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COMMENT

The Brilliant, the Curious, and the Wrong

Pierre Schlag*

It is no secret that many legal academics are thoroughly fed up with fancy scholarship. Candidly, they could not care less about the effect of Gadamer on the parol evidence rule or about the mirror games that Wittgenstein can play with the Rule Against Perpetuities. It is also no secret that there is another group of legal academics who turn a livid shade of red at the very mention of mainstream legal scholarship. These people would do anything to avoid reading yet another unbelievably stiff article advocating sensitive adjustment of competing considerations and policies in order to resolve . . . (the narrow problem of your choice).

Fancy scholarship strives as hard as possible to include as many obscure, impenetrable, and ponderous thinkers per footnote as possible.¹ The best luminaries, of course, are the ones who have said as little as possible about contemporary law: Tolstoy, Jung, and Schopenhauer seem like good, as yet largely unclaimed, candidates. Fancy scholarship is characterized by the unverifiable, but no doubt masterful, deployment of the complex and arcane vocabulary of some foreign discipline like psychology or rhetoric or something altogether different. For some reason, when that foreign terminology is commandeered and applied to law, all our legal artifacts and problems mysteriously seem to

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1. In the past two decades, fancy law review scholarship has replicated the intellectual history of the past three centuries. Against an unholy combination of Locke, Bentham, and Hobbes that was well ensconced in the scholarship of the fifties, the right-and-principles people pulled out Kant. Of course, if Kant can be put to good use, it takes no great leap of mind to recognize that Marx and the Frankfurt school can be pressed into service as well. From there things began to accelerate rapidly. Someone retaliates with Wittgenstein. Others respond with French structuralists. From there it is a small step to Derrida. Too far for some: They answer back with Dilthey and Gadamer. But for every Gadamer, there is a Habermas. And every Habermas has his Foucault. Foucault is dead. We are running out of Europeans. Perhaps the AALS should meet in the Latin Quarter next year?

fall into place—leaving us in complete wonder as to why no one has thought of doing this before.

Mainstream scholarship can be as easily caricatured. The excuse for this sort of scholarship is typically some purportedly new development in the law. Characteristically, this scholarship accepts virtually everything the courts write at their word. The exception, of course, is what the courts say about the unbelievably narrow point that happens to be the subject of the article. This genre pictures the world as frozen except for one part—the part which is going to be submitted to the searing scientific analysis of the author. Another typical feature of this literature is that, although it invariably begins with some purportedly nontrivial conflict among rules, policies, and principles, attended with measured and sober arguments on both sides, it mysteriously concludes with a neatly packaged bit of legal wisdom—sensible, complete, and apparently unassailable. The conclusion is a work of art: Not only is it just, but humane as well, and close to Pareto optimal. Virtually everyone is made better off—including the author, who is no doubt awarded tenure for this masterful display of essential legal skills. All of this wonderfulness, of course, was made possible by footnotes four and five. Footnote four contains all the articles that have previously examined (and likely exhausted) the subject, but which, for the very good reasons stated in footnote four, are inadequate or distinguishable or both. Footnote five contains all the disclaimers suggesting that everything which matters to human beings (other than lawyers) cannot be considered in the article because it is, of course, beyond the purview of this article, or it is too controversial, or this article is a first approximation, or

I think this sets the scene. (A more detailed description can be found in the Appendix.) I have been relatively neutral: I have tried to be as unfair and unkind as possible to both sides while still maintaining a high fidelity to the type of scholarship described.² Enter now Dan Farber and his *Case Against Brilliance*, a provocative article that attacks brilliance in legal scholarship.³ Now, in truth, I don't think Farber's article belongs on this scene. In fact no one's piece belongs on such a deeply caricatured stage. The problem is that, want it or not, the caricatures are fast converging with the conventional norms that govern the writing and the interpretation of legal scholarship. This, of course, yields some unhappy implications, not only for what one writes, but for how one is interpreted as well. In Farber's case, the risk is that, while

2. This is an approach borrowed from Dworkin—except that it stands him on his head. Dworkin insists that interpretation of law, literature, and art “seeks to make of the material being interpreted the best it can be.” Dworkin, *Law's Ambition for Itself*, 71 VA. L. REV. 173, 177 (1985); see also R. DWORKIN, A MATTER OF PRINCIPLE 146-66 (1985). My thought is that one can learn much from developing the least attractive interpretation that best explains the data. This is especially true if the least attractive interpretation does a better job explaining the data than the most attractive interpretation.

3. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

he aims his attacks at brilliance, his piece could easily be interpreted as a defense of the mainstream scholarship described above. Likewise, by giving voice to resentment against fancy scholarship, Farber's arguments against brilliance may well carry more force (and sweep) than they otherwise would. Neither of these possibilities appeals to me, and, therefore, I want to focus very closely on what Farber does and does not say.

In his article, Farber uses a few spare distinctions and bleeds them for all they are worth. He distinguishes brilliance from pedestrianism in scholarship; and he distinguishes the fields of economics and law from all the others. His point is that brilliance may be a virtue in other fields, but in law or economics it is a sure sign of failure.

The structure of Farber's argument is simple and provocative. It goes something like this: A brilliant theory, by definition, is one that can only be conceived by a small number of people. In law or economics, explanatory or regulative theories must or simply do (Farber is unclear here) emphasize the rational aspects of human behavior.⁴ It is thus unlikely that a brilliant theory in law or economics can be correct, because brilliance is a sort of rationality which most people do not have.

Farber gives several examples of brilliant ideas in legal or economic scholarship and proceeds to show how their very brilliance renders them invalid. First on his list is the Coase theorem, which suggests that in the absence of transaction costs the choice of a legal rule will have no impact on the allocation of resources.⁵ This theorem rests on the insight that where it is costless for the parties to negotiate each party must consider as part of the cost of its activity the receipts that it could obtain by demanding payments from the victims of the activity in return for curtailing production.

Farber suggests that the theorem fails precisely because we do not observe people going around paying bribes to others to stop offensive activities. (When was the last time you paid your neighbor to turn down the stereo?) Coase's theorem is thus startling (i.e., brilliant). And because it is brilliant, it is unlikely to occur to most people, who, if hard truths be told, are not brilliant. In turn, if the idea does not occur to them, it's a cinch that it won't be put into practice.

Farber uses the same argument to attack the "brilliant" constitutional theories of Ronald Dworkin and John Hart Ely.⁶ The theories of

4. Farber's lack of clarity on this point is troublesome. That the received legal and economic theories emphasize the rational aspect of man seems descriptively accurate. That valid or edifying legal theories of a normative, descriptive, or regulative order must necessarily emphasize the rational side is by no means self-evident.

5. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

6. Farber attacks Ely's representation-reinforcing theory of judicial review and Dworkin's view that the open-ended clauses of the Constitution can best be interpreted as based on concepts rather than particular conceptions of equality, freedom, and justice. Farber, *supra*

Dworkin and Ely are ingenious, suggests Farber—so ingenious, in fact, that they are likely to occur only to brilliant people, not to the common run of mortals. And that is a problem, argues Farber, for the consent of the governed is the bedrock of law and one cannot consent to what one does not know or understand.

Farber's argument, of course, does not apply to brilliant insights about the nonrational side of man (say, for instance, the Freudian unconscious). Obviously, no one would demand that the Freudian unconscious know its own brilliant theoretical configuration in order to function. But for Farber, this concession to psychology and the other "soft" social sciences has no bearing on law or economics. Indeed, for Farber, the latter are distinct in that they are necessarily committed to an account of human behavior that accords a central role to the rational side of human beings.⁷ And when we talk about this rational side of life, Farber insists that our insights and theories be accessible to the common run of mortals. Curious. Almost brilliant. And likely wrong.

