

**Jurisprudential Inquiries between  
Discourse and Tradition:  
Towards the Incompleteness of  
Theoretical Pictures**

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## **PREVIOUS PUBLICATION OF SECTIONS**

Pursuant to Regulation 2.2 of the *Assessment Regulations for Research Degrees*, I record the fact that earlier versions of sections IA1c, IB1i, IB2a, and IB2b, of this thesis, have been published in the *Leiden Journal of International Law* (2008) 21(1) 29-61.

## **DECLARATION**

Pursuant to Regulation 2.5 of the *Assessment Regulations for Research Degrees*, I hereby solemnly declare and confirm that the thesis submitted herein has been composed by me alone and that the thesis has not been submitted for any other degree or professional qualification.

Signed: \_\_\_\_\_  
Maksymilian Del Mar  
Date: 7 March 2009

## **ABSTRACT**

This thesis offers an alternative history of theoretical pictures of law and legal work. It argues that these theoretical pictures can be understood as giving primacy to either the explanatory paradigm of discourse on the one hand, or to the explanatory paradigm of tradition on the other. Broadly speaking, discourse-oriented explanations of law and legal work tend to focus on the nature, function and status of normative requirements themselves. Tradition-oriented explanations, on the other hand, tend to focus on the long-term acquisition and transmission, in specific contexts, of common ways of seeing and doing.

The first part of the thesis is composed of five sections. The first four are dedicated to revealing the basic features of the above-mentioned explanatory orientations, i.e., law-as-discourse (IA1), legal-work-as-discourse (IA2), law-as-tradition (IB1), and legal-work-as-tradition (IB2). The fifth section (IC) uses these basic features to read five distinct works in legal theory as oscillating between the two explanatory paradigms.

The second part of the thesis argues that to the extent that we recognise that jurisprudential inquiries are oriented towards either the explanatory paradigm of discourse or that of tradition, we are on our way to recognising the incompleteness of theoretical pictures of law and legal work. This second part offers three further arguments, which are designed to encourage the adoption of an attitude that acknowledges the incompleteness of the results of one's inquiries. First, it is shown that truth can be the aim of an inquiry, but that this is not incompatible with incompleteness understood from the first person post factum perspective (IIA). Second, it is argued that the results of one's inquiry are not complete because an inquiry only ever appears complete to one when (and only when) one does not problematise its central terms (IIB). Third, and finally, it is argued that the highly intensive mode of self-reflection engaged in by theorists practicing the examined life may lead to certain limitations in the construction of theoretical pictures (IIC).

The real question concerns our philosophical attitude to our own views.

Bernard Williams, *Philosophy as a Humanistic Discipline* (2006b, 191)

What is needed from now on is historical philosophising, and with it the virtue of modesty.

Friedrich Nietzsche, *Human, All Too Human* (1996, §2)

## INTRODUCTION

This thesis argues that theoretical pictures of law and legal work can be understood as oriented towards either the explanatory paradigm of discourse or the explanatory paradigm of tradition. The basic features of the discourse-oriented explanatory paradigm are as follows:

- The tendency to give explanatory priority to normative requirements, such as already posited rules or theoretically identified norms;
- The tendency to represent and value the unity and rationality (e.g., coherence and consistency) of systems or orders of normative requirements;
- The tendency to represent and value the autonomy of systems or orders of normative requirements;
- The tendency to situate explanations of the role of normative requirements in behaviour conceptualised from the first person *ex ante* perspective, and largely self-conscious and deliberative;
- The tendency to represent and value the ability of systems or orders of normative requirements to control or constrain the actions of officials;
- The tendency to focus on the problem of the existence of normative requirements, and thus giving prominence to the problem of validity;
- The tendency to emphasise the importance of a source of validity and the conditions under which such a source is authoritative;
- The tendency to emphasise the importance of governance from above, and thus the tendency to study the imposition of social order by ruling authorities;

- The tendency to explain the emergence and maintenance of social order via the function that normative requirements, imposed by an authoritative source, play, as reasons for action, in the deliberation of the citizenry;
- The tendency to emphasise and give explanatory priority to the alleged properties of language itself;
- The tendency to understand language as capable of itself picking out phenomena in the world; and
- The tendency, when explaining social life, to give priority to the mental representations by individuals of the mental representations of other individuals.

The basic features of the tradition-oriented explanatory paradigm are as follows:

- The tendency to give explanatory priority to the long-term learning of certain embodied skills and abilities;
- The tendency to emphasise the importance of long-term and large-scale human interaction;
- The tendency to situate explanations in certain communal contexts, such as institutions and associations;
- The tendency to emphasise the spontaneity and adaptation of behaviour;
- The tendency to represent normative requirements as afterthoughts, post factum justifications and explanations, and projections of experiences;
- The tendency to focus on and value governance from below, and thus the tendency to study the emergence of social order from everyday interaction;



- The tendency to emphasise the importance of the responsiveness of governmental institutions, particularly with respect to the needs of the poor and the marginalised; and
- The tendency to focus on the transmission of social knowledge via the non-discursive involvement of persons in common activities.

In seeking to show how the basic features of these explanatory paradigms are expressed in works of legal theory, attention is also given to the relationship between explanatory tendencies and problems in theoretical pictures. For example, it is argued that the prioritisation of normative requirements as constitutive of social order (as in discourse-oriented theoretical pictures) tends to lead to the problem of how those normative requirements are, or can be, integrated into the life of persons and communities (this is sometimes referred to as the problem of motivation or the problem of socialisation). What is crucial to notice here is that this gap, and therefore also the need to bridge it, is formed by prioritising the explanatory power of normative requirements in the first place. Although most of the examples of the relationship between explanatory tendencies and problems are one-way, i.e., that explanatory tendencies lead to the emergence of certain problems, the thesis does not defend the idea that that is always the case. Rather, the thesis acknowledges that there are many instances of mutual influence and dependency between explanatory tendencies and problems. It may be that there is a case to be made for one-way causal traffic in this respect, but this question is left open for future investigation.

Of course, theoretical pictures of law and legal work do not come neatly packaged under these two explanatory paradigms. Some theoretical pictures can be characterised as oriented towards one or the other paradigm, but others can be profitably read as relying on characteristics of both. That is why, after having

provided an account of the history of theoretical pictures of law and legal work on the basis of explanatory tendencies towards either discourse or tradition, this thesis goes on to show how certain works of legal theory can be profitably read as sites of tension between some of the basic features of these two paradigms.

The presentation of the four theoretical pictures of law and legal work and the reading of the five works that are characterised as oscillating between discourse and tradition comprise the first part, as well as the bulk, of the thesis. Although the thesis sets out to offer accurate and careful readings of the selected works, its main aim is to reveal the basic features of the above-mentioned explanatory paradigms. The classification of works engaged in is, of course, necessary, as is their selection. Further, both classification and selection are inevitably accompanied by controversy. The point, however, is not to be faithful to the intentions of authors or even to the detailed nuances of each individual work: rather, it is to paint, with broad and generous brushstrokes, an alternative history of jurisprudential inquiries.

If it is accepted that theoretical pictures of law and legal work either tend towards or oscillate between the explanatory paradigms of discourse and tradition, then we have a *prima facie* argument that all theoretical pictures of law and legal work are incomplete. In this *prima facie* form, theoretical pictures of law and legal work are incomplete because there is no meta-discourse or absolute standard, or a view from nowhere, against which these theoretical pictures can be evaluated: rather, as noted above, it is argued that they either tend towards or oscillate between explanatory paradigms. The second part of the thesis begins with this insight and transforms it into three arguments for the adoption of an attitude, from the first person *post factum* perspective, as to the incompleteness of theoretical pictures.

The first argument is that the attitude being encouraged is not at odds with theories that emphasise the importance of truth as a norm or aim of an inquiry. In offering an account of the history of jurisprudential inquiries, the first part of the thesis provided a theoretical picture. It set out to say – and, arguably, it could not have got going or kept up its momentum without the impetus to say – something truthful about these inquiries, about what these inquiries, in fact, are or have been. However, setting out to offer as true and adequate a picture as one can is not incompatible with adopting an attitude to the results of one’s own inquiries as incomplete. Making room, then, for the first person post factum acknowledgement of the incompleteness of theoretical pictures does not contradict theories that argue that the norm of truth regulates theoretical practice (e.g., either in the form that we do, or that we should use, the standard of truth to evaluate theoretical pictures) or those that argue that the aim of inquiry is truth. The former of these is an essentially third person account. The second is essentially an ex ante account. The perspective of the attitude encouraged here, however, is first person post factum.

The second argument fastens onto a limitation that flows from the expression of theoretical pictures in language. As noted above, it is the task of the first part of the thesis to reveal the basic features of theoretical pictures of law and legal work oriented either towards or oscillating between the explanatory paradigm of discourse or to that of tradition. These basic features, however, are not further explained. The crucial point is that this is not an avoidable shortcoming. The demand for explanation can proceed forever. What this phenomenon of explanatory regress points to is that until certain concepts – taken for granted in certain theoretical pictures – are problematised, they are meaningful. They are meaningful precisely *in* use. It is not that the meaning of these terms is fixed *by* their use – at least not if by ‘fixing’ we

mean that we have access to that meaning by making explicit the conditions or criteria of use. Rather, the meaning of terms and phrases is brute – words have meaning when we do not problematise them. The moment we begin to problematise them is also the moment in which the ‘bruteness’ of these words falls out: they begin to disappear before our eyes. Recognising this feature of language, called here the phenomenon of explanatory regress, is not offered as a proof of the incompleteness of theoretical pictures. Rather, as above, the argument is designed as an encouragement for the adoption of an attitude that acknowledges the incompleteness of the results of one’s own theoretical pictures.

Finally, the third argument suggests that some limitations of theoretical pictures may be the result of the intensively self-reflective mode of the examined life. More specifically, it is argued that the self-reflective mode of theoretical practice tends to produce a tendency to locate or find evidence of, or to try to make explanatory room for, the ‘freedom’ or ‘rationality’ of human beings – the point being that the very notions of ‘freedom’ and ‘rationality’ are modelled on and gain their significance from the experience of persons insofar as they lead very self-reflective lives.

It is important to emphasise that the second part of the thesis does not attempt to provide a proof of incompleteness in general, or more specific proofs of the specific hallmarks of incompleteness it discusses (e.g., as above, via the phenomenon of explanatory regress expressed in the third argument). Rather, it discusses tendencies (rather than necessities) and sketches three arguments designed to encourage the adoption of an attitude of acknowledgement of the incompleteness of the results of one’s own theoretical pictures.

This thesis is composed of the above alternative history and the related encouragement of the adoption of an attitude that acknowledges that the results of one's inquiries are incomplete. Ultimately, however, these are not tasks performed for their own sake. Although it is outside the scope of the thesis to mount an appropriately thorough argument, it is suggested, as a coda for future investigation, that the robustness of a discipline and the wellbeing of a community of scholars depends, at least partly, on two abilities. First, theorists need to learn to walk the line between the canonisation of the history of the discipline and the ignorance of past works. This is the task that is attempted in the first part of the thesis; it is done so by not relying on either the usual ways of understanding the history of the discipline of jurisprudence (e.g., as a debate over the separability of law and morality) or on the usual labels of so-called movements or positions within legal theory (such as positivism, natural law, realism, and so on). The second ability is that of theorists learning to be open to the insights of others. Although it may amount to mere speculation or wishful thinking, it is suggested that the adoption of an attitude that acknowledges the incompleteness of the results of one's inquiry may allow a theorist to be both more willing and more able to learn from the insights reached by others. It is the task of both parts of the thesis to contribute to this ability. The first part attempts to do so not only by attempting to reconstruct, as powerfully as possible, the world of each explanatory paradigm, but also by showing that both paradigms ought to be taken seriously as not only explanatory orientations but also sites of struggle over the ends and means of the common good (this is attempted in sections devoted to revealing the political life of each explanatory paradigm). The second part contributes to the second ability more directly by offering some arguments for the adoption of the above-mentioned attitude.

Future work can also take these abilities not only as assisting in the development of the robustness of a discipline and the wellbeing of a community of scholars, but also as capable of contributing to the manner in which theoretical pictures can inform policy making in the public sphere. It could be argued, for example, that, the incompleteness of theoretical pictures (from the first person post factum perspective) suggests that no scholar ought to propose, or at least propose as uncontroversial and infeasible, policies on the basis of any one theoretical picture. In other words, it could be suggested that acknowledgement of explanatory paradigms, as well as phenomena such as explanatory regress and the limitations flowing from the intensely self-conscious form of scholarly life, should lead us to adopt a view of the role of theory in the public sphere as informing and revitalising our imagination, and thus also enabling us to be more careful and circumspect, rather than leading us towards any one specific course of action. The matter, however, is more complicated – if only by the fact that action in the public sphere requires confidence and consensus, and not just modesty and openness. Further, any such investigation would need to engage more carefully with the relationship between theory and practice, as well as with the literature on public reason, the common good and the public sphere. Needless to say, these tasks fall outside the scope of the thesis. Nevertheless, the thesis hopes to have made a first step towards such future investigations.

## I. A HISTORY OF JURISPRUDENTIAL INQUIRIES

In his extraordinary reports of a tour of the USSR on the eve of its collapse, in 1989, Ryszard Kapuscinski tells the story of the Temple of Christ the Saviour.<sup>1</sup> The temple was completed in 1883, after forty-five years of construction by three generations of Czars. It was built to commemorate the survival of the Napoleonic march in 1812. Its dimensions were exceptional:

The Temple of Christ the Saviour is more than thirty stories tall. Its walls are 3.2 metres thick; they were built out of forty million bricks. These walls – on the outside and on the inside – are covered with slabs of Altaic and Podolia marble as well as Finnish granite. The slabs are attached to the bricks along the entire surface of the temple with the help of special lead grips. The shrine is crowned by a gigantic cupola covered with sheets of bronze that weight 176 tons. On the summit stands a cross three stories high. The cupola is surrounded by four belfries in each of which hang fourteen bells with a combined weight of 65 tons. The main bell weighs 24 tons.... Twelve gates sculpted in bronze lead into the interior of the church. Their combined weight is 140 tons.<sup>2</sup>

It was even more impressive inside, which included an iconostasis built with 422 kilograms of gold. However, no visitor, including Kapuscinski in 1989, standing on the site in Moscow, nearby to the Kremlin, can any longer see the Temple of Christ the Saviour. It was demolished in four months in 1931 by Stalin, who had chosen that site as the locus for his Palace of the Soviets, but who had never completed the project, distracted as he was, says Kapuscinski, in orchestrating the murder of millions in the satellites of the USSR and the deportation of many more to Siberia in the purges that preceded and continued throughout the Second World War.

The story exemplifies one extreme attitude to history that the forthcoming sections of this thesis seek to counter: disinterest, dismissiveness, and ignorance. The other extreme, however, is just as dangerous, just as destructive. It involves the

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<sup>1</sup> Kapuscinski 1994.

<sup>2</sup> *Ibid.*, 97.

idealisation, or canonisation, of history. In his *Humanism and Democratic Criticism*,<sup>3</sup> Edward Said opens with a fervent critique of Harold Bloom's *The Closing of the American Mind*,<sup>4</sup> which, according to Said, represents the worst of the canonisation impulse in American literary criticism. In his critique of Bloom's 'canonical humanism', Said says the following:

So far as the historical presence of the humanities is concerned, two views are locked in interminable combat. One view interprets the past as an essentially complete history; the other sees history, even the past itself, as still unresolved, still being made, still open to the presence and the challenges of the emergent, the insurgent, the unrequited, and the unexplored.<sup>5</sup>

Walter Benjamin, who Said refers to as observing that 'every document of civilisation is also a document of barbarism',<sup>6</sup> illustrated Said's characterisation of the past emerging in the present, with the image of the Angel of History, facing backward to the past, but moving forward, and watching the rubbish heap of history pile up.<sup>7</sup> Others too, and in more contemporary times, have resisted the temptation to canonise, imprison, freeze the past. James Elkins writes a short book composed of alternative histories of art – ones that acknowledge the presence of already written histories that do not, as is all too common, proceed up to and then from the Italian Enlightenment, and ones that he himself has devised in order to counter the oppression of the Western canon.<sup>8</sup> Susan Nieman writes what she calls 'An Alternative History of Philosophy', tracing the treatment of the concept of 'evil', as distinct from the problems of knowledge or existence that flood the pages of one history of philosophy after another.<sup>9</sup> In these and other cases there is wonder and fascination with the past, but not such as to result in the reification of any one way of telling how the past appears

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<sup>3</sup> Said 2004.

<sup>4</sup> Bloom 1988.

<sup>5</sup> Said 2004, 26.

<sup>6</sup> *Ibid.*, 23.

<sup>7</sup> See, Benjamin 2002.

<sup>8</sup> Elkins 2002.

<sup>9</sup> Nieman 2002.



to the observer. There is also, and very significantly, a readiness to listen to the voices of those ignored by the stampede of ‘great turning points in history’ or other such grand narratives. In speaking of the ‘trash’ of history that the Angel of History sees pile up, Benjamin refers to the ‘minor voices’, all those left out, characterised as insignificant, as slipping through the thick fingers of the canon or the self-glorified tales of the victorious. More recently, Gilles Deleuze and Felix Guattari continued Benjamin’s call for minor history with their *Kafka: Toward a Minor Literature*.<sup>10</sup>

These and other precursors inform the attitude with which the forthcoming sections of the first part of the thesis are written. We should not ignore the past, for we can learn a great deal from it – in particular, about the limitations of our own ideas, about the particularity of our time and place – but we should not let our interest in the past become the passion of the engraver, the builder of monuments, such that we demand what Saul Bellow demanded in his introduction to Bloom’s book, i.e., ‘Show me’, said Bellow, ‘the Zulu Proust.’<sup>11</sup>

Before moving on, below, to consider how we can understand the traditions of jurisprudential inquiries – those theoretical pictures of law and legal work – to coalesce around two explanatory paradigms, i.e., discourse and tradition, one final preliminary matter must be mentioned. The forthcoming sections avoid certain well-established terms and categories commonly used to map the principal positions or traditions of jurisprudential inquiries. Thus, such commonly-referred to traditions as ‘legal positivism’ and ‘natural law’, or theses such as the ‘social thesis’ or the ‘separation thesis,’ are used sparingly, and avoided wherever possible. This does not mean that the forthcoming sections shirk from examining and wrestling with difficult issues that occupied the efforts of current and previous generations. Nor does it mean,

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<sup>10</sup> Deleuze and Guattari 1986.

<sup>11</sup> Bellow, quoted in Said 2004, 27.

in the case of the specific forthcoming sections, that many, if regrettably not all, of the authors considered to be in the canon (for one can always ask here, ‘whose canon?’), will be ignored, and that those considered minor or not considered at all by historians of jurisprudential inquiry will be examined in detail.<sup>12</sup>

Rather, the motivation behind this avoidance of commonly used terms is in keeping with striking the balance referred to above, i.e., to encourage an interest in the history of ideas, but not such as to result in the canonisation, in the freezing, of topics, problems, and methods. Thus, the forthcoming chapters attempt to show, *inter alia*, that one can be creative in constructing a history of theoretical inquiries – of any kind, but, in this case, of jurisprudential inquiries. In so doing, the thesis wishes to pay heed to Bernard Williams’ view, namely that:

Above all, historical understanding...can help with the business, which is quite certainly a philosophical business, of distinguishing between different ways in which various of our ideas can seem to be such that we cannot get beyond them, that there is no conceivable alternative.<sup>13</sup>

It matters how legal theorists view the history of their inquiry. It might further be asserted that this matters because the process of coming to one’s own view, i.e., the process of constructing a theoretical picture of one’s own, will be heavily informed by how one has understood the traditions of inquiry one becomes familiar with. Arguably, then, if one understands the traditions of inquiry differently, or at least sees that the most common ways of organising that history (e.g., as a debate between legal positivism and natural law) are possibilities to which there are alternatives, then one may open up possibilities for alternative topics, problems or methods for that inquiry. Whether the first part of the thesis succeeds in this endeavour is for the reader to judge.

