interpretation, I rounded up the usual suspects: Bickel, Ely, Dworkin, Sunstein, Posner, Amar, and so on. I didn't subject my students to potted lectures on Hobbes, Bentham, and Austin, or the American constitutional convention, but I tried to show what these disputes are finally about, what deeper problems are structuring the terrain in ways these recent authors grasp only tenuously. In a seminar on liberalism and its critics, I do work the students through some canonical texts by Locke, Montesquieu, and Mill. Turning then to recent legal writing, they're in a position themselves to assess my routine suspicion that liberal-bashing on the left and right depends heavily on accounts of liberalism one might charitably call caricatures.

I've begun working on torts, which I hope to be ready to teach in 2002. My immediate instinct is that nothing in political theory about responsibility and liability is going to supply any traction on concrete legal dilemmas. But the more abstract debate about whether (or to what extent) tort law does (or should) promote economic efficiency, or whether it's up to something else, immediately resonates with centuries-old debates about markets and commodification, about utilitarianism and rights theory, and the like. So I hope my background in theory will give me a useful context, or a perch from which to survey and illuminate the legal terrain.
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