One problem with Farber's argument, of course, is that it seems to eliminate by fiat a major point of contention in legal theory: Namely, to what extent and in what manner must a legal theory account for the rationality of those it is attempting to interpret or explain (the relevant actors)? If one pressed hard enough on Farber's demand that legal theory conform to the rationality of those it seeks to explain or interpret, the implications would be serious. I suppose, for instance, that any theoretical account of judicial decisions which accorded less than studied respect for the type of rational thought actually deployed by judges in deciding cases would have to be junked. Accordingly, many of the contributions of legal realism, law and economics, CLS, feminist jurisprudence, law and society, and grand theory would have to be dismissed from the intellectual panorama of the legal academic. It is difficult to see what sort of theoretical enterprise could survive Farber's demands other than some refurbished version of the old formalist approach which (like the judicial decision) attempts to explain legal doctrine with more legal doctrine (and, of course, vice versa).⁸ The point is that the extent to which legal theory should maintain fidelity to the rationality of those it seeks to explain or interpret is not a criterion extrinsic to theory generally, but is rather itself the product of a particular theory—in this case, Farber's.

Farber demands not merely that legal theory be rational, but that its

note 3, at 924-26 (citing R. DWORIN, *TAKING RIGHTS SERIOUSLY* 134-36, 226 (1977); J.H. ELY, *DEMOCRACY AND DISTRUST* 22-30 (1980)).

7. It is a bit difficult to discern from Farber's article precisely what role a legal or economic theory must accord to the rationality of the relevant actors—those whose behavior the theory seeks to explain or interpret. See Farber, *supra* note 3, at 922-23, 929 n.53. At least this much is clear, however: The theory cannot advance a type of rationality that is beyond the capacity of those whom it is trying to explain or interpret.

8. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809-21 (1935) (attacking legal formalism as circular and incoherent).

rationality be of the same kind or degree as (certainly, no more brilliant than) the rationality of the people or texts sought to be explained or interpreted. This is a curious requirement. It is difficult to see how a theory that satisfied this criterion would be theory at all. Indeed, our sense that a theory offers an interpretation or an explanation, not merely a recapitulation of what has already transpired, depends upon a critical distancing between the theory and the conventional practice of its subject matter.⁹ (No alienation, no theory.) Perhaps, then, Farber's attacks are not really aimed at brilliance, but rather at theory? There is some support for this interpretation when he says:

Perhaps the current bias in favor of brilliant, 'paradigm shifting' work should be abandoned. The more pedestrian 'normal science' may be the worthier endeavor.

There is a tendency today for high-flying theorists to scoff at those whose work stays closer to the ground. Icarus, too, was undoubtedly scornful of pedestrianism.¹⁰

But why would Farber want to attack theory? One answer is that he has a theory of his own: one which is often held by those who are skeptical of theory. The theory-skeptic in law, as elsewhere, often ascribes an overly narrow role to theory and correspondingly places overly stringent demands on the theory. But the jurisdiction of theory is hardly narrow. Indeed, theory can aim to:

explain
 interpret/illuminate/edify
 organize/taxonomize/order/ground
 control/restrain/direct/empower/subvert
 justify/redeem/rationalize/legitimate
 identify/name/clarify/translate
 evaluate/criticize
 and so on.¹¹

To a large extent, we tend to judge the value of theory by what might

9. The virtue of brilliance is that it achieves at once a great distance from the conventional understanding and yet returns to shed a stronger light on the subject matter. By this standard, the brilliance/pedestrianism distinction cuts across the mainstream/fancy scholarship distinction.

10. Farber, *supra* note 3, at 929.

11. Perhaps it is helpful to think of theory in terms of its relation to practice. From this perspective, it is vexing how many verbs one can credibly use to fill the gap in the following sentence:

"Theory _____ practice."

Some of the more common ones in legal scholarship include:

controls
 informs
 guides
 is
 determines
 reflects.

be called "aesthetic" criteria:¹²

representational accuracy
 consensual acceptability
 coherence
 elegance
 sweep
 determinacy
 predictability
 realizability
 and so on.