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<sup>12</sup> I have attempted to encourage this engagement with ‘minor scholarship’ in previous editorial work: see, Leskiewicz 2005.

<sup>13</sup> Williams 2006b, 195.

## **IA. DISCOURSE-ORIENTED JURISPRUDENTIAL INQUIRIES**

### **IA1. LAW-AS-DISCOURSE**

It would be a mistake to think that the conception of law-as-discourse is restricted to the location of law in language. Even those legal theorists who emphasise the importance of problems of language for legal theory – such as Timothy Endicott, who has worked extensively on problems of vagueness – recognise that ‘law is not necessarily made by the use of language, and every legal system requires norms that are not made by the use of language.’<sup>14</sup> Laws, Endicott says, ‘are not linguistic acts, or even communicative acts. They are standards of behaviour that can be communicated (and may be made) by using language.’<sup>15</sup> Endicott’s point is more measured than others who have made the problems of language the hallmark of their legal theory. To provide but one example, the debate over the determinacy of the meaning of legal language, which has dominated contemporary American legal theory, tends to rest on an assumption, not necessarily often articulated, that language, as Brian Bix asserts in his *Law, Language and Legal Determinacy*, ‘is the medium through which law acts.’<sup>16</sup> It follows, according to Bix, that ‘the *nature of the medium* necessarily has a pervasive effect on what purposes can be achieved through the law and how well those purposes can be forwarded.’<sup>17</sup>

Despite, then, many affinities with features of language, the conception of law-as-discourse carries with it, or so it will be argued, characteristics that are somewhat independent of language (or at least embody a certain kind of understanding of language). Some of those characteristics are captured well by Roger

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<sup>14</sup> Endicott 2002, 6.

<sup>15</sup> *Id.*

<sup>16</sup> Bix 1993, 1.

<sup>17</sup> *Id.*; emphasis added.

Cotterrell's definition of contemporary normative legal theory. Such a theory, as opposed to what he calls empirical legal theory, seeks out – though one might equally say, assumes that it is possible – ‘to explain the character of law solely in terms of the conceptual structure of legal doctrine and the relationships between rules, principles, concepts and values held to be presupposed or incorporated explicitly or implicitly within it.’<sup>18</sup> The task of such a theory, according to Cotterrell, is to ‘fix the meaning of legal ideas to explain the reality of law.’<sup>19</sup> ‘The object of specification of a concept of law’ for such a theory ‘is that of explaining the possibility of a logical system and coherence in legal doctrine; to show how the professional doctrine of the lawyer constitutes an integrated totality.’<sup>20</sup> Once more, for good measure, ‘the construction of a professionally plausible and logically coherent concept of law as doctrine is both the starting point for and the final expression of knowledge of the nature of law from the standpoint of normative legal theory.’<sup>21</sup>

There is a lot going on in Cotterrell's definition. One important feature is that of the notion of systemacity – or, differently put, the order, or coherence or internal consistency as between and amongst some realm of already articulated norms. Another notion, intimately linked to the notion of systemacity, is that of the autonomy of the system – an idea in itself closely aligned with the so-called virtues of impartiality and neutrality. These ideas are themselves also linked not only, as Cotterrell notes, to the identity, and, thereby also, arguably, to the monopoly, of the legal profession (including, very significantly, the identity of legal scholars), but also to profound and deeply controversial issues concerning the separation of powers, the behaviour of officials, and the subjection of peoples to the governance of rules.

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<sup>18</sup> Cotterrell 1983, 241.

<sup>19</sup> *Ibid.*, 242.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Indeed, the last of those issues – that of the subjection of peoples to the governance of rules – is a particularly important issue. It is one of the principal features of law-as-discourse that it tends to prioritise the role of abstract phenomena – such as already articulated rules, or norms identified as operative by the theorist – in explanations of social life. As will be discussed below, for those taken with the conception of law-as-discourse, the very point of law is the guidance of human conduct (referred to in the literature as the normativity of law). The aim of the discussion (in section IA1d) is to show how the problem of legal normativity is linked to the prioritisation of abstract phenomena in explanations of behaviour.

Another feature of conceptions of law-as-discourse is their emphasis on the validity of laws. We ought to have clear standards, it is said, for determining when a law is a law, i.e., when a law is valid, for without such clear standards the very status of law would be undermined, i.e., it is unclear on what other foundation law could claim the authority or legitimacy said to be required for those who administer it to justifiably punish those who deviate from its requirements. One of the problems, however, for this emphasis on determining – or at least agreeing on – the criteria of legal validity is that of the problem of regression. What determines the standards of correctness of the criteria of validity? What is their foundation? How do they, or indeed can they, demand obedience or the loyalty of those under them? This has been a pressing problem for contemporary jurisprudence, which has sought refuge in concepts such as shared agency or conventions. Once again, the aim of the discussion (in section IA1f) is not to provide a solution to or to evaluate this problem, but rather, to show how that problem arises for those working under the conception of law-as-discourse. It will also be instructive to see how attempts at finding solutions often

appeal to the same kind of intuitions that create the problem in the first place, i.e., to an explanation of behaviour based on action for reasons.

As this section proceeds, these and other characteristics of law-as-discourse will become prevalent. It ought not be thought that any one theorist discussed below contains all the characteristics of this conception. What is found below are characteristics grouped under a general tendency – looked at, as it were, from afar, without becoming embroiled in details – of one aspect of the history of jurisprudential inquiries presented here. Needless to say, given space limitations, this section will not be able to give proper credit to the complex story of these ideas. Nevertheless, it is hoped that the brief overview can provide some sense of the principal features of law-as-discourse.

#### ***IA1a. The Political Life of Law-as-Discourse***

Jeremy Bentham famously defined law ‘as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power.’<sup>22</sup> Although Bentham’s location of the source of the ‘assemblage of signs’ in ‘the sovereign in a state’ has, in more recent times, been much criticised, the very idea of there being a source from which valid laws are yielded has remained largely intact – at least for those oriented towards the conception of law-as-discourse. Similarly so with the political ambitions of this conception.

Bentham, as is well known, was highly critical of what he saw as the unrestrained, unaccountable and ultimately corrupt power wielded by common law

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<sup>22</sup> Bentham 1970 (1782), 1.

judges. He sought, by reform consisting in universal codification – based, furthermore, on utilitarian principles – to curb, and perhaps even eradicate, that power. A particularly strong statement of his position is available from his response to a charge delivered on the 19<sup>th</sup> of November 1792, to a Middlesex Grand Jury, by Sir William Ashhurst, then a Puisne Judge of the King’s Bench. The title of Bentham’s paper, already indicative of the tone, is ‘Truth versus Ashhurst, or, law as it is contrasted with what it is said to be.’<sup>23</sup> The paper is a response to a series of quotations from Ashhurst’s speech. The first of these is that ‘No man is so low as not to be within the law’s protection’, a proposition that Bentham ridicules by pointing out that ‘Ninety-nine men out of a hundred are thus low’, for want of the extortionate sums required to ‘take his chance for justice’, i.e., to access the court.<sup>24</sup> ‘How many causes,’ says Bentham, ‘out of each of which Mr Justice Somebody has been getting in fees, while this speech of Mr Justice Ashhurst’s has been printing, more in amount than many a poor family has to live upon weeks!’<sup>25</sup> And how could it be otherwise, asks Bentham: ‘How should the law be otherwise than dear, when those who pocket the money have had the setting of the price?’<sup>26</sup> Not only is there a problem – no less so pronounced in contemporary times – with access to justice, but there is also a justice-tax imposed on citizens, upon which Bentham comments: ‘He’, referring to King George, ‘denies it’, meaning justice, ‘to ninety-nine men out of a hundred, and sells it to the hundredth.’<sup>27</sup>

Bentham’s criticism of the treatment of the common people by law and its institutions was relentless. ‘The lies and nonsense’ that ‘the law is stuffed with’, he said, ‘form so thick a mist, that a plain man, nay, even a man of sense and learning,

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<sup>23</sup> Bentham 1843 (1823). The paper was written in 1792 but not published till 1823.

<sup>24</sup> *Ibid.*, 233.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

who is not in the trade, can see neither through nor into it.’<sup>28</sup> It is no surprise, then, that when Ashhurst asserts that ‘Every man has the means of knowing all the laws he is bound by’, that Bentham asserts to the contrary, ‘Scarce any man has the means of knowing a twentieth part of the law he is bound by’<sup>29</sup> – not merely that of the common law ‘by its very essence’, but also that of statute law ‘by its very bulk.’<sup>30</sup> In a particularly strongly-worded passage Bentham says:

It is the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way to make laws for your dog: and this is the way the judges make law for you and me. They won’t tell a man beforehand what it is he should not do – they won’t so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then hang him for it.<sup>31</sup>

As is well known, Bentham was particularly critical of an absence of codification of criminal law. He complained, then, that, just as a hundred years previously (in the 17<sup>th</sup> century), when there was ‘no statute law to tell us what is, or what is not, theft; no more is there to this day: and so it is with murder and libel, and a thousand other things; particularly the things that are of most importance.’<sup>32</sup> And in making this complaint, Bentham asserted he was but echoing ‘that great Lord Coke’, who had said that ‘miserable is the slavery of that people among whom the law is either unsettled or unknown.’<sup>33</sup>

Bentham’s complaint with his times, linked to his pursuit of a definition of law along the lines quoted above, resonates with the contemporary world. There are at least two features of his attack that we can recognise in contemporary legal theory: first, that of the impact of a lack of codification on the life of the citizenry, and

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<sup>28</sup> *Id.*

<sup>29</sup> *Ibid.*, 235.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Ibid.*, 236.

<sup>33</sup> *Id.*



second, that of the impact of a lack of codification on the behaviour of officials. As Michael Robertson put it, under the first heading, it has been argued that ‘what the rule of law required was that all citizens be able to know in advance what the law demanded of them, so that they could plan their lives to avoid legal sanctions.’<sup>34</sup> For the law to do this, ‘it must not be arbitrary or uncertain or variable. It must be a clear and consistent system of public rules with predictable outcomes. It must be a rational order.’<sup>35</sup>

The second feature has received even more – one might even say, a good deal more – attention in jurisprudential inquiries since Bentham. The orthodox view is that ‘the rule of law meant that judges must not inject their own moral and political viewpoints into their decisions.’<sup>36</sup> Rather, ‘they must simply apply the already existing rules in a neutral fashion’, which meant ‘that the law had to be a system of comprehensive rules which could be applied to different fact situations in a logical fashion which would produce a uniform result regardless of the judge deciding the case.’<sup>37</sup> Again, as with the life of the citizenry under a legal system, ‘the law had to be a rational order.’<sup>38</sup>

Both features have been taken up by Neil MacCormick, Tom Campbell, and others, arguing for the ethics of legalism, ethical positivism, or making a moralistic case for a-moralistic law.<sup>39</sup> Neil MacCormick has, thus, argued that a Rule of Law without rules of law is impossible.<sup>40</sup> These rules may take the ‘form of provisions in treaties or on constitutional texts or in acts of legislation or in judicial precedents.’<sup>41</sup>

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<sup>34</sup> Robertson 2007a, 431.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See, MacCormick 2005 and 1985; and Campbell 1996.

<sup>40</sup> MacCormick 2005, 12.

<sup>41</sup> *Id.*

Where the state is not governed ‘according to pre-announced rules that are clear and intelligible in themselves’ then we risk, says MacCormick, placing in jeopardy ‘reasonable predictability in one’s life and reasonable protection from arbitrary interventions either by public officials or by private citizens.’<sup>42</sup>

These views are no doubt anything but new (though to say this is not to suggest that they are not relevant, or even pressing, in at least certain places in contemporary times). Robertson writes that ‘in ancient Greece and Rome, and also in the medieval period in the West, there were persistent attempts to use the law to prevent tyranny by kings and emperors.’<sup>43</sup> Others have provided historical illustrations of the rule of law as a bulwark against totalitarianism, absolutism and other manifestations of unbridled power.<sup>44</sup> Given all this, then, it is somewhat ironic that some of those who have taken issue with such arguments, as shall be explored presently, have done so on the basis that the rule of law is an ideology designed to protect and further increase the power of the already powerful.

Peter Goodrich is a prominent example of this critical view. Goodrich takes issue, in the first instance, with the understanding of language he believes underlies views such as Bentham’s, MacCormick’s and Campbell’s. To understand law, he says, we cannot remain within the ‘positivistic view that law is an internally defined ‘system’ of notional meanings or legal values, that it is a technical language and is by and large, unproblematically, univocal in its application.’<sup>45</sup> Goodrich argues that in both traditional linguistics and conventional jurisprudence ‘it is the abstract imperatives of a notional system that forms of the object of synchronic (static) scientific study’, which ignores ‘actual meaning, actual usage and the diachronic

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<sup>42</sup> *Id.*

<sup>43</sup> Robertson 2007a, 430.

<sup>44</sup> For a recent overview, see Costa and Zolo 2007.

<sup>45</sup> Goodrich 1984, 173.

(historical) dimension.<sup>46</sup> Goodrich looks back with some nostalgia to the rhetorical tradition. He laments that, over time, the tradition of rhetoric declined as it was made subordinate to logic.<sup>47</sup> Meaning, under this logical conception of language, ‘came to be conceived...as given or monolithic.’<sup>48</sup> As Michel Foucault, one of Goodrich’s heroes, put it, in typically poetic fashion: ‘The day dawned when truth moved over from the ritualised act – potent and just – of enunciation, to settle on what was enunciated itself: its meaning, its form, its object and its relation to what it referred to.’<sup>49</sup>

Goodrich argues that this ‘analysis of law as a unitary, formal language’ is made in political bad faith. Not only, he says, did the view of law as a written code allow for the development of a ‘an elitist, revelatory or hierophantic, culture of interpretation’,<sup>50</sup> to the effect, he argues, of ‘safeguarding and preserving the sanctity and general impenetrability of the written word as a system of social control’,<sup>51</sup> but it also implied that that written word of the law emanated from ‘a source, an authority or singular authorship that originally sets out the meaning and whose ‘will’ may be analytically or exegetically recovered.’<sup>52</sup>

To be fair, Goodrich’s target in these criticisms is Hans Kelsen. For Kelsen, as Goodrich cites him, ‘the law is an order, and therefore all legal problems must be set and solved as order problems. In this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgements.’<sup>53</sup> Legal science is to study the law in its systematic context, as a grammar and hierarchy of norms, as

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<sup>46</sup> *Ibid.*, 174.

<sup>47</sup> *Ibid.*, 177.

<sup>48</sup> *Id.*

<sup>49</sup> Foucault 1971,.

<sup>50</sup> Goodrich 1984, 178.

<sup>51</sup> *Id.*

<sup>52</sup> *Ibid.*, 177.

<sup>53</sup> Kelsen, quoted *Ibid.*, 180.

a structure, as a logical, internally defined, normative unity.<sup>54</sup> Such a view is about as antithetical to Goodrich's own as is possible. Goodrich argues that the 'study of both linguistic and legal structure as systems or codes,' which 'carries with it the attraction of clarity and abstract verifiability in terms of propositional logic and presupposition', is a form of 'crude, early semiotics', that exists to provide 'a descriptive overview of linguistic and legal rationality and certainty which is not only comforting to those within the legal institution who have a professional interest in the belief or mythology of legal determinacy, but also the intuitive appeal of describing "the common sense position prevalent amongst most lawyers, judges and legal scholars today."' <sup>55</sup>

Following on from the sociolinguistics of theorists such as V.N. Volosinov, who emphasised the 'functional and material concepts of language use', what we ought to do, argues Goodrich, is to move the object of the study of language 'from system to practice, from potential meaning to the determination and realisation of meaning within the concrete and hierarchical organisational forms of social interaction.'<sup>56</sup> What we ought to study, says Goodrich, is the 'appropriation and institutionalisation of meaning and discourse, the process of selection whereby a particular set of socially oriented interests and usages gain control of a discourse and define the social accenting and paradigm forms of meaning that are to prevail and to win credibility.'<sup>57</sup> We ought to ask: 'Who is speaking? Who has the right to speak? Who is qualified to do so? Who derives from it their own special quality, their prestige, and from whom, in return, do they receive assurance, at least the presumption that what they say is true? What is the status of the individuals who –

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<sup>54</sup> *Id.*

<sup>55</sup> *Ibid.*, 181; the quote is from Michael Moore.

<sup>56</sup> *Ibid.*, 184.

<sup>57</sup> *Ibid.*, 185.

alone – have the right sanctioned by law or tradition, juridically defined or spontaneously accepted, to proffer such a discourse?<sup>58</sup>

There are a few things at stake in Goodrich's critique. One is the alleged conservatism of legal scholarship as modelled on Kelsenian legal science: this shall be returned to below. Another is disagreement over the best means of constraining the power of officials: one view takes it that pre-articulated rules of considerable clarity and precision make it more difficult for officials to abuse the power granted to them by the task they are required to perform; the other takes that very same clarity and precision to be a mirage, which only creates an illusion of impartiality and neutrality, making it all the more difficult to criticise the exercise of power by officials, and serving thus only to maintain the status quo. This disagreement is indeed a neat illustration of the political tensions at play. On the one hand, much faith is invested in the autonomy of an ordered set of articulated norms or rules to constrain the power wielded by officials. The alternative – as described by Bentham, i.e., of unaccountable and corrupt judges – is seen to be the enemy. For the Goodrich-like view, on the other hand, the enemy is the alleged dishonesty of the orthodox view, said to consist in the inability or unwillingness of the proponents of the orthodox view to recognise that misuses of power cannot be avoided by clear and precise language alone. The orthodox response most commonly asserted to this is that it is true that the existence of such clear and precise language does not guarantee misuse of power, but that it at least minimises it, and is also the best method for minimising it. The rebuke to that, in turn, is that it ignores the role of other kinds of influences on action, much more powerful than language, including, perhaps primarily, self-interest. The debate, in the perhaps inevitable absence of any conclusive empirical evidence, continues.

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<sup>58</sup> *Id.*

The charge against legal science, mentioned above, ought to be understood against a broader historical background. As noted by Mark Van Hoecke and Francois Ost:

The emergence in the 19<sup>th</sup> century of the general theory of law can be explained by the deep-seated crisis in the science of law in Continental Europe at that time. Before the major codifications, legal scholars were faced with a considerable scientific and creative task. The sources of law were many and varied unsystematic and difficult to find, consisting as they did of customary law which differed considerably from region to region, of a limited body of legislation and learned Roman law that was taught in the universities. The creative work consisted in development and systematisation, principally of customary law, with the aid of Roman law.<sup>59</sup>

At play may also have been the desire, brought on in the spirit of the Enlightenment, to prove and reveal ‘the power of human reason to discern the basic principles underlying both the natural world and human societies.’<sup>60</sup> As Hoecke and Ost note in that respect:

As a theory, legal science constitutes a collection of systematically linked-up propositions. It involves the application of a consistent methodology and obtaining knowledge which is communicative and capable, if not of verification, at least of rational agreement. Whatever the scientific criteria used, scientific discourse sets out to rationalise the phenomena studied by reducing them, if not to uniformity, at least to order.<sup>61</sup>

On a charitable view, such desire for the triumph of rationality may be said to be motivated by an attempt to liberate the governance of societies – particularly in Europe – from religion. After all, Europe had had plenty of experience of the intolerance of institutionalised religion. But the Goodrich arguments continue to haunt these kinds of explanations: was ‘Continental legal dogmatics’ influenced more by ‘the belief in the sovereignty and rationality of the legislator’,<sup>62</sup> and in that respect, was but a servant of absolute power? Or, was it more self-serving than that, for the belief – one could say, assumption, of the sovereignty and rationality of the legislator,

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<sup>59</sup> Hoecke and Ost 1993, 31.

<sup>60</sup> Robertson 2007a, 430.

<sup>61</sup> Hoecke and Ost 1993, 37.

<sup>62</sup> *Ibid.*, 40.

‘allows giving positive responses concerning the intelligibility and validity of norms claimed to be part of the law’<sup>63</sup> and thus gives legal scholars (and only them) something important to do, guaranteeing their livelihood?

There are contemporary voices in agreement with Goodrich. Reza Banakar, for example, claims that assertions concerning the securing by law of the neutrality of adjudication, the safeguarding of expectations by the law, the expression of ideals and values within the law, and other such tasks – which, says, Banakar, secure the law’s support of the state, which is in turn dependent on the law for its legitimacy<sup>64</sup> – are qualities of the law that ‘tell us more about how the law, as a professional body, legitimises itself and secures its domination, than the role it plays in society in actual fact.’<sup>65</sup> Here is a fuller and clearer account of Banakar’s picture:

The strength of the law is geared to its ability...to present itself as a professional body, which organises itself around a rigorous code of ethics regulating the activities of its members, who use their expert knowledge to provide vital public services. To secure and enhance its professional standing, the law often presents itself from the vantage point of its ‘high priests’, that is, primarily as a formal body of rules and principles, which prescribes rights and duties, and which is applied with impartiality to given facts in the courtroom. Such a description places the law beyond the direct reach of the laity and strengthens its position among other disciplines and forms of knowledge. According to this view, the centre of gravity of the legal system rests on an esoteric body of knowledge, primarily of substantive character, which requires considerable exegetical skills of interpretation. Law becomes essentially concerned with interpretation of acts and case readings, expounding legal doctrines, and constitutes itself through textual manifestations of legal decisions, judgements, and opinions.<sup>66</sup>

It is a view in close sympathy with Goodrich’s. It could, for example, be Goodrich speaking when Banakar says that ‘the unified vision of the law emerges as sections of the legal profession speak on their own corporate behalf to ensure its monopoly of

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<sup>63</sup> *Id.*

<sup>64</sup> Banakar 2000, 281.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

knowledge.<sup>67</sup> It is also a highly sceptical view, according to which nothing is as it seems, and where all attempts at self-regulation are but further increases in power.

Those more positively disposed to the so-called ‘unified vision of the law’ have not remained silent. As MacCormick has noted, with respect to the specific debate over the intelligibility and appropriateness of the practice of rational reconstruction, the disagreement is largely about the political effects of ‘the act of propounding legal doctrine of the traditional or mainstream type.’<sup>68</sup> For MacCormick, however, the effects that ought to be paid attention to are the effects on the treatment of citizens by officials. ‘The rule of law’, he says, ‘can yet make a real difference for the better where it hedges official action against alleged wrongdoers and judicial moralising over unprohibited ill-doing.’<sup>69</sup> Legal certainty and clarity, being the features of the rule of law, ‘are systematic virtues which certain approaches’ to legal scholarship ‘can help generate.’<sup>70</sup> ‘Reconstructions of law which are its rational reconstructions generate in a high degree’, says MacCormick, ‘law with these virtues.’<sup>71</sup>

But MacCormick’s response, it must be said, is made in a different time, i.e., in the late twentieth century, when the viability of legal scholarship as rational reconstruction is reasonably secure. One example from another time – to which Goodrich and a good deal of Critical Legal Studies in the United States may be reacting to – is that of Christopher Columbus Langdell’s insistence on the case method. Langdell, says Robertson, ‘was attracted to the picture of law as a rational, consistent and ordered system, but he did not agree’ with Bentham ‘that this could

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<sup>67</sup> *Ibid.*, 283.

<sup>68</sup> MacCormick 1989, 191.

<sup>69</sup> *Id.*

<sup>70</sup> *Ibid.*, 192.

<sup>71</sup> *Id.*



only be achieved by new statutory codes.<sup>72</sup> According to Robertson, ‘Langdell claimed that the common law already contained such a system, and it was the task of the legal scientist to distil from the empirical data of the reported cases the legal principles which revealed which decisions were correctly decided and which were not.’<sup>73</sup> Langdell’s argument for rational reconstruction is very much at odds with the one offered by MacCormick. MacCormick argues, against the CLS charge, that the unified vision of law, rational reconstructed, ‘should not be presented as a predetermined necessity which exists wholly independently of the descriptive science. Perhaps even more than usually, here is indeed a science which constitutes its own object.’<sup>74</sup> Langdell may well have overstated the mark. According to Wai Chee Dimock, in promoting the case method, Langdell wanted the law to be made ‘into a science – a logical enterprise, a combination of induction and deduction – laying claim to just that generalisability and predictability properly attributed to it. Like science, law was to proceed, inductively, from observable phenomena to fundamental principles to more observable phenomena.’<sup>75</sup> And, crucially, what was at stake in claiming law as a science – in the context of an America smitten by technological advances – ‘was nothing less than the identity of the legal profession... Either law was to be a craft, reproduced through an apprentice system; or it was to be a branch of learning, in which case it could only be reproduced through books, reproduced at places where books were abundantly collected.’<sup>76</sup> Were the status of legal scholarship not accepted as science – were a conception of law be adopted that did not allow for that status – then law would not, as Langdell hoped, be the ‘province of the

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<sup>72</sup> Robertson 2007a, 431.

<sup>73</sup> *Id.*

<sup>74</sup> MacCormick 1989, 189.

<sup>75</sup> Dimock 2001, 205.

<sup>76</sup> *Ibid.*, 207.

university.<sup>77</sup> And, Goodrich might add, if that were to be the case, Langdell would, presumably, be out of a job.

Of course, we cannot know with what motivations – either to curb official power, or to selfishly maintain monopoly over legal knowledge, or indeed some combination of both – may explain the emergence and continued dominance of rational reconstruction in legal scholarship and the associated vision of law as a rational and consistent order of articulated rules or norms that are said to allow for reasonable predictability in the life of the citizenry and enable the control and accountability of officials. The point of the discussion was not to evaluate such explanations, but, rather, to point to some aspects of the political life of the conception of law-as-discourse.

#### ***IA1b. The Autonomy of Orders or Systems of Norms***

We have already seen how important the idea of an order or system of norms has been in conceptions of law-as-discourse. The importance of this idea was due, in no small part, to the belief in the relative autonomy of such orders or systems. Sometimes, as in Bentham, much faith is placed in such autonomy, as part of attempts to constrain the excesses to which power-wielding officials are said to be liable. At other times, there are no such motivations, and the notion of the autonomy of the order or system of norms is made in the spirit of a sociological finding. The interest in this section is more in the latter, but not to the exclusion of the former.

One context for the discussion of the autonomy of orders or systems of legal norms has been in the debate concerning transplantation in comparative law theory. The debate offers not only a fertile ground for a discussion between comparative law and legal theory, but also for an examination of the power and limits of the idea of

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<sup>77</sup> *Id.*

law-as-discourse. William Ewald divides the debate into contextualists and textualists.<sup>78</sup> According to Ewald, contextualist approaches ‘insist that law is not an autonomous discipline, insulated from the surrounding society.’<sup>79</sup> Ewald cites Baron de Montesquieu, Friedrich Carl Von Savigny, Karl Marx and Rudolf Jhering as contextualists – some of whom will be returned to in sections dealing with law-as-tradition (IB). Textualists, on the other hand, whose view, says Ewald, is closer to ‘the point of view of legal practitioners, and to the practice of much of comparative law’, views ‘law as in large measure autonomous of surrounding society: It is the domain of professional lawyers, and it evolves by its own the internal processes, which involve a large degree of borrowing and piecemeal alternations to the existing corpus of laws.’<sup>80</sup> As he acknowledges, Ewald’s division does not add much to the already well-trodden distinction between ‘law in action’ and ‘law in books,’ though it must be said that the purpose of his distinction is more to set up his own proposal, of ‘law in minds’, rather than provide any close reading of those categorised under either category. It should be noted that the distinction does not map onto the distinction provided in this thesis (i.e., between discourse and tradition), not merely as the distinction pursued here is made on two different levels (i.e., ontological and epistemological), but more because many of the theories classified under so-called contextualism or ‘law in action’ accept the basic premise that law is to be located in a realm of authoritatively-promulgated and already-articulated norms, whereas the law-as-tradition is much more radical than that.

One of the usual suspects in the debate concerning transplantation is Alan Watson, whose argument proceeds from the observation that a large of proportion of law in any society is a direct result of legal transplants – e.g., private law, contract

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<sup>78</sup> Ewald 1998.

<sup>79</sup> *Ibid.*, 702.

<sup>80</sup> *Ibid.*, 703.

law, conflicts of laws – to the thesis that ‘usually legal rules are not particularly devised for the particular society in which they now operate and also that this is not a matter for great concern’<sup>81</sup> and, more generally, that ‘law is largely autonomous and not shaped by societal needs.’<sup>82</sup> As one would expect, sociologists, such as David Nelken, have taken issue with Watson’s observations and theses. Nelken argues that ‘to show Watson’s claim to be accurate, more needs to be done than illustrate the survival of socially irrelevant legal distinctions and doctrines or provide examples of the contingent, the unforeseen, and the apparent “inertia” of law.’<sup>83</sup> Others have criticised Watson for treating ‘law as words strung out on a paper, not a living process.’<sup>84</sup> Still others have pointed out Watson’s own qualification (though never fully developed) of his view via the notion of legal formants, thanks to which legal discourse is situated within practices.<sup>85</sup> As developed by Rodolfo Sacco, the idea of legal formants ‘encompasses not only rules but also implicit, taken-for-granted or underlying features of law in practical contexts.’<sup>86</sup>

This section is not, however, the occasion for a careful discussion of the concept of autonomy of orders or systems of norms in the debate over transferability, or of the problems associated with comparing rules. It is important, also, not to let the concept of the autonomy of orders or systems of norms become too readily uniform as between other theories that invoke the concept. The adherents of perhaps the most obvious of these, systems theory or autopoiesis theory, have themselves sought to distance these theories from Watson’s notion of autonomy. As recounted by Cotterrell, Gunther Teubner criticises Watson ‘for attaching far too much importance

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<sup>81</sup> Watson 1993, 97.

<sup>82</sup> Watson 1985, 119.

<sup>83</sup> Nelken 2003, 449.

<sup>84</sup> Lawrence Friedman, quoted in Cotterrell 2006, 114.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* Sacco’s view is discussed below in IB (though not in relation to his theory of legal formants). For Sacco’s view on formants, see Sacco 1991.

to lawyers' professional practice... Teubner sees these practices not as, in themselves, the motor of law's development, but rather as the necessary consequence of law's modern character as a distinctive discourse focused specifically on producing decisions that define what is legal or illegal.'<sup>87</sup> 'What Watson sees', continues Cotterrell, 'as the autonomous law-making of legal elites, adherents of autopoiesis theory see as the working out of law's independent destiny as a highly specialised, functionally distinctive communication system.'<sup>88</sup>

In light of Teubner's views, then, Watson's notion of autonomy turns out to be quite restrained. For Watson, the autonomy of some realm of articulated norms (such as private law) will be, or at least is often, secured by the closed world of legal elite. The carrier of autonomy, then, remains human. It is quite a different matter for autopoiesis. According to Teubner himself, paraphrasing Niklas Luhmann, autopoiesis theory 'separates psychic processes from social ones and perceives the human individual in society as a communicative artefact, as a production of self-observation of social autopoiesis.'<sup>89</sup> Teubner situates autopoiesis in a trifecta of theories – poststructuralism, discussed by reference to the work of Michel Foucault; critical theory, represented by Jürgen Habermas; and Luhmann's autopoiesis theory – all of which have in common the desire to escape the methodological individualism of certain previous social theories. Although all, according to Teubner, wish 'to replace the autonomous individual, not with supra-individual entities, but with communicative processes', they differ 'in their identification of the new cognizing unit.'<sup>90</sup> Foucault and Luhmann are 'more radical in their disenchantment of the human individual' than Habermas, for whom 'intersubjectivity' takes the place of the

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<sup>87</sup> Cotterrell 2003, 145.

<sup>88</sup> *Id.*

<sup>89</sup> Teubner 1989, 732.

<sup>90</sup> *Id.*

epistemic subject.<sup>91</sup> According to Teubner, Foucault sees ‘the human individual’ as ‘nothing but an ephemeral construction of a historically contingent power/discourse constellation, which dictates the *epistème* of a historical epoch.’<sup>92</sup>

For present purposes, all three share not merely or even primarily the desire to rid social theory of methodological individualism, but more so have in common the placing of such explanatory priority on artefacts in their explanation of social life, and further, granting those artefacts much autonomous influence over any one or more human beings. For Teubner, for example, the law itself ‘autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations – and all this quite apart from the world constructions in lawyers’ minds.’<sup>93</sup> More simply, and even more astoundingly, for Teubner ‘there is no direct cognitive access to reality. There are only competing discourses with different constructions of reality.’<sup>94</sup> As we shall see later, in the section concerned with legal-work-as-tradition, this view could not be further from what has become known as Cognitive Legal Studies (see IB2d).

For Luhmann, law performs not only the functions listed above by Teubner – it also demarcates the scope of jurisprudential inquiry, or as he puts it, ‘the location of legal theory’:<sup>95</sup>

What are the boundaries of law? This question points to the well-known issue as to whether these boundaries are analytical or concrete, that is, whether they are defined by the observer or by the object itself. If the answer is ‘analytical’ (and there are some who feel, wrongly, that they are bound by the theory of science to answer this way), one allows each observer to decide his own objectivity and so ends up where one started from, that is, stating that interdisciplinary communication is impossible. It is for these reasons that our answer is ‘the boundaries are defined by the object’. This means, in fact, that the law itself defines what the boundaries are, and what belongs to law and

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Ibid.*, 739.

<sup>94</sup> *Ibid.*, 743.

<sup>95</sup> See, ch. 1, ‘The Location of Legal Theory’, in Luhmann 2004.

what does not. Answering the controversy this way shifts the questions: how does the law proceed in determining its own boundaries?<sup>96</sup>

It pays to consider the language used by Luhmann. For, given all their attempts at escaping methodological individualism, it is somewhat of a surprise to see both Luhmann and Teubner using terms and phrases more associated with the explanation of the behaviour of individuals. In the quote above, for example, Luhmann asserts that ‘law itself *defines* what the boundaries are’ (emphasis added). In another passage he states that ‘law is *aware* of the distinctions between norms and facts, and between facts and validity.’<sup>97</sup> It is the use of these descriptions of distinctly human activities, such as the making of definitions, modelled on the basis of folk psychology and itself consisting of notions that have developed out of the embodied experience of living together, that may be argued (and would be argued by adherents of Cognitive Legal Studies) to undermine the explanatory power of autopoiesis or systems theory (or at least its claims with respect to the autonomy of artefacts or systems of artefacts).

As noted above, for systems theory, law is a self-reproducing system of communication – or, as Cotterrell puts it, paraphrasing Luhmann, law is a self-founded discourse that defines what is legal or illegal.<sup>98</sup> Given the emphasis on a system of communication, it is unsurprising that Luhmann struggled to show how it was that on his view law was not identical with language. As recounted by Brian Tamanaha, Luhmann once noted that ‘although it may be intuitively clear that law is not identical with language, it takes some reflection to find the crucial point of difference.’<sup>99</sup> According to Tamanaha, Luhmann tries to locate that difference in the development of legal institutions. ‘Prior to the differentiation of society, and the emergence of differentiated law’, says Luhmann, ‘there was a kind of primordial soup

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<sup>96</sup> *Ibid.*, 57-8.

<sup>97</sup> *Ibid.*, 69.

<sup>98</sup> Cotterrell 2006, 137.

<sup>99</sup> Luhmann, quoted in Tamanaha 1995, 521.

in which law, custom, and language (among others) all served the function of stabilising behavioural expectations, and could not be sharply distinguished from one another.<sup>100</sup> That ‘primordial soup’ never receives a great deal of attention in Luhmann – it resembles, as we shall see in a later section, the social practices that are invoked by legal positivists to ground, say, the rule of recognition (see IA1f). Nevertheless, what remains distinctive, for Luhmann, about the development of legal institutions is their production of law as language – indeed, of law as an autonomous system of communication, occasionally – though significantly, for Luhmann – brushing up against other more or less equally autonomous systems of communication.

It is important, however, to see that just as they are at pains to distance themselves from views that locate law in systems of legal professionals and organisations, so Teubner and Luhmann are keen to distance themselves from those ‘analytical-normativist legal theories’ for whom law is, allegedly, ‘a system of rules.’<sup>101</sup> Autopoiesis avoids finding law made up of either rules or decision-makers, arguing, instead, that law is made up ‘of legal communications, defined as the synthesis of three meaning selections: utterance, information and understanding.’<sup>102</sup> These communications, in turn, ‘are interrelated to each other in a network of communications that produces nothing but communications.’<sup>103</sup> The result is the ‘self-reproduction of a network of communicative operations by the recursive application of communications to the results of former communications. Law as a communicative network produces legal communications.’<sup>104</sup> In a move that might by now be familiar, the adherents of systems or autopoiesis theory construct their own view of the

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<sup>100</sup> *Ibid.*, 522.

<sup>101</sup> Teubner 1989, 739.

<sup>102</sup> *Ibid.*, 740.

<sup>103</sup> *Id.*

<sup>104</sup> *Ibid.*, 739-40.



traditions of jurisprudential inquiry – as above, they are either sociological (focusing on decision-makers, on legal professionals and organisations) or analytical-normativist (focusing on systems of rules) – thanks to which they are able to create a space for, and the substance of, their own theory.

Whether or not adherents of these so-called sociological or analytical-normativist theories of law would wish to complain of Teubner's and Luhmann's descriptions of them is another matter. Nevertheless, it would be no easy task for analytical-normativist legal theories to recant on the identification of law with a system of rules. The notion of a system has certainly had a healthy run in contemporary Anglo-American legal theory. It should be noticed that the metaphor of a system is not merely spatial – as in the number of rules, including, say, the union of primary and secondary rules – but also temporal, as in the number of rules valid at any moment of time. Although first popularised by H.L.A. Hart, the most famous exposition of the notion of a momentary legal system is due to Joseph Raz. According to Nicola Lacey, in Hart's general jurisprudence, 'the content of the momentary legal system of legal positivism – that is, all the rules of a system valid at any moment of time – can, other than in exceptional cases such as revolutionary situations, be identified independently of any reference to the non-momentary legal system – an entity subsisting over time and identified in terms of a complex and shifting combination of values and institutional arrangements.'<sup>105</sup> As we shall see below, the notion of a momentary legal system, with its accompanying focus on criteria of validity, raises, in the absence of a more dynamic, more long-term, and ultimately more human carrier, the problem of an absence of a social locus for such a system, or

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<sup>105</sup> Lacey 2006, 963; see also, Raz 1980, 34.

of a satisfactory explanation of change, occurring over long periods of time, and not, for one reason or another, attributable to changes in criteria in validity (see IA1f).