Obviously, theory can be used for other purposes, and it can be judged on other grounds. The important thing to note is that not every type of theory can usefully be judged on just any aesthetic criterion. Lack of predictability, for instance, is not necessarily an objection to a theory aimed at interpretation.¹³ Likewise, indeterminacy is not necessarily a damning objection to all normative legal theories.¹⁴

But Farber does think that brilliance is a general objection to legal or economic theory. This supposition stems from his view that, in order to be valid, a theory must be representationally accurate in accounting for the rationality of those to be interpreted or explained: The theories must not contain intellectual moves that cannot be performed by the those sought to be explained or interpreted.¹⁵ Indeed, Farber's arguments against Coase, Dworkin, and Ely are all premised on the observation that it is *not possible* for the relevant actors to *perform* the intellectual moves described in the theories. For Farber, the Coase theorem fails because, as a matter of historical actuality, most people are unlikely to think of acting pursuant to the theorem. Likewise, the theories of Dworkin and Ely flounder on the vexing historical fact that few people have the intellectual equipment necessary for actual consent to their theories.

But, contrary to Farber's intimations, the theories of Coase, Dworkin, and Ely do not depend upon the presence or absence of such historical facts. Quite the contrary. Coase, for instance, did not think that

12. Of course, political and moral criteria are applied to assess theory as well. But while these criteria may play a dominant role in deciding what any one of us thinks of a theory, the scholarly struggle among competing theories takes place largely on the aesthetic turf.

13. If it is, someone should alert the American Psychiatric Association as soon as possible.

14. If it is, then

15. I think this is what Farber means when he states: "A startling economic theory . . . requires that they [the relevant actors] behave as if they knew the theory was true, even though they do not. Thus, the fact that an economic theory is startling makes it implausible." Farber, *supra* note 3, at 923 n.32. I have difficulty understanding why Farber's second sentence follows absent a claim that a theory is only valid if the relevant actors can act *pursuant to* (as distinct from *in accordance with*) the theory. See note 17 *infra*. And if that's the claim, it is difficult to see why the theorist could not answer Farber by saying either "I am not doing that kind of theory—why should I have to?" or "You're right, there is something intriguing here—but all that shows is that my theory doesn't account for everything."

his transaction cost-free world described actual behavior in any significant sense.¹⁶ Rather, his supposition of zero transaction costs was designed to focus attention on the importance of transaction costs in affecting resource allocation and on the design of rules of law. Likewise, neither Dworkin nor Ely made any attempt to suggest that their theories were rooted in the thoughts of the founding fathers or anchored in the minds of judges.¹⁷ Rather, the theories serve to illuminate and justify certain patterns that have emerged in the interpretation of the Constitution as a whole. Farber's arguments thus depend upon historical actualities that the targeted theories of Coase, Dworkin, and Ely do not and need not dispute. None of these theories claims or needs to claim that it is "right" in the way Farber demands.¹⁸

Curiously, Farber's commitments to representational accuracy skew his own theoretical commitments. When he criticizes Dworkin and Ely on the grounds that few of us are smart enough to consent to such brilliance, he seems to require an actual historical consent as the test of legitimacy. Indeed, he writes:

It is hard to see how the vast majority of the population can be presumed to have agreed to something that they could not conceive of. . . . How can someone have consented to a position that is so novel and clever that only one person on earth has ever thought of it?¹⁹

16. "The argument has proceeded up to this point on the assumption . . . that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption." Coase, *supra* note 5, at 15.

[W]hile consideration of what would happen in a world of zero transaction costs can give us valuable insights, these insights are, in my view, without value except as steps on the way to the analysis of the real world of positive transaction costs. We do not do well to devote ourselves to a detailed study of the world of zero transaction costs, like augurs divining the future by the minute inspection of the entrails of a goose. Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 J.L. & ECON. 183, 187 (1981).

17. Farber notes that it is unlikely that John Bingham, the primary drafter of the fourteenth amendment, could conceive of either Dworkin's or Ely's theory. Farber, *supra* note 3, at 925-26 & n.44. Putting aside the broader question of whether the intent of a framer has any relevance to the theories advanced by Dworkin or Ely, there is a more serious problem with Farber's argument: It is totally beside the point whether John Bingham could think *with* or *pursuant* to those theories. Suppose, as Farber suggests, that Bingham could not. Such a supposition hardly means that he couldn't think *in accordance* with those theories. Many lawyers no doubt have never heard of (or even explicitly formulated) anything like Dworkin's concept/conception distinction. See R. DWORKIN, *supra* note 6, at 134-36. Likewise, many lay people probably have never heard the phrase "level of abstraction." And in both cases, there may even be reason to doubt that they could formulate such ideas. But none of these observations imply that lawyers or the laity do not think in accordance with these ideas.