The above discussion has barely scratched the surface of the notion of the autonomy of the order or systems of norms. One can see various echoes of some of the moves made above in other theories. The reference by Luhmann, for example, to ‘the primordial soup,’ from which law as language – and ultimately law as a network of communications – emerges, might bring to one’s mind the historical tale told by Max Weber of the emergence of modern formal rational law from less formal, less rational, systems of governance in more traditional societies.<sup>106</sup> A similar historical argument is made by those, like Habermas, who speak of the increasing juridification of society.<sup>107</sup> Once these historical moves are accepted, the debates tend to switch to arguments over the limits of these so-called formal-rational or highly-juridified systems of governance. As Weber himself put it, ‘the expectations of parties will often be disappointed by the results of a strictly professional legal logic.’<sup>108</sup> Such conflicts, said Weber, are ‘the inevitable consequence of the incompatibility that exists between the intrinsic necessities of logically consistent formal legal thinking and the fact that the legally relevant agreements and activities of private parties are aimed at economic results and oriented toward economically determined expectations.’<sup>109</sup> Gaps are then said to open up between formal and substantive justice. As Tamanaha notes, ‘as a consequence of the mismatch in expectations, there is a constant anti-formalist pressure on formal rational systems, reflected in the demands for substantive justice or equity, for purposive adjudication, for “free law” decisions which focus on the concrete facts of the case more so than on the legal

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<sup>106</sup> Weber 1954.

<sup>107</sup> Habermas 1996.

<sup>108</sup> Weber, quoted in Tamanaha 2001, 38.

<sup>109</sup> Weber quoted *Id.*

norms, and for the use of juries.<sup>110</sup> What all these debates presuppose, however, is the viability of the concept of law-as-discourse, i.e., in this case, of law as a realm of articulated, and most usually, State-authorised and bureaucratically administered norms.

In any event, a more extensive study of the concept of a legal system has already been conducted, and much more elegantly than could ever be achieved in this section. The study in question, by Michel Van Der Kerchove and Francois Ost, sets out to show how legal theory has traditionally gravitated towards the value of abstract order, of internal consistency and coherence, of the hunt for the Holy Grail of exhaustive criteria for formal validity.<sup>111</sup> As they note, ‘one hardly ever sees major questions concerning modern Western law...handled without recourse to’ the ‘idea of system and the ideal of systematisation.’<sup>112</sup> A satisfactory definition of law, under the influence of this idea and this ideal, cannot, as Norberto Bobbio argued, be formulated from the standpoint of legal norms considered in isolation; rather, it must begin from the standpoint of the legal order.<sup>113</sup> In Kelsen, as in others, the standpoint of the legal order is also a hierarchical one: ‘the norms of a legal order’, Kelsen argues, ‘are not a complex of valid norms standing co-ordinately side by side, but form a hierarchical structure of super- and subordinate norms.’<sup>114</sup> As is well known, such a conception depends, as it does most prominently in Kelsen (and, in a different way, in Hart), on the presupposition of a basic norm, which, for Kelsen, must remain an unthinkable black hole that ensures the unity and validity of the entire set of legal norms, thereby also guaranteeing the identity of the legal system. Given this fascination with the closed world of a system of norms, and the continual dominance of Kelsen in

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<sup>110</sup> *Ibid.*, 39.

<sup>111</sup> Kerchove and Ost 1994.

<sup>112</sup> *Ibid.*, 1.

<sup>113</sup> *Ibid.*, 2.

<sup>114</sup> Kelsen quoted *Ibid.*, 13.

continental legal theory, it is perhaps unsurprising that Jean-Michel Berthelot, in his magisterial overview of the epistemology of the social sciences, chose to exclude legal science on the basis that, unlike ‘proper’ social sciences, it did not deal with human interaction.<sup>115</sup>

Ost and Kerchove’s overview of forms of systemacity in legal theory – in the work, amongst others, of Kelsen, Romano, Raz, Alchouron, Bulygin, Hart, Bobbio, Hart, Perelman, Wroblewski, Luhmann, and Teubner – and the correlative ideas of static and dynamic systemacity, formal and substantive systemacity, linear and circular systemacity, diachronic and synchronic systemacity, doctrinal and other processes of systematisation, axiomisation, formalisation, consistency, completeness, autopoiesis, more or less relative self-organisation, organic/social/constitutional autonomy, tangled hierarchies, and many other ideas besides – all this demands careful study, if only because these theorists and ideas have preoccupied the minds of legal theorists for a long time. This section shall not reproduce their efforts.

For the purposes of this section, what is significant is the emergence of these problems – such as, the very problem of the identity of a legal system, accompanied as that problem tends to be by the values of coherence, consistency, completeness, etc. – from the tendency to prioritise (perhaps often unreflectively so) the explanatory paradigm of discourse, i.e., of law as a realm, at least most prominently even if not exhaustively, of an order or system of articulated norms.

One should not think, however, that these problems have no contemporary resonance, or that they do not receive attention from individuals and organisations dealing with day-to-day difficulties of managing justice. Perhaps the most prominent example of a contemporary discussion of the identity of a legal system – and one that

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<sup>115</sup> Berthelot 2001. For a recent discussion of Berthelot, see Samuel 2008.

assumes not only the viability but also the utility of a coherent and consistent order or system of articulated norms – is that of the Report of the International Law Commission (ILC) over the alleged fragmentation of international law.<sup>116</sup> The next section explores this contemporary illustration of the notion of the autonomy of the order or system of norms in international legal theory.

### **IA1c. *The Fragmentation of International Law***

The ILC's interest in researching the alleged fragmentation of international law began on the occasion of the fifty-second session of the ILC in 2000.<sup>117</sup> Thereafter, the work proceeded relatively quickly, culminating in the above-mentioned Report and adopted conclusions in 2006. At first entitled 'Risks ensuing from the fragmentation of international law', the title and direction was softened to 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law.'<sup>118</sup> As will become clear, the shift in the title is but an instance of the increasing modesty and self-criticism that characterises the narrative of the Report.

In introducing the phenomenon of fragmentation in international law, the Report makes a distinction between two forms of fragmentation: institutional and legal – the latter to be 'found within the law itself.'<sup>119</sup> The Report notes the growth of treaty activity in the past fifty years,<sup>120</sup> and surmises that this forms part of a more general feature 'of late international modernity' in which we have witnessed 'what

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<sup>116</sup> Koskenniemi 2006 (hereinafter referred to as 'the Report'); but see also ILC, 2006.

<sup>117</sup> The Report, 1.

<sup>118</sup> *Ibid.*, 1.

<sup>119</sup> *Ibid.*, 6. Indeed, elsewhere, the Report notes that 'the issue of institutional competencies is best dealt with by the institutions themselves' and that the ILC 'has instead wished to focus on the substantive question – the splitting up of the law into highly specialised 'boxes' that claim relative autonomy from each other and the general law': *Ibid.*, 13.

<sup>120</sup> *Ibid.*, 7.

sociologists have called “functional differentiation”, the increasing specialisation of parts of society and the related autonomisation of those parts.’<sup>121</sup> The Report acknowledges this to be a phenomenon found in both international and national domains, and calls it the ‘well-known paradox of globalisation’, namely that ‘while [globalisation] has led to increasing uniformisation of social life around the world, it has also lead to its increasing fragmentation – that is, to the emergence of specialised and relatively autonomous spheres of social action and structure.’<sup>122</sup> Irrespective of what we may think of such a sociology of globalisation, what is significant for the purposes of this section is the extension of that thesis to changes ‘within the law itself.’ The following passage illustrates this extension well:

The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialised and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by ‘general international law’ has become the field of operation for such specialist systems as ‘trade law’, ‘human rights law’, ‘environmental law’, ‘law of the sea’, ‘European law’ and even such exotic and highly specialised knowledges as ‘investment law’ or ‘international refugee law’ etc. – each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialised law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles in practices of international law. The result is conflicts between rules or rule-system, deviating institutional practices and, possibly, the loss of an overall perspective on the law.<sup>123</sup>

According to the Report, the perils cited by scholars of such an alleged loss of unity include ‘the erosion of general international law, emergence of conflicting jurisprudence, forum shopping and loss of legal security.’<sup>124</sup> Although, even in these initial pages, the Report acknowledges split scholarly opinion of the phenomenon, it does not point to any potential benefits, but rather notes that ‘others have seen here a merely technical problem that has emerged naturally with the increase of international

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<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*, 8.

<sup>124</sup> *Ibid.*, 9.

legal activity that may be controlled by the use of technical streamlining and co-ordination.<sup>125</sup> Shortly thereafter, the Report is more circumspect, noting that the ILC ‘has understood the subject to have both positive and negative sides’, but it then restricts the positives to a statement that fragmentation ‘reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques.’<sup>126</sup> In this context, the Report cites the work of Sally Engel Merry,<sup>127</sup> as representative of theories of legal pluralism, which are more positively disposed to the phenomenon, but is quick to follow with work said to be critical of that movement.<sup>128</sup>

As it proceeds, however, the Report begins to accumulate worries and qualifications about its approach. For example, in its introductory illustration of the phenomenon of fragmentation, it offers an example of the apparent applicability of three different ‘rule-complexes’ to what appears to be the same legal problem (in the case at hand, of ‘the possible environment effects of the operation of the MOX Plant nuclear facility at Sellafield’).<sup>129</sup> The Report notes that in dealing with the above problem ‘the UNCLOS Arbitral tribunal recognised that the meaning of legal rules and principles is dependent on the context in which they are applied.’<sup>130</sup> However, at least in this introductory outline of its method, the Report is more concerned with what it characterises as dangerous implications for ‘the objectives of legal certainty and the equality of legal subjects’,<sup>131</sup> caused, allegedly, by ‘the splitting up of the law into highly specialised “boxes” that claim relative autonomy from each other and the

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<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, 14.

<sup>127</sup> Merry 1988. Elsewhere, the report also cites Santos 1995, but this work is also not discussed in any detail. Legal pluralism will be returned to in section IB1e.

<sup>128</sup> Roberts 2005. Of course, the Report cites many other references, many of which are discussed in an earlier paper co-authored by Koskenniemi: see Koskenniemi and Leino 2002.

<sup>129</sup> The three different rule-complexes are ‘the (universal) rules of the UNCLOS, the (regional) rules of the OSPAR Convention, and the (regional) rules of EC-EURATOM’: the Report, 10.

<sup>130</sup> *Ibid.*, 12.

<sup>131</sup> *Ibid.*

general law.’<sup>132</sup> Similarly, although the Report acknowledges that ‘new types of specialised law do not emerge accidentally but seek to respond to new technical and functional requirements’, listing numerous examples, it goes on to argue that ‘when such deviations or [specialisations] become general and frequent, the unity of the law suffers.’<sup>133</sup>

How is ‘unity’ characterised in these early stages of the Report? We receive a hint, but also, once again, an important qualification, when the Report notes that ‘In conditions of social complexity, it is pointless to insist on *formal unity*.’<sup>134</sup> The Report continues by saying that ‘a law that would fail to articulate the experienced differences between fact-situations or between the interests or values that appear relevant in particular problem-areas would seem altogether unacceptable, utopian and authoritarian simultaneously.’<sup>135</sup> This qualification marks the Report’s somewhat anxious awareness that the project it is introducing – i.e., an elaborate conceptual structure said to be capable of ‘dealing with tensions or conflicts between legal principles’<sup>136</sup> – comes dangerously close to presupposing an ideal of formal unity. In other words, the Report’s anxiety is created by the tension between its recognition of the undesirability and impossibility of formal unity, and the formalism of its method for understanding legal rules that is invoked by its focus on normative conflicts. Put another way: the Report suffers from taking ‘the law itself’ as an object.

The conceptual structure that the Report outlines, and then works within, focuses on various kinds of normative conflicts. It presents these various kinds of normative conflicts as techniques that ‘seek to establish meaningful relationships between such rules and principles so as to determine how they should be used in any

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<sup>132</sup> *Ibid.*, 13.

<sup>133</sup> *Ibid.*, 15.

<sup>134</sup> *Ibid.*, 16; emphasis added.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*, 18.



particular dispute or conflict.<sup>137</sup> The Report outlines four principal normative conflicts: 1) relations between special and general law; 2) relations between prior and subsequent law; 3) relations between laws at different hierarchical levels; and 4) relations of law to its ‘normative environment’ more generally.<sup>138</sup> These conflicts may manifest themselves in the form of horizontal relations where one law invalidates another (e.g., *jus cogens* norms), or relative relations, where one law ‘is set aside only temporarily and may often be allowed to influence “from the background” the interpretation and application of the prioritised law.’<sup>139</sup>

A conflict, more generally, says the Report, can be approached in two different ways: first, it can relate to the ‘subject-matter of the relevant rules or the legal subjects bound by it’;<sup>140</sup> second, it can relate to ‘different interests or different policy objectives.’<sup>141</sup> Again, having made this distinction, the Report acknowledges the difficulties inherent in it. To the extent, for example, that the approach dictated by ‘subject-matters’ implies a ‘pre-existing classification scheme of different subjects’ it runs into the reality of there being no such classification schemes.<sup>142</sup> Further, one can also not hope to pigeon-hole interests and policy objectives, for the argument as to which policy objective is relevant can be ‘wholly arbitrary’, leading to a ‘*reductio ad absurdum*.’<sup>143</sup> Nevertheless, despite these difficulties, the Report says that the ‘same subject-matter’ can be invoked:

The criterion of ‘same subject-matter’ seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other

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<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, 18.

<sup>139</sup> *Ibid.*, 19. The Report mentions a number of works it considers of relevance to the question of conflicts between norms: see *Ibid.*, 24 ff21. Two further relevant references, particularly in the context of a conceptual structure of conflicts between norms, are: Zucca 2007 and Besson 2005. It is noteworthy that the very notion of a normative conflict depends on the idea of the possibility of unity, or an internally consistent order or system of norms.

<sup>140</sup> The Report, 21.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*, 22.

<sup>143</sup> *Ibid.*

words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party.<sup>144</sup>

Although the ‘pointing in different directions’ (where, for example, the different objectives of trade law and environmental law might ‘have an effect on how the relevant rules are interpreted or applied’) may not lead to ‘logical incompatibilities between obligations upon a single party, they may nevertheless also be relevant for fragmentation.’<sup>145</sup> Logical incompatibilities are not, the Report says, its focus. To have such a focus, it continues, is to mischaracterise ‘legal reasoning as logical subsumption.’<sup>146</sup> Instead, the Report seeks to focus on situations ‘where two rules or principles suggest different ways of dealing with a problem’ and in this way, to avoid a model of logical reasoning which deems it possible for decisions to bypass the role of ‘interpretation and choice between alternative rule-formulations.’<sup>147</sup> In effect, this qualification is another instance of the tension referred to above. On the one hand, the Report seeks to identify normative conflicts between two or more sets of rules or principles said to relate to the same subject matter, and on the other, it acknowledges that the process of ‘conflict-ascertainment and conflict-resolution’ is part of the ‘pragmatic process through which lawyers go about interpreting and applying formal law.’<sup>148</sup> However, the Report’s invocation of that ‘pragmatic process’ is never elaborated upon, and the Report continues throughout to stress the importance of establishing – partly on the basis of a mix of its own reading of Hartian,

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<sup>144</sup> *Ibid.*, 23. The invocation of the ‘same subject-matter’ appears often enough in the literature on fragmentation of international law. Consider the following statement from Enzo Cannizzaro: ‘In situations in which the two courts are called on to qualify legally the *same or analogous conduct* under rules which are formally different, although of *identical content*...an analysis of the scope of their respective jurisdictions might serve to avoid overlapping judicial findings.’ See, Cannizzaro 2007, emphasis added.

<sup>145</sup> The Report, 24.

<sup>146</sup> *Ibid.*, 25.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*, 27.

MacCormickian and Dworkinian insights<sup>149</sup> – a ‘systematic relationship between the various decisions, rules and principles.’<sup>150</sup> The only alternative mentioned derisively by the Report is to conceive of ‘the various decisions, rules and principles of which the law consists’ as being ‘randomly related to each other.’<sup>151</sup> As we shall see in the section below dealing with legal-work-as-tradition, there are many alternatives, none of which need lead to so-called randomness.

It would be unfair to the Report to end the brief summary here. For, in contradistinction to the aim with which the Report began – i.e., to offer an account of purposive harmonisation based on establishing definite relationships of priority between normative conflicts – the conclusion notes that ‘relevant hierarchies must only be established ad hoc and with a view to resolving particular problems as they arise.’<sup>152</sup> It notes further that the ‘formalist agenda’ of addressing conflicts by way of legal techniques establishing defeasible-priorities between normative conflicts has its limitations.<sup>153</sup> ‘The world’, says the conclusion, ‘is irreducibly pluralistic’ and it would be a mistake to think that law can ‘resolve in an abstract way any possible conflict that may arise’, for each area of the law, institutionally organised, ‘has its experts and its ethos, its priorities and preferences, its structural bias.’<sup>154</sup> These are significant concessions, but it is noteworthy that the conclusion goes yet further. Unlike the introduction, it specifically endorses the ‘constitutive value’ of legal pluralism. Coherence, it says, is ‘a formal and abstract virtue’, traditionally connected with the aims of ‘predictability and legal security.’<sup>155</sup> Identifying lapses of coherence,

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<sup>149</sup> *Ibid.*, 28.

<sup>150</sup> *Ibid.*, 33.

<sup>151</sup> *Ibid.*, 33.

<sup>152</sup> *Ibid.*, 485. It should be noted that at 484 the Report asserts that it ‘has not aimed to setup definite relationships of priority between international law’s different rules or rule-systems’, but this is difficult to reconcile with the position taken in the introduction as to the possibility of such a systematic view.

<sup>153</sup> *Ibid.*, 487.

<sup>154</sup> *Ibid.*, 488.

<sup>155</sup> *Ibid.*, 491.

it seems to suggest, points us in the direction of identifying problems of co-ordination, but this, it notes, is ‘counterbalanced by the contextual responsiveness and functionality of the emerging (moderate) pluralism.’<sup>156</sup> Indeed, the Report acknowledges that there is ‘no homogenous, hierarchical meta-system’ that ‘is realistically available to do away with such problems.’<sup>157</sup>

At play in these debates is a tension between the attractiveness of the conception of law-as-discourse, i.e., in the Report, the desire, no doubt in no small part driven by the very agenda of the ILC, to establish, maintain and protect the unity of the international legal order – of an order or system of norms – and the somewhat reluctant realisation that this may be a theoretical anxiety that masks the importance of the responsiveness of international legal institutions to the problems they are tasked to deal with. Responsiveness, as we shall see below, tends to be a value emphasised by those oriented to the law-as-tradition paradigm (see IB1f).

#### **IA1d. *The Normativity of Law***

It is time now to turn to another feature of those theories of law that give explanatory priority to law-as-discourse. The argument here, in short, is that the prioritisation of abstract phenomena – i.e., norms, preferably already articulated or at least already identified as operative by the theorist – is used in dealing with the problem of the normativity of law. Both the solution to the problem and the articulation of the problem are linked – they are like two sides of the same coin. On the one hand, the problem is posed as one in which one asks how norms guide human conduct. On the other hand, the solution posits norms as reasons for action, assigning those reasons causal powers of influencing – or more strongly – determining behaviour. The

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<sup>156</sup> *Ibid.*, 493.

<sup>157</sup> *Ibid.*

problem and the solution are made for each other. Both privilege first person ex ante perspectives from which to describe behaviour. The task, by no means easy, for accounts of the normativity of law conceptualised in this manner, is to come up with a watertight fit between the problem and the solution. The debate is underlined by the conception of law-as-discourse, which raises both the problem and offers resources for its resolution, thereby further sedimenting its influence in this tradition of jurisprudential inquiry. Naturally, this characterisation will not fit all cases, and, as we shall see, in certain theories, the problem of the normativity of law may be playing a function specific to that theory.

A useful context for a discussion of these issues is a recent paper by Timothy Endicott. Endicott's work has focused on the relevance and implications of certain problems in the philosophy of language for legal theory, and in particular, on the problem of vagueness.<sup>158</sup> More recently, however, Endicott has turned to confront the implications of the phenomenon of vagueness for the normativity of law.<sup>159</sup> On its face, the implication appears very troublesome. After all, if the very 'point of a norm is to guide conduct for a purpose', then the vagueness of a norm 'seems repugnant to the very idea of making a norm.'<sup>160</sup> For a vague norm, as Endicott continues, 'leaves the persons for whom the norm is valid with no guide to their conduct in some cases.'<sup>161</sup> Once more, 'a vague norm in a system of norms does not control the officers or officials responsible for applying the norms or resolving disputes – and part of the value of a system of norms is to control the conduct of the persons to whom the system gives normative power.'<sup>162</sup> In contradistinction to these worries, however, Endicott sets out to show that not only is vagueness 'a central technique of

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<sup>158</sup> See, Endicott 2000.

<sup>159</sup> Endicott 2005.

<sup>160</sup> *Ibid.*, 27.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

normative texts: it is needed in order to pursue the purposes of formulating such texts', but that it is also 'of central importance to the very idea of guiding conduct by norms.'<sup>163</sup>

Characteristically, and in a move that will be much criticised by theorists in the part below dealing with law- and legal-work-as-tradition, Endicott states that 'not all norms are vague.'<sup>164</sup> Examples of terms that Endicott characterises as vague include 'child', 'trade', or, more 'extravagantly', 'abandoned', and 'reasonable.' Vagueness, on this view, is a property of certain terms and phrases. It is inherent in them; it is a characteristic of the nature of language. It is not that any term or phrase can, in certain circumstances (or, to speak somewhat artificially, 'on certain facts'), become vague. Rather, and in testimony once more to the autonomy granted to orders or systems of norms, it contains its own properties that allow it, as it were, to propel itself. Endicott's move, i.e., the demarcation of vagueness as an inherent property of certain terms and phrases, allows him to characterise vagueness as a technique used by lawmakers. Sometimes lawmakers have a choice – they can either choose what Endicott calls the 'arbitrariness of precision' (arbitrary not because it is vague, but because it is unclear for what other reason the voting age is, say, exactly 18, rather than 18.5) or the 'arbitrariness of vagueness.'<sup>165</sup> At other times, precision may be impossible – Endicott's example is laws concerning baby-sitting – at which point the 'impossibility' of precision is quickly characterised as in any event 'undesirable', such that Endicott is free to conclude that 'because there is no precise way of setting precise standards that will meet the criteria for a good legal regime' (in the case of baby-sitting, Endicott describes this as a matter of law not interfering too much with

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<sup>163</sup> *Ibid.*, 28.

<sup>164</sup> *Id.*

<sup>165</sup> *Ibid.*, 37-40.

what counts as good parenting), so ‘the purpose of the regulation itself requires vague standards.’<sup>166</sup>

Recall that Endicott set out to show how vagueness is of central importance to the guidance of human conduct by norms. The above argument serves, at best, to justify some practices of lawmaking, rather than answering how vagueness is good for the normativity of law amongst ordinary citizens. For Endicott, to recall, as for many of those working under the law-as-discourse paradigm, a ‘norm is a reason for action: the point of a norm is to guide conduct for a purpose.’<sup>167</sup> Endicott continues:

The reason for making the norm is to promote or to achieve the purpose; the norm itself is treated as a reason, or it is not treated as a norm at all. It is a consequence of this understanding of a norm, that a normative text is a text formulated and communicated to express a reason for action. Normative texts have the general purpose (whatever other purposes they may have in particular instances) of guiding conduct.<sup>168</sup>

Having set out the requirement of legal normativity that way, Endicott struggles to provide an example of where a norm that he characterises as vague (e.g., not ‘neglecting’ one’s child when deciding on a baby-sitter) actually plays a role, let alone a beneficial role, in the behaviour of citizens. ‘Under the Children and Young Persons Act,’ says Endicott, ‘the parent needs to decide whether it would be “neglect” (and may need to guess whether officials would count it as neglect).’<sup>169</sup> Is this assertion, as to what a parent would need to do, capable of proving the role or the beneficial role of a vague term in a statute in the practical reasoning of an agent? Without elaborating on the example, Endicott quickly asks us to ‘note that many norms are addressed to officials or institutions.’<sup>170</sup> Indeed, here as elsewhere in the paper, Endicott keeps hiding the problem of legal normativity under the carpet of justifying the alleged

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<sup>166</sup> *Ibid.*, 42.

<sup>167</sup> *Ibid.*, 36.

<sup>168</sup> *Id.*

<sup>169</sup> *Ibid.*, 34.

<sup>170</sup> *Ibid.*, 35.

inherent vagueness of norms vis-à-vis the practices of lawmaking and adjudication. It is not that the norm of ‘neglect’ actually functions as a reason for action for a parent. Rather, what matters is whether the evaluative term ‘neglect’ can and ought to be reasonably used as a resource for evaluating the conduct of parents. A parent that officials are likely to recognise as properly caring for their children would not need to, nor would be expected to, consult a statute requiring them to abstain from neglecting their children. At best, the inclusion of the term ‘neglect’ in a statute that is to be used when evaluating the conduct of a parent charged under the statute, helps officials to consider the widest possible array of circumstances surrounding the case (arguably necessary given the variety of parenting styles and the complexity of familial contexts), as well as to serve the liberal values of minimising the interference of the state in the private lives of families – in short, once again, the alleged vagueness of a term, especially when characterised as an inherent property of a term, helps to justify lawmaking and adjudicating practices. It does little to advance a solution to the problem of the normativity of allegedly vague rules with respect to the citizenry.

To state this is not necessarily to disagree with Endicott that it may indeed be beneficial for ‘the framers of norms’ to ‘be prepared to assess competing forms of arbitrariness, and to judge whether the forms of arbitrariness resulting from a vague norm are more or less damaging than the forms of arbitrariness that result from a precise norm.’<sup>171</sup> It is simply to state this argument is silent on the role of such norms in the behaviour of the citizenry – once again, it functions more as a justification for the use of certain kinds of resources in the post factum evaluation, by third parties, of the behaviour of others. That it is also capable of serving as a justification for minimising interference of the state in the regulation of private realms does not turn it

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<sup>171</sup> *Ibid.*, 47.



into a proof of the role, beneficial or otherwise, of such norms in the ex ante first person behaviour of the citizenry.

The brief discussion above certainly raises a puzzle. One cannot but help ask: what is the purpose of the normativity of law debate for legal theories? What should they expect from any solutions to it? The temptation, given the highly unrealistic thought experiments engaged by theorists (e.g., as above, of the parent consulting a statute to decide on an appropriate baby-sitter) is that the demand for normativity is a litmus test for the reasonableness of norms, i.e., reasonableness here being correlated to the values a theorist might be sympathetic to in justifying (or criticising) certain lawmaking and adjudicating practices (e.g., disagreement over whether more or less regulation of private life is appropriate, or more or less faith in officials in their capacity to exercise wise judgement, etc.).

A theorist for whom the reasonableness of the law, in line with certain values, is of prime importance, is John Finnis. Unfortunately, Finnis's position cannot be considered here in any depth. Nevertheless, it will be useful, before going on to consider Hart and Raz, to indicate how he too privileges the first person ex ante perspective. Perhaps the strongest statement of the privileging of this perspective by Finnis, provided by him in a recent article, and in effect a paraphrase of what Finnis takes to be the thesis of a co-authored paper by Hart and Stuart Hampshire, is the following passage:

One has a knowledge of, and certainty about, what one is doing, one's own voluntary actions, which is not an observer's knowledge, and is not based like the observer/spectator's on empirical evidence or on the observation of one's own (the acting person's movements): it is practical knowledge.<sup>172</sup>

Nevertheless, Finnis, like Raz (as we shall see below), qualifies his endorsement of Hart's first person ex ante point of view. The criticism is that Hart does not consider

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<sup>172</sup> Finnis 2007, 31, summarising Hart and Stuart Hampshire 1958.

the *content* of rules seen from the perspective of the internal point of view, i.e., from a perspective under which those rules are reasons for action. Hart's legal theory, says Finnis, 'leaves those reasons largely unexplored, and rests largely content with reporting the fact that people have an attitude which is an internal aspect of their practice.'<sup>173</sup> 'It does not', as clearly Finnis argues it should, 'seek to understand those reasons as reasons all demand to be understood – in the dimension of soundness or unsoundness, adequacy or inadequacy, truth or error.'<sup>174</sup> Indeed, Finnis goes as far as to say that Hart's position suffers from a serious incoherence:

Trying to understand the internal point of view makes, I would say, no sense as a method in social theory unless it is conceived as trying to understand the intelligible goods, the reasons for action, that were, are and will be available to any acting person, anyone capable of deliberation or of spontaneously intelligent response to opportunities. Once these reasons are understood, along with accompanying, potentially reinforcing, potentially disruptive, subrational inclinations (passions, emotions), theorists are equipped to understand the myriad ways in which the practices of individuals and groups can, do and doubtless will respond, reasonably and more or less unreasonably, in the ever-variable but far from random circumstances of human existence.<sup>175</sup>

This prioritisation of rationality – at most, as above, accompanied by 'subrational inclinations' – is at odds with theories (including some law-as-tradition and legal-work-as-tradition theoretical pictures) for whom emotions are always there, occasionally accompanied by tendencies for self-conscious reflection. The point here, however, is that, in effect, Finnis provides more fodder for the argument posed above, i.e., that the normativity of law is a thought experiment engaged in by legal theorists, or a thought-context set up by legal theorists, thanks to which the reasonableness or otherwise of the rules themselves can be evaluated. By creating a possible world in which the rules really do function as reasons for action (including, potentially, as exclusionary reasons – to be discussed below), the thought-context allows a theorist to

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<sup>173</sup> Finnis 2007. 42.

<sup>174</sup> *Id.*

<sup>175</sup> *Ibid.*, 52.

justify their own practice of taking the evaluation of the content of the rules seriously. Surely, or so the argument goes, if rules function as reasons, and thus are capable of guiding the behaviour of the citizenry, then the content of the rules matter. Of course, this is not the only way for the content of the rules to matter (one might, for example, place importance on how the ‘law itself’ symbolises, represents, the values of a particular community), but it certainly appears to be a way used by Finnis and others to justify taking seriously the importance of the reasonableness of the content of rules.

It is time now to look a little more closely at the various articulations and the various treatments of the thought-experiment or thought-context referred to above in Raz and Hart. Of assistance here will be Sundram Soosay’s recently completed PhD thesis, ‘Skills, Habits, and Expertise in the Life of the Law.’<sup>176</sup> As a work that engages directly and carefully with the behavioural underpinnings of contemporary Anglo-American analytical legal theory, Soosay’s work stands out as a *rare avis*. The aim of the discussion below is not to provide a comprehensive overview of Soosay’s contribution, but rather, to sketch some of the main critical points raised by him, while also making reference to some of the principal sources in legal theory that he focuses on.<sup>177</sup> Again, to recall, the point of the discussion in the context of this section is to reveal another feature of the law-as-discourse paradigm, i.e., of the posing of the problem of the normativity of law, which afflicts human beings imagined as intentional, highly self-conscious and deliberative agents, and to which the only solution is one that grants already articulated or theoretically posited norms causal power in their role as reasons for action for such agents. The point is that the problem is just as artificial as the solution: it is only for agents imagined to be such that norms, imagined to be reasons for action, could have that kind of causal power.

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<sup>176</sup> Soosay 2005. See also Soosay 2006.

<sup>177</sup> The focus below is on Hart 1994 and Raz 1990.

It was mentioned above that Soosay's discussions of Hart and Raz are critical. The aim here is not to be critical in the same spirit as Soosay, i.e., to argue over the reality or unreality of the pictures of behaviour offered by those theorists. In the context of the literature on the normativity of law, arguing over the reality or unreality of those pictures may mean that we will miss their function as thought-experiments or thought-contexts thanks to which those theorists discuss and evaluate the importance of rules, their pedigrees and their content. The general aim, in any event, is to describe the tendencies and features of theoretical pictures of law and legal work (in this part, that of discourse-oriented pictures); it is not to assert, as Soosay seems to assume, that there is a meta-standard or unproblematic account of reality, such that any one theoretical picture can be said to be closer to the truth of the matter.

The object of Soosay's criticism is directed to the 'tendency always to imagine that intentional action is carried out in a wholly self-conscious and deliberate manner, with explicit decision-making included as an inevitable part of its structure.'<sup>178</sup> In Soosay's view, this is a tendency that has dominated thinking within legal theory, 'particularly, of analytic and positivist legal theory, the view championed by the likes of Hart, MacCormick<sup>179</sup> and Raz', but also Ronald Dworkin.<sup>180</sup> The discussion below will not consider Soosay's treatment of MacCormick and Dworkin, as both are returned to in subsequent sections (MacCormick is returned to in IA2b, and IC4, and Dworkin in IA2a). The discussion will proceed, instead, to discuss Soosay's criticism of Raz, and then Hart. Before going on, it is noteworthy to remark that despite his fervent criticism of this tendency, and his attempt to replace it with another conception, Soosay does retain one of its most important features, namely, the notion

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<sup>178</sup> Soosay 2005, 10.

<sup>179</sup> Soosay's criticism of MacCormick is based on MacCormick's previous work – indeed, as we shall see in a subsequent section (IC4), MacCormick acknowledges and discusses Soosay's criticism in MacCormick 2007.

<sup>180</sup> Soosay 2005, 10.

of intentional action. The decision to retain the concept of intentionality, however, may very well – as we shall see in discussions of legal-work-as-tradition, render Soosay’s alternative conception less radical than he may wish it to be. This is largely because the notion of ‘intentional action’ fits neatly into an intellectual history that carries with it the concepts of self-consciousness and strategic and explicit deliberation – it does not necessarily do so (which is an important point to emphasise – the conception of intentionality can be, as in Maurice Merleau-Ponty,<sup>181</sup> a case of motor-intentionality), but it traditionally has.

One of Soosay’s examples of the above-mentioned dominant tendency to favour the self-conscious and explicitly deliberative mode of explanation of behaviour is Raz’s *Practical Reason and Norms*.<sup>182</sup> Raz, says Soosay, exemplifies ‘unspoken adherence to the self-conscious, deliberative model.’<sup>183</sup> He assumes ‘a thoughtful, self-conscious attitude on the part of human agents’ and thus he speaks of action always and invariable being taken for reasons.<sup>184</sup> Raz recognises that there ‘are occasions when decisions are made and action is taken where reasons do not appear to play the role we expect’ – where there is, in other words, ‘no careful weighing up of reasons.’<sup>185</sup> Nevertheless, in explaining this phenomenon Raz ‘does not depart from his scheme of reasons’ and chooses, instead, to speak of ‘exclusionary reasons’, i.e., ‘the idea...that among the reasons the individual has to work with, a special class of reasons exists which operates not by contributing to the process of reasoning, but by shutting the process down altogether.’<sup>186</sup> An ‘exclusionary reason’, then, ‘is a reason

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<sup>181</sup> See, for example, Merleau-Ponty 2002 (1945).

<sup>182</sup> Raz 1990, 176; hereinafter, referred to in the text as *PRN*.

<sup>183</sup> Soosay 2005, 14.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

not to reason’,<sup>187</sup> the latter being a reason undertaken deliberately and self-consciously.<sup>188</sup> Raz reifies the concept of a reason for action – he promotes, in other words, the view that we really do act for reasons even when it would appear that we are not.

Soosay’s dissatisfaction with Raz’s approach is that an explanation that uses the concept of ‘exclusionary reasons’ is not ‘representative of our experience of norms and of legal life specifically.’<sup>189</sup> But let us consider *PRN* from another angle – one that does not depend on its verisimilitude (or lack of) with legal life. In keeping with an observation made several times now, namely that theories are responses to the constructions of previous theories, *PRN* can be understood to be a response to – and an attempt at a solution of – a problem that Raz found with Hart’s ‘practice theory of rules.’ Raz’s characterisation of norms as reasons for action is designed to avoid the three major defects he argues that the practice theory suffers from: that ‘it does not explain rules which are not practices; [that] it fails to distinguish between social rules and widely accepted reasons; and [that] it deprives rules of their normative character.’<sup>190</sup> Consider the alleged third defect: the claim is that the practice theory ‘deprives rules of their normative character.’<sup>191</sup> This defect is tied to the understanding that Raz attributes to Hart of the use of an expression such as ‘it is a rule that one ought to.’<sup>192</sup> Raz takes it that Hart understands the use of such an expression to be warranted only if the practice of conforming to the rule exists.<sup>193</sup> In this way, Raz states, ‘rule sentences are used to make normative statements’, but those normative statements are not statements that there is a reason to act in the manner

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<sup>187</sup> *Id.*

<sup>188</sup> *Ibid.*, 15.

<sup>189</sup> *Ibid.*, 16.

<sup>190</sup> Raz 1990, 53.

<sup>191</sup> *Ibid.*, 56.

<sup>192</sup> *Ibid.*, 57.

<sup>193</sup> *Ibid.*, 58.

prescribed by the rule, but ‘merely...that there is a reason.’<sup>194</sup> In other words, rules understood by Hart, according to Raz, do not provide reasons for action. They simply describe the circumstances – by way of Hart’s internal point of view – in which a member of a community can felicitously use the expression, ‘one ought to....’ In that sense, says Raz, the internal point of view reveals to us when a speaker, the member of a particular community, is not alone,<sup>195</sup> but it contributes nothing to practical reasoning, i.e., it does not provide a reason *for* acting in accordance with the rule.

Following on from Finnis’s critique cited above, Raz’s argument should feel familiar. As with Finnis, one of the points that can be made about Raz’s critique of Hart is that Raz identifies these three defects precisely because Raz needs to promote legal normativity – conceived of as a need for showing how rules function as reasons for action – as a problem. However, for Raz, unlike for Finnis, the reason why we need the problem of legal normativity is not in order to justify the evaluation of the reasonableness of the content of rules, but rather, to explain, or provide further proof for a particular explanation of, the authority of law. Saying that rules of law function as exclusionary reasons for action is a thought-context, or thought experiment, thanks to which we can see the authority of the law in action. Law is authoritative when the rules of law function as exclusionary reasons for action, and since law really does function as exclusionary reasons for action (how else could law be normative?), then it follows that those rules of law that function in such a manner are authoritative.<sup>196</sup> It is, once again, a watertight argument, but it is one that emerges only because it sets up both the problem and the solution. Again, the point, in any event, is not to evaluate the argument, or even to defend the all too brief characterisation of it here; the point,

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> This may still leave the issue of the conditions under which authority ought to be exercised open, but it links that issue to the authoritativeness of law.

rather, is to show the interconnection between the problem of legal normativity, the picture of behaviour as intentional, conscious and deliberative conduct (functioning as a thought-context or thought-experiment), and other features or aims of a theorist's inquiry (justifying law's authority, or justifying the evaluation of the reasonableness of the content of norms, etc.)

Let us move on to Soosay's criticism of Hart. Soosay argues that 'Hart insisted that our experience of...[law] was characterised by a "critical reflective attitude," going out of his way to distinguish this attitude from "mere habits of behaviour".'<sup>197</sup> Similarly with the distinction between internal and external rules – here, says Soosay, 'Hart sought to make clear that obedience to the law arises from a self-conscious commitment to the law, which is what the internal aspect amounts to. It describes not only cognisance of the rule in question, but explicit acceptance of it.'<sup>198</sup> Finally, Hart's 'preference for a deliberate, self-conscious view of law is reflected...in his insistence that law and morality be seen as separate', an insistence that Soosay attributes to the attempt to 'make clear that legal life is not a matter of intuition or feeling or cultural inheritance', but rather, 'a matter of self-conscious choice' – 'a matter of taking a hand in our own destiny, approaching life in a thoughtful manner and making decisions as to how we will live.'<sup>199</sup> Soosay calls Hart's approach 'a top-down, bureaucratic model', and one he wants to challenge by offering 'instead a ground-up, experiential one.'<sup>200</sup>

A good part of Soosay's criticism is what Soosay calls Hart's 'searching' investigation into 'habits of behaviour.'<sup>201</sup> Soosay argues that 'for Hart, the

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<sup>197</sup> Soosay 2005, 38.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* In this respect, assuming Soosay's point to be correct, it is interesting to note the great degree of similarity – of course, noted by many scholars before – between Hart and John Stuart Mill.