We don't need anyone's theory to think. But that does not mean that we are not thinking within a theory.

18. Another curious aspect of Farber's arguments is the notion that, because brilliant theories are likely wrong, theoretical work should be abandoned in favor of more pedestrian normal science. Even if Farber's premise about the invalidity of theory were granted, it is not clear why he thinks "invalidity" is a killer argument here—or why it counsels abandonment of the theoretical enterprise. Once one recognizes that theory can have a multiplicity of aims, "invalidity" in the sense used by Farber will often be, not an objection to a theory, but a necessary requirement.

19. Farber, *supra* note 3, at 925.

I suppose these things are hard to imagine if the sort of consent required for the legitimacy of law must be a plausible historical event. But such a grudgingly narrow conception of consent is so stringent that one may be left with the vexing conclusion that no law is legitimate: Probably few lay people are capable of conceiving the meaning of the Constitution in the conventional (i.e., nonbrilliant) way that even our most unexceptional Supreme Court Justices have interpreted the document. That is not because lay people are not clever enough, but rather because they are not lawyers.

Even if most of Farber's argument is at best curious, and at worst wrong, there is one part that nonetheless remains near brilliant: It is the notion that brilliance in law stands in special need of containment and criticism. Few people in legal academia would have thought to make such a direct attack on brilliance. For one thing, it is not as if we have an overabundance of the stuff to begin with. For another, our professional conventions are quite sufficient to prevent us from doing anything so crazy as attempting brilliance. They are not called conventions lightly. Still, there is some solace to be found in the thought that, at least one person, Farber,²⁰ seems to think that the conventions of legal scholarship are sufficiently embattled that they are in need of some intelligent defense—and not by mere conventional means nor even, as Farber states, with a “first-order theory about economics or law, but rather [with] a meta-theory about scholarship in those areas.”²¹ When convention needs a meta-theoretical defense, I suppose there is some cause for celebration. But not too much: The struggle against convention often seems to lapse into a struggle among conventions. And the struggle between the conventions of mainstream and the conventions of fancy scholarship will likely continue—at least, in the Appendix.

20. Another is Stanley Fish, who in his inimitable style deploys some fancy rhetorical strategies to rise to the defense of institutional convention. Fish, *Anti-Professionalism*, 7 *CARDOZO L. REV.* 645 (1986); see also Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 *U. FLA. L. REV.* 209 (1983).

21. Farber, *supra* note 3, at 930 n.56.

APPENDIX

I. WHY DO THE MAINSTREAM SCHOLARS RAGE?

The economic interpretation. In the struggle for status, fame, and glory, the fancy scholars with their foreign imports are taking over the most highly prized markets: the elite law reviews. This dumping of foreign extralegal luminaries results in a devaluation of the capital assets of mainstream scholars, and of the sort of legal skills in which they have invested.

The political interpretation. What is at stake here is a fight for the meaning and the value of law. The fancy scholars, with their extradisciplinary luminaries, necessarily devalue the law; they make it appear derivative, secondary. Moreover, their approach explodes the accepted and possible limits on what can be called law. Little good can come of this devaluation and entropy.

The sociological interpretation. It is no secret that in legal scholarship the fancy versus mainstream distinction tracks fairly well a distinction between elite and pedestrian law schools. The scholars at pedestrian law schools are quite simply fed up with persons from elite institutions dictating what must be read over the summer—especially since the required reading list seems to change annually. Besides, the main reason for this rapid turnover is that the conventions of the elite law schools require the participants to produce ever more novel treatments of the same old problems. Given these constraints, it is no wonder that fancy scholarship becomes increasingly bizarre.

The psychological interpretation. The fancy scholarship is immensely destabilizing. Neither its substance nor its form seems to stay put for very long. This sort of free play is quite threatening.