<sup>200</sup> *Ibid.*, 40.

<sup>201</sup> *Ibid.*, 41.



unthinking, automatic character of such habits surely could not be sufficient to account for the complexity of legal life.<sup>202</sup> For Soosay, habits, ‘both of perception and behaviour’ – or, in another way, ‘the embedding of the law in the environment the human agent perceives’<sup>203</sup> – are ‘central to the operation of the law...in the present day.’<sup>204</sup> Again, a proper analysis of Soosay’s own approach is not possible here: what can be said, however, is that in his criticism of Hart, Soosay privileges the task of the explanation of ‘compliance’ and ‘efficacy.’<sup>205</sup> The very notion of ‘embedding of the law in the environment’ and the method of proceeding ‘bottom-up’, utilised by Soosay, are both heavily influenced by an interest in explaining not so much how law could work (in the now familiar fashion of a thought-experiment or thought-context), but how it actually works well, and further, not in spite of, but because of ‘our widespread failure to reason through our decisions.’<sup>206</sup>

However, as we have seen with Finnis and Raz, the internal point of view – the privileging of the first person *ex ante* perspective and the imagination of behaviour as intentional, conscious, deliberative action for reasons – needs to be considered as an element in a theory, and its function within that theory must be examined. Although an appropriately subtle analysis cannot be made here, a few observations will be timely. It is important to see that Hart describes his own project, in *The Concept of Law*,<sup>207</sup> as that of advancing ‘legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and

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<sup>202</sup> *Id.*

<sup>203</sup> *Ibid.*, 42.

<sup>204</sup> *Id.*

<sup>205</sup> *Ibid.*, 41-2.

<sup>206</sup> *Ibid.*, 43.

<sup>207</sup> Hart 1994.

morality, as types of social phenomena.’<sup>208</sup> In that spirit, his theory is perhaps best taken as an analytical scheme that allows us to differentiate between types of rules, as well as different aspects of them, where, for example, the internal point of view is understood as a device (again, a thought-experiment or thought-context) that allows us to distinguish between the internal and the external aspects of rules. As Hart repeatedly stresses, ‘the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which’, he thought, ‘we cannot hope to elucidate even the most elementary forms of law.’<sup>209</sup> In that respect, then, one has to see, as with Raz and Finnis, the privileging of the self-conscious and deliberative mode of explanation of behaviour as playing a supportive role, assisting, in Hart’s case, in the drawing of distinctions without which his definition of a legal system as a union of primary and secondary rules would be impossible.

There is one more contribution to the debate that ought to be briefly described in this context. In a paper entitled ‘Normativity and Norm-Subjects’,<sup>210</sup> Michael Giudice argues that contemporary legal theory ignores the distinction between norms-subjects and norm-subjected. Norm-subjects are those who ‘actually face, and so have a choice about, the normative claims of legal norms.’<sup>211</sup> But to be a norm-subject, as Giudice points out, requires, amongst other things, that one has knowledge of the norm. Such a lack of knowledge can arise – and one might think, in fact, that this is the normal rather than abnormal state of affairs – when citizens are not aware, for whatever reason, that new norms have been introduced into the legal system; or when new norms are introduced retroactively; or when citizens know that a relevant

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<sup>208</sup> *Ibid.*, 17.

<sup>209</sup> *Ibid.*, 80.

<sup>210</sup> Giudice 2005.

<sup>211</sup> *Ibid.*, 108.

norm exists, know that it makes a demand on their practical reason in the situation at hand, but are unsure of what exactly the norm requires. Where these conditions of knowledge, and others, are missing, citizens are better conceptualised as norm-subjecteds, as persons subjected to norms.

Giudice's distinction is instructive in the context of the present discussion. Working under the conception of law-as-discourse, theorists are prone to conceive of persons as agents acting intentionally for reasons articulated by the law. The question of law's normativity is positioned with respect to ex ante guidance at a micro-level of actions. As Giudice points out, when we acknowledge the case of norm-subjecteds, what we see is a functioning of law as post factum evaluation of behaviour. But what impels Giudice to notice this alternative is recognition of the limits of explanations of behaviour based on the causal power of reasons.

A great deal more could be said in this context. The problem of legal normativity and its relationship with modes of explanation of behaviour is a topic ripe for debate in contemporary legal theory. There have been important contributions, like that of Sylvie Delacroix,<sup>212</sup> which have not been discussed here.<sup>213</sup> To have indulged any further, however, would be to step outside the boundaries of the purposes of the present discussion. The aim has been to show that it is an important feature of a conception of law-as-discourse that such conceptions tend to privilege the first person ex ante perspective, or, differently, tend to imagine behaviour as consisting of intentional, self-conscious and deliberative action for reasons, and that this mode of explanation of behaviour functions as a thought-experiment or thought-context allowing for the performance of other kinds of functions within those theories. Whether or not the matters that those explanatory limits leave out (such as the case of

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<sup>212</sup> Delacroix 2006

<sup>213</sup> But, see, Del Mar 2007.

Giudice's norm-subjecteds) are striking enough to ease theorists out of such a picture is an altogether different matter.

### **IA1e. *The Existence of Rules and the Philosophy of Language***

Another important feature of the conception of law-as-discourse is the insistence on identifying criteria of validity thanks to which the existence of phenomena as rules of law can be ascertained. This ambition has numerous implications. One of them is that it creates a need for social foundations for those ultimate rules that set the criteria for validity, which will be the topic of the next section. Another is its implications for an understanding of language, or, perhaps more accurately, its close link with a certain kind of understanding of language. It is the second of these that shall be explored in this section. The focus is on two theorists, beginning with Hans Kelsen, and then finishing with Hart.

Kelsen begins his *Pure Theory of Law*<sup>214</sup> in the following manner: the 'exclusive purpose' of legal theory, he says, 'is to know and to describe its object. The theory attempts to answer the question what and how the law *is*, not how it ought to be.'<sup>215</sup> In describing the object (law), the further aim of this 'science' is to 'eliminate from the object of this description everything that is not strictly law', e.g., 'psychology, sociology, ethics and political theory.'<sup>216</sup> Kelsen's next move is to differentiate between an act or series of acts as perceived by our senses, and the 'legal meaning of an act'<sup>217</sup> – the latter being an 'external fact' that 'is not immediately perceptible by the senses.'<sup>218</sup> So, for example, a group of people assembling in a large room, making speeches, some raising their hands (others not), is an 'external

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<sup>214</sup> Kelsen 1970.

<sup>215</sup> *Ibid.*, 1; original emphasis.

<sup>216</sup> *Id.*

<sup>217</sup> *Ibid.*, 2.

<sup>218</sup> *Id.*

happening’ that we can perceive with our senses. The legal meaning of this ‘happening’, however, is that of a statute being passed in an assembly.<sup>219</sup> Of course, we may, says Kelsen, intend our acts to have legal meaning – such that the subjective and objective meanings of the act coincide. So, for example, we may intend a certain document to be our last and will and testament. But whether our act of producing the document, and the document itself, amounts to a will and testament – in other words, whether that act possesses a legal meaning – does not depend on our subjective intentions. The legal meaning is, instead, ‘derived from a “norm” whose content refers to the act, this norm confers legal meaning to the act, so that it may be interpreted according to this norm.’<sup>220</sup> But the very judgement as to whether some act or series of acts is legal or illegal – i.e., whether it possesses legal meaning according to the scheme of interpretation of a norm – is ‘itself created by an act, which, in turn receives its legal character from yet another norm.’<sup>221</sup> It is the whole set of these norms, ‘which have the character of legal norms and which make certain acts legal or illegal’, that ‘are the objects of the science of law.’<sup>222</sup>

It is instructive that Kelsen speaks of the ‘content’ of norms. The behaviour stipulated – i.e., ‘commanded, permitted, or authorised’<sup>223</sup> – by the norm is the content of the norm.<sup>224</sup> It is the content of the norm that enables the judgement as to ‘whether the actual behaviour conforms to the norm, that is, to the content of the norm.’<sup>225</sup> Kelsen notes that the ‘behaviour as it actually takes place may or may not be equal to the behaviour as it ought to be’,<sup>226</sup> though the difference between ‘equality’

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<sup>219</sup> *Id.*

<sup>220</sup> *Ibid.*, 4.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Ibid.*, 5.

<sup>224</sup> *Ibid.*, 6.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

and ‘identity’ is not further elaborated upon by Kelsen. Further, it is not clear whether by this Kelsen wants to refer to the above-mentioned difference between subjective and objective meanings of acts, or to an explanation of some necessary gap between behaviour as it happens and behaviour as it is normatively stipulated. In any event, whatever meaning was intended by Kelsen in that specific passage, he himself quickly moves on to the problem of validity: to that difference between subjective and objective meanings of acts. An act will only possess the legal meaning if it is authorised by a legal norm. The judgement of whether that act is authorised by a norm must itself be authorised by a norm, and so on. In order to avoid the infinite regress, Kelsen famously posits ‘a *basic norm (Grundnorm)*.’<sup>227</sup> It never follows simply from the factual act (from the ‘mere happening,’ from the ‘is’) of a judgement (that humans ought to behave in some way) that humans ought to behave in that way: it is only the objective validity of a norm that can guarantee the normativity (the oughtness) of the judgement, and indeed, of any command, prescription or proscription of any act or series of acts. The objective validity of that judgement or that stipulation needs to be authorised by a norm (for example, ‘custom can be interpreted as an objectively valid norm only if the custom has been instituted by a higher norm as a norm-creating fact’),<sup>228</sup> which itself must be objectively valid, and so on until you reach the *basic norm*.

But Kelsen is not happy to rest with the concept of objective validity. Instead, he seeks to further explain the significance of objective validity by reference to the notion of existence. Thus he says, ‘by the word “validity” we designate the specific existence of a norm.’<sup>229</sup> The existence of such a norm is different to the existence of a ‘mere happening’ or the subjective meaning of an act – further, they are not mutually

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<sup>227</sup> *Ibid.*, 8; original emphasis.

<sup>228</sup> *Ibid.*, 9.

<sup>229</sup> *Ibid.*, 10.

interdependent on each other, though they are not without relation.<sup>230</sup> For example, it is not the command or will of a legislature that produces the existence of norms in a statute: that existence is only guaranteed by the acts of the legislature being authorised (conforming to) some further norm, which, when tracked all the way down, is finally supported by the basic norm. Validity, then, is the mode of existence of norms for Kelsen.

Perhaps unsurprisingly, talk of existence (or, one might say differently, making norms the object of a metaphysical analysis) leads Kelsen to confront the difference between validity and efficacy of norms. Effectiveness, says Kelsen, ‘is an “is-fact”—the fact that the norm is actually applied and obeyed, the fact that people actually behave according to the norm’<sup>231</sup> – it is, if you like, a different kind of (social or empirical) mode of existence of norms that doesn’t always coincide with the other form of existence (validity). Nevertheless, there is a relationship between the two: ‘a general legal norm is regarded as valid only if the human behaviour that is regulated by it actually conforms with it, at least to some degree.’<sup>232</sup> There is, in other words, a ‘minimum of effectiveness’ that ‘is a condition of validity.’<sup>233</sup> There is no complete and necessary overlap and there cannot logically be, because the validity of a norm ‘presupposes...that it is possible to behave contrary to it.’<sup>234</sup>

We can notice immediately two features here. The first is with the way norms are understood: there is, according to Kelsen, a determinable content of norms. Furthermore, that content is assumed to be capable of letting us pick out some ‘actual’ behaviour as either conforming to it or not: for how else can we read the statement that ‘behaviour can only conform or not conform with an objectively valid norm, but

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Ibid.*, 11.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

cannot do so more or less'?<sup>235</sup> If it cannot be a matter of degree (which would involve judgement), then it must be a matter of simple reference. The second closely related feature is that Kelsen believes there is 'actual' behaviour that 'really' happens or that 'merely' happens, and that is visible to our senses in some straightforward fashion. For Kelsen, then, the efficacy of norms is assumed to be empirically observable: it is not a matter of judgement as to whether some behaviour conforms to a norm – it is a simple empirically-observable phenomenon. We observe the 'mere happening' of the behaviour in question and can, by reference to the norm, tell immediately whether it conforms or not. Notice, however, that Kelsen needs to posit that 'mere' or 'actual happening' that is straightforwardly and empirically-observable, for he needs it in order to be able to add another layer – the layer of the norm, the abstract object, which either supervenes or does not supervene on the empirical object (depending on whether it conforms to it or not).

Language, then, for Kelsen, functions as a pointer to some specific set of objects, while the world is unproblematically made up of those objects – all we have to do is arm ourselves with language and we can see whether the objects it is designed to pick out are really there. The world is assumed to be already made up of the objects that language describes. Those descriptions can be straightforwardly either true or false, depending on whether the object of the description really exists or not.

The above features are also visible in Hart's *The Concept of Law*, to which it will now be appropriate to turn. As with Kelsen, the discussion is necessarily brief and selective, and focused on how the ambition to posit the existence of rules, or indeed a system of rules, has implications, or goes arm-in-arm with a certain understanding of language. Of course, one should expect there to be significant

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<sup>235</sup> *Ibid.*, 21.



differences between Hart and Kelsen. The story told by Hart is set against a very different intellectual background, and one much more informed by conventionalism than Kelsen's could, perhaps, ever have been. Indeed, it is not without reason that Hart described his own project as falling under the term 'descriptive sociology', as opposed, arguably, to what he might have thought as the more metaphysical bent of Kelsen. As we shall see, however, there are also significant similarities, especially on the level of a theory of language.

Hart begins *The Concept of Law* by noting how the discipline of legal theory is perhaps unique in its self-reflexivity. Contrasted with this torturous self-reflexivity is the relative success of legal practice: 'Few Englishmen', says Hart, 'are unaware that there is a law forbidding murder, or requiring the payment of income tax, or specifying what must be done to make a will.'<sup>236</sup> And yet, Hart was not content to seek to explain this more or less successful practical life of the law. He sought, instead, to investigate why it was that this question – what is law – perplexed the minds of so many. As is well-known, he identified three recurrent issues that, according to him, operated to motivate the question, 'what is law?' The first was that in societies with legal systems 'certain kinds of human conduct are no longer optional, but in *some* sense obligatory',<sup>237</sup> and what that 'some sense' consisted in was most controversial and also peculiarly difficult to answer. The second issue was related to the first and concerned the relationship between law and morals: both, after all, seemed to have something to say about the obligation to act in certain ways, and yet there was (and remains) little consensus on just how these two forms of obligation interact with each other. The third issue, of particular relevance to this section, Hart

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<sup>236</sup> Hart 1994, 2.

<sup>237</sup> *Ibid.*, 6.

called a 'more general one', namely: 'what *are* rules? What does it mean to say that a rule *exists*?'<sup>238</sup>

The first intuitive attempt to answer this last, third, question by arguing that 'a rule exists means only that a group of people, or most of them, behave "as a rule" i.e., *generally*, in a specified similar way in certain kinds of circumstances'<sup>239</sup> is, argued Hart, unsatisfactory because '*mere convergence* in behaviour between members of a social group'<sup>240</sup> does not provide the conditions under which we may confidently assert that a rule requiring such convergent behaviour exists. There are linguistic signs, Hart says, such as the words 'ought', 'must' or 'should', that point to the existence of a rule, as opposed to some 'mere convergence.' Some theorists, Hart notes, have thought that the crucial difference between 'mere convergence' and the existence of rules 'consists in the fact that deviations from certain types of behaviour will probably meet with hostile reaction, and in the case of legal rules be punished by hostile officials.'<sup>241</sup> But, argues Hart, such 'predictability of punishment' (no matter how well organised) cannot be accepted 'as an exhaustive account of what is meant by the statement that a social rule exists',<sup>242</sup> primarily because rules do not merely or even always explain predictability, but are themselves guides – e.g., 'in punishing' the judge 'takes the rule as his *guide* and the breach of the rule as his *reason* and *justification* for punishing the offender.'<sup>243</sup> 'The predictive status of the rule...is irrelevant to' the judge's purposes, 'whereas its status as a guide and justification is essential.'<sup>244</sup> It is this distinctive status of rules that Hart seeks to explain in *The Concept of Law*, or, to put it in his own words, it is the 'further elucidation of the

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<sup>238</sup> *Ibid.*, 8.

<sup>239</sup> *Ibid.*, 9.

<sup>240</sup> *Id.*; emphasis added.

<sup>241</sup> *Ibid.*, 10.

<sup>242</sup> *Id.*

<sup>243</sup> *Ibid.*, 11; original emphasis.

<sup>244</sup> *Id.*

distinction between social rules and *mere convergent habits of behaviour*' that is 'crucial for the understanding of law.'<sup>245</sup>

The shift from the characterisation of the problem of legal theory as one concerned with the definition of law, to one that describes their character so that the distinction between social rules and mere convergence can be delineated is not coincidental. The instinct for a definition of law is, says Hart, misguided: apart from many borderline cases (that any attempt for an absolute definition will not capture or properly account for), there are many different instances (or uses) of the general term that again leaves us to ponder the poverty of a definition.<sup>246</sup> The purpose of *The Concept of Law*, then, 'is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena.'<sup>247</sup>

All this is very well-known, and yet, looked at closely, what one can see here is Hart attempting to satisfy the ambition to provide an account of how rules exist without eradicating the continuous change and fragility of the role of law in everyday life. In wanting to leave room for the latter, he is moving towards a conception of law-as-tradition – a move that distinguishes him sharply from Kelsen. The ambition to establish the existence of rules, however, appears to win out. Hart appears to believe that it is necessary to account for the existence of rules in order to avoid what he sees as the only alternative: empirical observation of 'mere convergence,' 'mere habitual regularities.'

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<sup>245</sup> *Ibid.*, 12.

<sup>246</sup> *Ibid.*, 15-16.

<sup>247</sup> *Ibid.*, 17.

Let us now consider, albeit necessarily briefly, the famous device – mentioned briefly in the previous section – that Hart introduces in order to provide the distinction he promised between the mode of law’s existence and ‘mere convergence.’ The device is that of the internal point of view, which helps us to see the internal aspect of rules. It is enough for a group to have a habit, unlike a rule, says Hart, when ‘their behaviour *in fact* converges’, where ‘deviation from the regular course need not be a matter for any form of criticism.’<sup>248</sup> But, he argues, ‘such general convergence...is not enough to constitute the existence of a rule requiring that behaviour.’<sup>249</sup> There are two moves here, and they are both complementary. One is to assume (as was also the case with Kelsen) that we can recognise and observe regularities as such, simply and unproblematically, without the exercise of judgement. The second is that ‘mere observation’ of this kind cannot on its own guarantee for us the existence of law. Thus, as with Kelsen, Hart finds himself positing an empirical given upon which the distinctive mode of existence of law (in Hart’s case, of rules, rather than norms as for Kelsen) is said to supervene.

What, then, according to Hart describes the conditions of the existence of rules? Quite simply, it is the internal aspect of rules, namely that ‘if a social rule is said to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole.’<sup>250</sup> This is Hart’s version of the mode of existence that Kelsen called ‘validity’, except that Hart’s is much more robustly social and conventional (and it is in that sense, once again, that it is a descriptive sociology and not a legal science). The internal aspect of rules opens up to us when we enter the reflective critical attitude of those participants in a legal system – that is, we get to see the internal aspect of rules only through the internal point of

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<sup>248</sup> *Ibid.*, 55.

<sup>249</sup> *Id.*

<sup>250</sup> *Ibid.*, 56.

view. We see evidence of this critical reflective attitude ‘in the criticism of others and demands for conformity made upon others when deviation is actual or threatened, and in the acknowledgement of the legitimacy of such criticism and demands when received from others.’<sup>251</sup> But this critical reflective attitude should not be mistaken for some individual and subjective psychological feeling: ‘What is necessary’, says Hart, ‘is that there should be a critical reflective attitude to certain patterns of behaviour as a *common standard*, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified.’<sup>252</sup>

Hart is quick to point out that his theory copes with change: as soon as standards of behaviour are accepted in the manner outlined above, so we may confidently assert that a social rule exists. But, as he acknowledges, social rules can also cease to exist, for societies can be – as they have been – subject to revolutions, after which a society may be faced with the burgeoning stock of entirely different standards from which deviations would be criticised, and justifiably so, according to Hart. Of course, in a contemporary legal system the persistence and stability of law is to some extent protected by our recognition of how social rules come to become standards of that kind: rules of making, applying and changing law, themselves ultimately supported by the rule of recognition. But at the bottom, and one may say also, at the heart of it all, is this deeply social and conventional mode of existence of social rules, explicable, ultimately, by the internal aspect of rules – a kind of Platonic cave that we can enter only by using the crutches of the internal point of view.

What is the effect of Hart’s insistence on the positing of the mode of existence of social rules on his account of the meaning of rules? We saw in Kelsen that it was a

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<sup>251</sup> *Ibid.*, 57.

<sup>252</sup> *Id.*; emphasis added.

consequence of his postulation of the peculiar form of existence of norms that norms had to have a content that allowed us to use them to pick out already existing objects in the world. Again, although Hart's view is more subtle, precisely because it is more social, more conventional, and less metaphysical than Kelsen's, it nevertheless finds itself confining meaning to an inherent 'core and penumbra' of terms or phrases. It construes meaning as a property of the word itself. Let us briefly recall Hart's well-known account. Hart calls it 'the open texture of rules.' Hart recognises that 'even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases.'<sup>253</sup> He makes it clear that it would be naïve to think that 'particular fact situations...await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question.'<sup>254</sup> But, as we saw above with Endicott (who was, one can safely assume, influenced by Hart), Hart considers the uncertainty, or the limit of guidance that language can provide, to be 'inherent in the nature of language.'<sup>255</sup> There is, Hart thinks, a core of the meaning of a term such that no uncertainty exists: these are the plain, familiar, generally unchallenged cases of the extension of the word. Famously, the example he uses is that of a 'vehicle in the park.' Clearly, he says, a motorcar falls within the core of the term: there is no uncertainty that a motor-vehicle is part of the inherent meaning of the term 'vehicle.' Bicycles, airplanes, roller-skates, and so on, are much less clear – they 'possess some features of the plain cases but others which they lack.'<sup>256</sup> These latter cases, says Hart, illustrate the inevitability of indeterminacy, and thus also judicial discretion in legal reasoning. The determination by judges as to whether the resemblance of the

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<sup>253</sup> *Ibid.*, 126.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

penumbral cases is sufficiently similar and relevant to the plain cases depends ‘on many complex factors running through the legal system and on the aims and purpose which may be attributed to the rule.’<sup>257</sup>

All this is, of course, perfectly familiar. But let us look closer. Hart tells us that the world is not ‘characterised...by a finite number of features’<sup>258</sup> – and that, presumably because these features are infinite, we cannot anticipate them by language. Unfortunately, Hart does not elaborate on what he means by the finitude of the world’s features. It does not seem likely that he considers that finitude to be exemplified by the infinite ways in which we can look at the world – at the infinite number of aspects of things – and where, indeed, aspects are themselves things (forms of objectification). There are, after all, facts for Hart: there *are* motorcars, buses, and motorcycles. We can be certain that certain words pick out certain features of the world: e.g., vehicles pick out motorcars.

Many, some of whom are discussed further in the legal-work-as-tradition section, have pointed out the problem with Hart’s core-and-penumbra theory of meaning. To cite but one well-known counter-example, how are we to respond to Bernard Jackson’s question as to whether an ambulance is a motor vehicle and thus falls within the rule banning ‘vehicles in parks’?<sup>259</sup> For the purposes of the present section what is essential is that we see that the ambition to postulate the existence of rules comes hand-in-hand with a theory of meaning that assumes it is possible for words to latch on, to pick out, some feature of the world. It is a theory that neatly closes the gap between word and world, but in which the effect is unilateral: it proceeds from word to world, unproblematically (at least in the easy cases). In doing so, and in a feature familiar to conceptions of law-as-discourse, this grants language a

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<sup>257</sup> *Ibid.*, 127.

<sup>258</sup> *Ibid.*, 128.

<sup>259</sup> See, Jackson 2000.

great deal of autonomy: words themselves, rather than, say, a judgement made by a cognitive subject, that picks out some feature of the world. In cases of the core, for Hart, there is no space for judgement: language does the work for us.

We return now, full circle, to a point made earlier in this part. Conceptions of law-as-discourse gravitate towards, or are constituted by (depending on the direction of explanations, which varies), intuitions that grant language itself – i.e., more generally, objects outside of us, abstract artefacts at first created by us – a good deal of power over us. In Hart as in Kelsen, the ambition to articulate the mode of existence of rules, has implications, or once again, proceeds arm-in-arm, with a particular understanding of language. In Kelsen, the mode of existence of laws is validity, and that validity is describable in true or false fashion by a legal scientist. In Hart, the existence of rule of law is guaranteed by the internal aspect of rules, describable by a theorist from the internal point of view. What was of interest in this section is how this ambition, and these solutions, are driven by, or result in, a picture of language as capable of referring to objects in the world, where those objects are actual or mere happenings, already there, ready for the picking by the terms and phrases of our language. Of course, in saying all this, the discussion above is not offered as a criticism of either Hart or Kelsen, or the above understanding of language. The point, once more, is merely to illustrate another common, and also important, feature of conceptions of law-as-discourse.

#### ***IA1f. The Social Foundations of Validity***

As mentioned above, another feature of the conception of law-as-discourse – and indeed the final to be explored briefly here – is that of the requirement for the social foundations of validity. Rules of law are identified on the basis of a criterion or



criteria of validity: in contemporary legal theory, the two most popular of these are Kelsen's Grundnorm and Hart's rule of recognition. Famously, and perplexingly, Kelsen asked legal theorists to simply presume the existence of the Grundnorm – to take it as a presupposition that ought not, that could not, be problematised. Although Hart was, arguably, just as vague, in asserting that rule of recognition required to be practised by officials, i.e., that the rule of recognition rested on the foundations of social practice, legal theorists flocked to problematise, mull over, and attempt to articulate these social foundations, the dynamics of this social practice, at the foundation of the rule of recognition.

What is interesting for the purposes of this section is how closely the two principal options taken here by theorists, namely, the theory of conventions taken from David Lewis,<sup>260</sup> and the theory of shared agency courtesy of Michael Bratman,<sup>261</sup> have loud and clear affinities with the mode of explanation of behaviour elaborated upon above in section 1A1d. In other words, it is unlikely to be a coincidence that out of all of the various possible sources thanks to which the concept of social practice could be articulated, legal theorists working under the conception of law-as-discourse should choose one of either two explanations, both of which tend to prioritise the first person ex ante perspective, and tend to place a lot of emphasis on the notion of intentionality, often requiring a good deal of self-conscious deliberation.

Evidence of the above is not difficult to find. Gerald Postema, favouring Lewis' account, argues that 'social conventions of the kind Lewis modelled are generated and maintained by a form of practical reasoning which is essentially common.'<sup>262</sup> In his latest paper, entitled 'Salience Reasoning', Postema uses a

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<sup>260</sup> Lewis 2002. For legal theorists relying on Lewis see Postema 1982 and 2008; Coleman 1982; and Marmor 2008.

<sup>261</sup> Bratman 1999 and 2007. See, for example, Shapiro 2000 and 2002.

<sup>262</sup> Postema 2008, 41.

concept, namely salience, that is also used by theorists working under the explanatory paradigm of tradition. For Postema, however, unlike for those theorists, ‘the remarkable ability of people to identify salient options and appreciate their practical significance in contexts of social interaction is best explained in terms of their exercise of...“salience reasoning”, which is a form of common practical reasoning.’<sup>263</sup> For those other theorists, as we shall see, the same ‘remarkable ability’ remains an ‘ability’, embodied and not requiring any conscious deliberation or reasoning. However, Postema cannot accept such an account of salience, because such a theory would not offer the explanation he is seeking. He is clearest in the following passage:

Rules are norms: they offer standards for behaviour, not just descriptions of it. They purport to guide behaviour of the rational agents they govern. To understand such norms, Lewis correctly argues, we must consider how they are meant to figure in the practical reasoning of these agents.<sup>264</sup>

As with other theorists working under the explanatory paradigm of law-as-discourse, Postema works with a conception of a norm as already articulated and functioning as a reason for action in the deliberation of intentional agents. Indeed, for Postema, as he articulates in a previous article, ‘the self is what it is in virtue of what it is in time’, all the more ‘rational’ or ‘reasonable’ if it is consistent between the past, present and future of one’s life.<sup>265</sup> Postema, it should be noted, does not restrict the reasonableness or rational of consistency over time to individuals; he extends it also to communities, arguing that ‘if we, in and through the communities we constitute, are to deliberate and act purposively and responsibly in time, we must be able to see our common actions as fitting into meaningful patterns and practices through time.’<sup>266</sup> Needless to say, Postema believes and argues that indeed we ought to deliberate and act

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<sup>263</sup> *Id.*

<sup>264</sup> *Ibid.*, 42.

<sup>265</sup> Postema 1991, 1173. Indeed, the article in question, ‘On the Moral Presence of Our Past’, was written (or at least published) seventeen years before ‘Salient Reason’ – a fact itself indicative of Postema’s own attempt at philosophical consistency.

<sup>266</sup> *Ibid.*, 1176.

purposively and responsibly in time. ‘The hopes, aims, projects, and values we hold as a community’, he continues, ‘take shape through our common deliberation, discourse, and activity over time.’<sup>267</sup> For Postema, it is not just that ‘We are what we do together’;<sup>268</sup> what is important is that that ‘doing together’ is a common act of temporally consistent deliberation. One might well suggest, as with the debate over law’s normativity above, that the deliberation of individuals and communities is functioning here as a thought-context for anything but the ‘mere acceptance’ of a rule of recognition. Acceptance must, in other words, be a matter of shared intentions or shared deliberation – it must be something explicit, intervening causally in minds. Once again, the demand for a justification is pushed back – this time said to reside in the reasonableness or rationality of the deliberation of a community.

If he had extended his analysis to Postema, Soosay may well have characterised this demand for deliberation as unrealistic. Indeed, in a recent paper, Mathew Smith adopts a similar tone when he criticises accounts of the social foundations of the rule of recognition along the lines of Bratmanian shared agency theory as ‘hyper-committal’.<sup>269</sup> For Bratman, as recounted by Smith, ‘it is in virtue of agents sharing intentions that an activity in which they are engaged is a shared activity.’<sup>270</sup> Further, ‘in order that I can be responsive to your intentions, I must represent your intentions in my intentions (and so that you can be responsive to my intentions, you must represent my intentions in your intentions).’<sup>271</sup> Thereafter, it is ‘these interlocking intentions’ that ‘constitute the systematic unity within which mutually responsive and supportive actions occur.’<sup>272</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Smith 2006.

<sup>270</sup> *Ibid.*, 273.

<sup>271</sup> *Ibid.*, 274.

<sup>272</sup> *Id.*

Apart from summarising Bratman, Smith provides a few illustrations of legal theoretical work that has relied on Bratman. Thus Coleman, is said to employ the Bratmanian framework in arguing that judges share ‘an intention to apply primary rules together.’<sup>273</sup> For Coleman, per Smith, ‘judges have a certain kind of shared intention that knits together their activities into a shared action. As a result, their activities as judges have a systematic unity.’<sup>274</sup> By now, the references to unity and the demand for representing the intentions of others (representationalism) in an intentional mental state of one’s own (mentalism) should be familiar. They are part of the family of ideas belonging to the explanatory paradigm of law-as-discourse.<sup>275</sup>

As mentioned above, Smith argues that the five key features of Bratmanian shared activity – i.e., conceptual agreement, commitment to conceptual agreement, epistemic agreement, commitment to epistemic agreement, and strong practical commitment – are ‘hyper-committal’.<sup>276</sup> What is required is ‘not only that there is conceptual agreement with respect to concepts deployed with respect to the activity to be shared but that the agents have more or less correct beliefs about each other’s subplans and intentions.’<sup>277</sup> But that too, alone, would not be satisfactory, for we would need not only to ‘have shared beliefs about each other’s intentions and subplans; parties must also be practically committed to the shared activity and the subplans.’<sup>278</sup> And the demands rack up, in a way that Smith finds simply unrealistic. ‘Our intentions’, he says, ‘can easily fail to refer to each another [sic] and continue to

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<sup>273</sup> See, Coleman 2001, 78.

<sup>274</sup> Smith 2006, 278.

<sup>275</sup> Of course, it would be a mistake to think that all those who may be said to be working under the conception of law-as-discourse subscribe to all these ideas. For example, Smith, citing also Ronald Dworkin as a fellow critic in this respect, argues that ‘there is far too much disagreement in the practice of law for the foundations of law to be conventional social norms’: *Ibid.*, 268.

<sup>276</sup> *Ibid.*, 284.

<sup>277</sup> *Ibid.*, 282.

<sup>278</sup> *Ibid.*, 283.

fail to refer to each other even once we begin to engage in our respective actions.’<sup>279</sup> Further, he says, in a move that is now commonly made by some adherents of the law and legal work as tradition conception, ‘there is psychological evidence that people do not commit themselves to actions for reasons that are prior to commitment they take themselves to have.’<sup>280</sup> ‘Instead,’ he continues, following the work of the moral psychologist Jonathon Haidt,<sup>281</sup> ‘they generate reasons post hoc to justify their commitment.’<sup>282</sup> Smith concludes, in an echo that may remind us of Soosay’s critique, that:

If shared activity is possible only in cases of explicit deliberative agency in which the agent reflects on all her reasons and then, based upon a careful consideration of all of them, identifies what it is to which the reasons recommend she ought to be committed, and she so commits herself, then shared activity will be quite a rare phenomenon.<sup>283</sup>

As noted above, this thesis is not written in the spirit of identifying what theoretical picture identified in this brief history of jurisprudential inquiries is more realistic or better captures our intuitions about the experience of social or indeed legal life. What is interesting here for the purposes of this section is that even where the conception of law-as-discourse might be said to come closest to those favouring the conception of law-as-tradition, i.e., in the search for social foundations, the choice is made for the most un-tradition-like explanations, i.e., ones that seek the production of a systematic network of mental states (representing intentions to one another) formed thanks to the priority given to first person ex ante perspectives on human behaviour. We shall soon see how different are theoretical pictures of social life under the law-as-tradition conception.

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<sup>279</sup> *Ibid.*, 281.

<sup>280</sup> *Ibid.*, 291.

<sup>281</sup> See, Haidt 2001.

<sup>282</sup> Smith 2006, 291.

<sup>283</sup> *Id.*

We have come to the end of this account of the basic features of law-as-discourse. This conception has been a particularly prevalent, particularly dominant, tradition of jurisprudential inquiry, at least in the Anglo-American context. It is not, however, without its critics, as we shall see in sections dealing with law-as-tradition. Nevertheless, one would not be exaggerating were one to assert that this tradition remains very influential.

## IA2. LEGAL WORK-AS-DISOURSE

In his ambitious series of papers entitled ‘Language and the Law’, serialised in the *Law Quarterly Review*, Glanville Williams stated that not only was language ‘perhaps the greatest of all human inventions’ it is also ‘the chief medium of thought.’<sup>284</sup> ‘Almost all thinking’, he continued, ‘above a very primitive level, is in words.’<sup>285</sup> Remarkably, Williams noted that ‘a person congenitally deaf, who of course cannot think in vocables, can hardly think or reason at all...until he is taught or develops a gesture-language, or until he is taught to speak or read.’<sup>286</sup> These papers were published in 1946, but in case one is liable to think such ideas are not taken seriously anymore, the following from George Pavlakos’ *Our Knowledge of the Law*, published in 2007, might serve as an example that the ideas live on: ‘without grammar’, Pavlakos asserts, ‘there is no possibility of intelligible and coherent human thought...grammar sets constraint on how we can think anything... To that extent, a fundamental thesis of the present work is that human knowledge, in any domain in which people may seriously claim to have knowledge, and to be able to distinguish knowledge from error (mistaken beliefs), is wholly dependent on grammar in this sense.’<sup>287</sup>

The analysis of knowledge, at least in the analytical tradition, by reference to the alleged propositional content of thought, has been common enough. It is part and parcel of a package that echoes the demand for representationalism and mentalism referred to in the part above. It is also, one might note provocatively, somewhat convenient for philosophers – at least those attracted to the armchair. All that is required for an epistemologist to do is to posit the propositions said to exhaust some

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<sup>284</sup> Williams 1946, 71.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Pavlakos 2007, 17. Pavlakos’ position is discussed at length in section IA2c.

claim to knowledge, and consider whether the claim is justifiable in light of the criteria the philosopher presents as capable of ascertaining whether knowledge has been attained. The debate then rages over how much the criteria proposed can explain, with examples and counter-examples swapped regularly. The debate is best symbolised by the notorious shock to contemporary epistemology caused by a short paper by Edmund Gettier<sup>288</sup> – on its face, a very modest paper, containing just a few examples that revealed the explanatory limits of the dominant definition of knowledge in the analytical tradition at the time, i.e., of knowledge as justified true belief. Needless to say, a more detailed and careful discussion of the technical debates in analytical epistemology over the last few decades is outside the scope of this thesis. The point in referring to it is to acknowledge the debt owed by legal theorists to others who have attributed great importance to both already articulated bits of information and to the process of articulating them in accounting for knowledge.

Another such source of inspiration may be said to come from the literature subscribing to the ‘Language of Thought Hypothesis.’<sup>289</sup> According to this hypothesis, ‘thought and thinking are done in a mental language, i.e., in a symbolic system physically realized in the brain of the relevant organisms.’<sup>290</sup> Thoughts, say these philosophers, are properly thought of as propositional attitudes. It should be noted, of course, that the tradition of the representational or computational theory of mind, of which it forms a part, popularised perhaps most prominently by Jerry Fodor,<sup>291</sup> has been subject to many criticisms. Nevertheless, despite such criticisms, emanating mainly from outside the philosophical world (that is, mainly, from fields such as neuroscience, sociology, anthropology, and other behavioural sciences), the

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<sup>288</sup> Gettier 1963.

<sup>289</sup> See, Aydede 2004.

<sup>290</sup> *Ibid.*, 1.