The epistemological interpretation. Fancy scholarship is three times removed from everyday realities. Fancy scholarship is what happens when an entire generation is brought up reading Marx while watching Star Trek. The epistemological gyrations of fancy scholarship are simply too complex to allow any understanding of law, the world, or fancy scholarship itself. Given its epistemological structure, the fancy scholarship is ineffectual on all counts.

The moral interpretation. Much of fancy scholarship is steeped in nihilism. It promotes nihilism in the following ways: First, the world it presents is far too complex and too perverse for any reader to emerge from it believing that he or she can think or do anything good or right; second, much of the fancy scholarship shows if not a moral nihilism, at least a legal nihilism, in that it is bereft of any useful guides as to what judges or legislators or any other legal actors should do.

The stylistic interpretation. Fancy scholarship is quite simply indigestible: It displays an overabundance of jargon and drones on in incom-

prehensible dialects for far too many pages. It is exceedingly abstract and, on the whole, impenetrable.

II. WHY ARE THE FANCY SCHOLARS LIVID?

The economic interpretation. In the struggle for status, fame, and glory, mainstream scholarship is protected by barriers to entry: Mainstream scholarship always has an edge because its function, purpose, and utility are assumed. Fancy scholarship, by contrast, must show not only that it plays the game well, but, in addition, that the game should be played by different rules—all in one work.

The political interpretation. What is at stake here is a fight for the meaning and the value of law. Mainstream scholarship, with its incessant insistence on narrow topics and solutions, continuously reinforces conventional legal thought, thereby insulating law from its social origins and its political implications. The result is total effacement of any critical inquiry into the conventional development of law, and promotion of the view that law as it is currently practiced by judges and lawyers is an unqualified human good.

The sociological interpretation. In scholarship, the fancy versus mainstream scholarship debate tracks fairly well with age or generation differences. The prevalence of mainstream scholarship stems from the exercise of power by senior faculty over the tenure and promotion process. Senior faculty require this mainstream scholarship because it is difficult to judge the value of anything else and because these mainstream exercises validate the sort of scholarship that the senior faculty itself produces.

The psychological interpretation. Mainstream scholarship presents a comfortable, pat picture of the world. It thus plays to a large number of academics who have insatiable control needs and who therefore seek to promote the certain and the familiar.

The epistemological interpretation. Mainstream scholarship is so simple-minded in its view of the world as to be totally divorced from any reality worth talking about. It is doubtful whether this sort of work is scholarship at all, or whether it is actually an exercise in brief writing minus, of course, a court date and a client. This genre of scholarship assumes so much as given (e.g., the issue, the context, and the proper mode of reasoning), that its conclusions are of no value except perhaps to some future archaeology. As for its purported effectiveness in guiding the development of the law, it is a cinch that *Gilbert's* and *Emmanuel's* have had more impact.

The moral interpretation. Much of mainstream scholarship is steeped in nihilism. It promotes nihilism in the following ways: First, the absence of a critical moment in this type of scholarship deprives it of any claim to moral authority; second, its indiscriminate embrace of conven-

tional modes of legal analysis induces a passive acquiescence in the view that lawyering is essentially a noble enterprise.

The stylistic interpretation. Mainstream scholarship is boring. The structure of this genre is painfully predictable. First, there is the problem. Then there is the replay of how the cases led us up to the problem (you can't possibly talk about the gloss on . . . (the recent case of your choice) . . . without droning through a stylized summation of twenty to seventy years of precedential history. Then there are the values and interests on both sides. Then there is sensitive balancing (along with digs at the courts for being so formalistic). And then Of late, the ennui produced by this style has reached previously unforeseen proportions, as these articles expand to fill 100 pages and the footnotes reach the 500 range. (More footnotes equals more authorities equals more evidence equals more or better truth equals, well) The scholarship is also drearily responsible in tone (which, of course, contrasts sharply with its substance). On the whole, reading mainstream scholarship leaves one with the impression that the authors don't like their jobs very much—but that they have a strong sense of duty and that the rule of recognition for duty is pain.