<sup>291</sup> See, Fodor 1975.



grip of the picture that makes a philosopher move from the practice (perhaps at first unreflectively adopted, and, as suggested above, convenient strategy) of analysing thought by analysing language, to the thesis that thought is impossible without language, is all too easy. Further, even in philosophical works that set out to study the contrary, e.g., José Luis Bermudez's *Thinking Without Words*, thought without language (already from the first few pages almost exclusively whittled down to the thoughts of animals and children) is analysed with ideas that emerge from the philosophy of language.<sup>292</sup> Thus, for example, Bermudez states that he will: '1) explain the metaphysics of nonlinguistic thought; 2) explain the semantics of nonlinguistic thought; 3) explain how it is possible for us to identify the content of such thoughts; and 4) explain the decision-making processes of nonlinguistic creatures in a way that underwrites the practice of psychological explanation.'<sup>293</sup> The bias here towards discourse-friendly ideas, such as mental or semantic content, or decision-making processes, and the condescension revealed in the phrase 'nonlinguistic creatures', makes the study sound not like the breaking of a new barrier, but like the extension of an old empire. Once again, the point in raising this line of literature here is simply to recall, and to encourage recognition of the force of, that philosophical temptation to replace our understanding of thought, and of thought in action, by an understanding of the more or less dynamic structure of language.

In many respects, it is the legacy of the rule of law ideal that limits the legal epistemological picture to that of an analysis of the structure and interpretation of language. This legacy has been recognised, if not fully elaborated upon, by other legal theorists. Michael Moore, for example, suggested that 'formalism survives because it is, *prima facie*, the theory of adjudication required by our ideals about the rule of

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<sup>292</sup> Bermudez 2003.

<sup>293</sup> *Ibid.*, 12.

law.<sup>294</sup> Similarly, Brian Tamanaha has argued that ‘especially with regard to formal-rational rule of law systems, legal knowledge has its own internal logic and demands that constantly push it to develop in directions that differ from commonsense notions.’<sup>295</sup> ‘The more law becomes a specialised body of knowledge,’ Tamanaha continued, ‘the greater its potential to diverge in form and outcome from the understandings of the society to which it is attached.’<sup>296</sup> We ought, however, to be careful about Tamanaha’s explanation. The explanation is problematic because it hides the move to locate legal-work-as-discourse in a historical argument: contemporary legal epistemology is to be exhaustively explained by reference to the structure and interpretation of language because, it is argued, that is the nature of the contemporary legal system (at least in the West) – it is a formal-rational system in which the medium of the law is language. However, as we shall see, that characterisation of contemporary legal systems is precisely the one that is challenged by those oriented towards the explanatory paradigm of tradition.

It would be too simplistic to suggest that within the immense literature on statutory and constitutional interpretation legal epistemology is narrowed to the exegesis of the text itself. Although much more would need to be said to develop the point in appropriate depth, one can argue that the literature on statutory interpretation reveals a basic difficulty concerning the degree of influence to grant to the text itself, or put another way, how much reference to make to certain alleged inherent properties of the text when explaining the process of legal work.

One illustration of the difficulties here is the debate over Stanley Fish’s call for a move away from an analysis of the properties of the text itself – away from, for example, an analysis of the Hartian core and penumbra of words – and towards a

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<sup>294</sup> Moore quoted in Goodrich 1984, ff40.

<sup>295</sup> Tamanaha 2001, 73.

<sup>296</sup> *Ibid.*, 74.

recognition of the role of the reader, or a community of interpreters. Fish calls for recognition of the ‘reader’s active role and concomitant inability to measure any given interpretation against the “actual” text.’<sup>297</sup> Here is Fish:

Different notions of what it is to read...are finally different notions of what it is to be human. In [one] view, the world, or the world of the text, is already ordered and filled with significances and what the reader is required to do is get them out (hence the question, ‘What did you get out of that?’). In short, the reader’s job is to extract meanings that formal patterns possess prior to, and independently of, his activities. In my view, these same activities are constitutive of a structure of concerns which is necessarily prior to any examination of meaningful patterns because it is itself the occasion of their coming into being.<sup>298</sup>

There are couple of things to be extracted from this passage. The first is that of the view of language, or the text, as in some sense exhausting what there is, what we may think of as existing: this a view rejected, not only by Fish above, but others more sympathetic to granting much more significance to the text, as for example, Glanville Williams, who says that ‘in the past philosophers have tended to mistake the structure of discourse for the structure of the universe’ – ‘a training in semantics,’ adds Williams, ‘helps to prevent this error.’<sup>299</sup> Interestingly, a study of semantics did not prevent Pavlakos in *Our Knowledge of the Law* to come to the opposite view, namely, that ‘semantics exhausts ontology.’<sup>300</sup> But though Pavlakos’s thesis shall be returned to below (see, IA2c), this general philosophical debate is outside the scope of the thesis.

The second point raised in Fish’s passage is the challenge to the view of language as the realm of given meaning, and the turn towards the active reader, already armed with certain concerns and preoccupations. In a recent article, elaborating on this Fishian idea, Robertson argues that the notion of ‘an unconstrained

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<sup>297</sup> As described by Levinson 1982, 381.

<sup>298</sup> Fish quoted *Id.* The quote comes from Fish 1980.

<sup>299</sup> Williams 1946, 72.

<sup>300</sup> See Pavlakos 2007.

legal actor is a central character in modern jurisprudence.<sup>301</sup> ‘Legal formalists’, he continues, ‘fear that he [sic] will not respect the constraints imposed by the objective meaning of legal texts, and will instead distort the meaning to suit his partisan purposes.’<sup>302</sup> Legal positivists, also, says Robertson, ‘fear that he [sic] will not respect the constraints imposed by the established legal rules, and will instead persistently advance his own moral and political principles, thus threatening both the rule of law and its democratic legitimacy.’<sup>303</sup> On the other side, he says, ‘there are the anti-positivist and anti-formalist legal theorists who are not dismayed by the prospect of a legal actor free of such constraints.’<sup>304</sup> For Robertson, both of the above fears and the celebration rely on the premise that it is possible for an unconstrained legal actor to exist – a premise Robertson takes to be persuasively dismissed by Fish.<sup>305</sup>

This is not the moment to rehearse Robertson’s argument – his idea of an already and always constrained legal actor shall, in any event, be returned to below (see IB2d). The point that Robertson’s point helps to make clear is disagreement over how best to explain what is going on in the process of legal work. This disagreement can be characterised as one posing the following question: is the process best explained by the inherent properties of a text, or by something external to the text, belonging perhaps to the mind of the worker, or the community of workers?

Reference has already been made to Hart’s core and the penumbra theory of meaning. For Hart, it was at this level of meaning that the process of legal work was to be described. Notice that this line of disagreement cuts across the divide between, say, legal positivists and natural lawyers. Lon Fuller, for example, famously disagreed with Hart’s core and the penumbra theory of meaning, but did so nevertheless, at least

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<sup>301</sup> Robertson 2007b, 258.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

on its face, on the level of a disagreement over how the meaning of words is determined. He argued, in short, that every interpreter of a legal text, in every situation (and not only, as Hart suggested, in hard cases) needed to take into account the purpose of the rule in question. Thus we have Fuller's famous example of the upright sleeper – where we are unable to determine the scope of the rule that prohibits sleeping in a railway station without taking into account the purpose of the rule<sup>306</sup> – which has appeared in various manifestations in legal theory, e.g., Jackson's above-mentioned example of the ambulance in the park (designed as a counter-example to the core of the word vehicle being an motorcar).<sup>307</sup>

Others, however, have not been tempted to remain – in the context of a theoretical picture of legal work – at the level of a theory of meaning. Thus, Karl Olivecrona argued, in his *Law as Fact*<sup>308</sup> that we are only 'dimly aware of a permanent existence of the rules of law... [That] a rule exists only as the content of a notion in a human being.'<sup>309</sup> In a similar, though much more politically charged manner, David Kennedy has argued for the irreducibility of ideology-driven resolutions of disputes by the judiciary.<sup>310</sup> These two views move further away from the paradigm of law-as-discourse than does Fish: the focus is not on the reader, as active as he or she may be in Fish's work, but on the human being or the community member, whose legal work is explained by reference to other factors that are not reliant, or at least not as reliant, on the influence of the text. More accurately perhaps, as above, the explanations are not at the level, as they are with Fish, of a theory of meaning – over how best to understand language – but an altogether different level, say, a socially-cognitive one (with the proviso that that cognition may be embodied or

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<sup>306</sup> See, Fuller 1958.

<sup>307</sup> See, Jackson 2000; see, also Jackson 1988.

<sup>308</sup> See, Olivecrona 1939.

<sup>309</sup> Olivecrona quoted in Williams 1946, 85.

<sup>310</sup> See, Kennedy 2005.

tacit). That latter level, in any event, is exactly the level that shall be investigated in the conception of legal-work-as-tradition. What is of interest in the present discussion is the use of theories of meaning or the properties of language as providing explanatory insights of, or, more strongly, exhausting, our picture of legal work.

Before going on, a preliminary matter must be at this point clarified. Several references have now been made to the idea of ‘legal work.’ At other points above references were also made to other terms, such as ‘legal epistemology’ or ‘knowledge of the law.’ As used herein, these terms encompass theoretical pictures of the process of the work conducted by judges and lawyers, but do not include practices of lawmaking (the legal work, say, of parliaments and drafting committees). One might ask, of course, which judges and which lawyers, working from in what legal system, in what institutions, in what areas of the law? One might also ask: legal work as performed *when*? Theoretical pictures of legal work, one might argue, may very well change depending on the dominant style of law-making, as itself seen to be part of a particular age, e.g., the period of ambitious codifications, accompanied by Enlightenment ideology, and in France rather than in Prussia.<sup>311</sup>

The very positing of these questions, however, is indicative of a kind of conception of legal work under which it is thought that the cultural, institutional and other contexts of legal work matter.<sup>312</sup> It is not so for all theories, though it must be acknowledged that of the ones discussed here most are theoretical pictures of legal work in common law systems. The point is, however, that for those working under the legal-work-as-discourse explanatory paradigm, as with those of theories working

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<sup>311</sup> La Torre 2002, 377.

<sup>312</sup> Though not always: e.g., Michael Lobban argues that the nature of legal reasoning changes depending on the maturity of the area of the law in question – considering maturity to be the level of development, of complexity, of the rules. This kind of conception may be deemed contextual, but nevertheless under a broadly conceived explanatory paradigm of legal-work-as-discourse: see, Lobban 2007.

under the conception of law-as-discourse, theoretical pictures of legal work have either unreflectively avoided the particularities of socio-historical-cultural context, or, sought to represent their theoretical pictures as general or universal.

One further preliminary matter must be noted. The explanatory paradigm of discourse feeds, primarily, an ontological rather than epistemological ambition. The law itself is asserted to exist (under certain conditions), and this, as we have seen, leads to an understanding of legal language as doing a good deal, if not all, of the cognitive work for us. The work of the human being, the scope for human judgement, tends to be minimised, or, in radical cases, excluded. Some illustrations are in order.

Consider the following statement from Paul Laband, writing in the early part of the twentieth century: ‘Legal decision consists of a given case’s subsumption under valid law; like any other logical conclusion it is independent from will. There is no freedom of the resolution whether the consequence should take place or not; it is produced – as it were – by itself, by intrinsic necessity.’<sup>313</sup> This statement echoes – at the epistemological level – what is made at the ontological one under the explanatory paradigm of law-as-discourse, i.e., an order or system of already articulated and authoritatively promulgated norms proceeds autonomously, with the addition here that it does so by travelling through the intentional mental states of actors faithful to the text.

Of course, to cite Laband’s statement is not to suggest it is representative of the theoretical pictures of legal-work-as-discourse. Matters are much more complicated, and, as a result of the difficulties involved in offering a general theory of legal work, numerous ‘concessions’ are made. As we shall see, however, many of the difficulties are said to arise as a direct result of nothing else but the inherent properties

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<sup>313</sup> Laband quoted in La Torre 2002, 379.

of the text: the vagueness of its terms, say, or the form of a phrase as a standard or principle rather than a rule. A typical example of the move from the ontological to the epistemological level in theories of legal-work-as-discourse is the move from the description of the structure of rules as syllogistic to the theory that legal work, particularly by the judiciary, operates in a syllogistic fashion. Of course, as we saw, the ontological ambition is accompanied by a political one, and thus what we see, at the epistemological level, is a theory designed to offer explanatory support for, or fight off scepticism about the very possibility of, the kind of legal work required to protect certain political aims. Thus, La Torre says, speaking of theory of legal reasoning espoused by the early MacCormick:<sup>314</sup> ‘Deductive justification (on the basis of a particular norm taken as “valid”) thus comes about within the framework of the legitimacy of a particular institutional order.’<sup>315</sup> In that respect, it is no coincidence that MacCormick’s most recent, and most definitive, statement of his theory of legal work, *Rhetoric and the Rule of Law*,<sup>316</sup> is at heart a discussion of this tension between the epistemological and the ontological levels. These observations shall be returned to in section IA2b below.

It would be amiss, given its popularity and stature in contemporary legal theory, not to mention Robert Alexy’s theory of legal argumentation.<sup>317</sup> It would certainly be amiss given that – though this part of the thesis specifically does not place much emphasis on the fact that – Alexy himself calls his theory a discourse theory of legal argumentation. There are two elements at work here: ‘First, that legal reasoning is inherently discursive, and second, that legal reasoning should be

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<sup>314</sup> See, MacCormick 1978.

<sup>315</sup> La Torre 2002, 387.

<sup>316</sup> MacCormick 2005.

<sup>317</sup> Alexy 1989.



rational.<sup>318</sup> Alexy, as is well known, is greatly influenced by Habermas, and he takes from Habermas the notion, or perhaps the assumption, that ‘ideas and concepts’, as La Torre puts it, ‘have a discursive origin.’<sup>319</sup> According to La Torre, this means that ‘one speaks, and thinks too, only because one is in and has been incorporated into a context of discourses from which our socialisation takes its origin.’<sup>320</sup>

Nevertheless, Alexy’s model departs in some respects from certain typical ideas found under the explanatory paradigm of discourse. He criticises, for example, that model of legal reasoning that prioritises coherence, because a normative order is never complete, and thus ‘a model of legal reasoning centred on coherence must necessarily prove insufficient.’<sup>321</sup> By contrast to the coherence model and others (i.e., the decision model taken from the legal realists, the deductive-syllogistic model, and the hermeneutic model taken from Hans-Georg Gadamer and Carlos Betti), Alexy’s model is procedural. Alexy’s ambition is to provide criteria for so-called ‘rational discourse’ under which any discourse (and thus also any decision within such a discourse) may be evaluated as rational.<sup>322</sup> As La Torre puts it, ‘the point is...for Alexy...to make explicit what is implicit, and to universalise it. Universalisation is in turn a transcendental (implicit) requirement of discourse on norms, values and principles.’<sup>323</sup> The above-mentioned criteria of ‘rational discourse’ is made explicit by Alexy in the form of certain kinds of rules – which, to remind ourselves, ‘spell out a series of standards which regulate the happy employment of prescriptive utterance and ultimately effect the evaluation of prescriptive speech to discourse’<sup>324</sup> – including,

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<sup>318</sup> Brozek 2007, 13.

<sup>319</sup> La Torre 2002, 394.

<sup>320</sup> *Id.*

<sup>321</sup> *Ibid.*, 395.

<sup>322</sup> Brozek 2007, 37.

<sup>323</sup> La Torre 2002, 396.

<sup>324</sup> Pavlakos 2007, 225.

‘rules of logic; rules of rationality; finally, pragmatic rules for the utterance of normative sentences.’<sup>325</sup>

In all this, what remains somewhat ironic is that the only person capable of transcending the discourse is the theorist himself or herself – or in this case, only Alexy – who is granted (or more clearly, self-granted) the power to make explicit the standards thanks to which the reasoning of all others can, and ought to be, evaluated. Though he takes a good deal from Alexy, it is a virtue of Pavlakos’ *Our Knowledge of the Law* that it spends the a good bulk of its time asserting that we cannot transcend the discourse within which we think and act – the ‘we’ here including the theorist, who is limited, at best, to providing some account of the dynamics of our participation in discourses, that participation, for Pavlakos, being captured best by his notion of ‘practice’ (hence the title, ‘the Practice Theory of Law’). In other respects, however, as we shall see in section IA2c, Pavlakos’ theory of our knowledge of the law belongs centrally under the legal-work-as-discourse paradigm.

Finally, by way of a preliminary matter, it can be observed that, as with the discussion above concerning the problem of legal normativity, the prime function, even if not aim, of a theory of legal-work-as-discourse may be to provide criteria thanks to which the process of legal work can be evaluated – evaluated primarily as either rational or not. This is despite any statements made to the contrary by theorists, e.g., that their theorists are descriptive rather than normative. As noted above, however, this thesis does not set out to present a history of jurisprudential inquiries from the perspective of their authors, taking on board their self-descriptions. Whatever the theorist himself or herself believes to be setting out to do or to have achieved is, for present purposes, beside the point.

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<sup>325</sup> *Id.*

There are three sections below. The three sections are: first, Dworkin's adjudication theory; second, MacCormick's theory of legal reasoning, as developed in *Rhetoric and the Rule of Law*; and third, Pavlakos' account of legal epistemology in *Our Knowledge of the Law*. The sections below are brief examinations, not designed to provide detailed or faithful readings of these contributions, but rather, designed to reveal common tendencies underlying the conception of legal-work-as-discourse, some of which have already been introduced above.

### **IA2a. Herculean Adjudication**

In *Law's Empire*,<sup>326</sup> Dworkin states his aim as follows: it is to develop the idea that 'legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be.'<sup>327</sup> His view, as is well known, is designed to account for disagreement about law – a disagreement that, he argues, is not taken seriously enough, indeed undermined, by those that fall foul of the semantic sting. That underwriting this view is the explanatory paradigm of law-as-discourse is made explicit by Dworkin: the law exists in the form of propositions – 'let us call,' he says, "'propositions of law" all the various statements and claims people make about what the law allows or prohibits or entitles them to have.'<sup>328</sup> The truth or falsity of these propositions of law is itself, says Dworkin, parasitic on other propositions, which he deems 'the grounds of law.'<sup>329</sup> Theoretical disagreement about law, he continues, is 'disagreement about law's grounds.'<sup>330</sup>

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<sup>326</sup> Dworkin 1986.

<sup>327</sup> *Ibid.*, vii.

<sup>328</sup> *Ibid.*, 4.

<sup>329</sup> *Id.*

<sup>330</sup> *Ibid.*, 5.

When we understand the manner in which theoretical disagreements about law are resolved, and of course thereby accept Dworkin's view, we shall see why it is wrong to think of judges as making law, at least in any arbitrary and therefore politically unaccountable way. The old debate, says Dworkin, between so-called progressive and mechanical judges will disappear once we accept the constructive interpretative account of legal reasoning Dworkin offers. Judges, says Dworkin, are participants in an interpretative community, and they are best thought of as engaged in the resolution of disputes via the exercise of the interpretative attitude. It is a mistake to think that when judges resolve disputes they are interpreting some concept itself, that they reach back, for example, to the intentions of the authors of legal texts, to derive the content of the concept itself. There is no such thing, once again, as a given meaning, to be merely recovered or revealed by the judge. Rather the concepts articulated in legal rules and principles – much like the concept of law itself – are interpretative, and once we adopt the internal point of view of participants in an interpretative community, we come to see that what matters, what actually goes on, is the use of interpretative concepts by members of a community who are possessed, inevitably, with an interpretative attitude. These members, involved in constructive interpretation, operate within paradigms of purposes of the values dear to a community, and in interpreting the interpretative concepts of the law, they are the captains of the law's integrity, which is, at once, the community's integrity. These paradigms of values are crucial – they are populated by concrete examples, such as the example of men rising when a woman enters the room in the case of the paradigm of value of courtesy, that one can find in the narrative of the law (its history of precedents) – and it is the member's construction of the interpretive concepts at stake within the relevant paradigms of value that will allow Dworkin to say that some

interpretation either fits or does not fit the integrity of the law, and thus also the integrity of the community. That concept of fit, in turn, is what allows Dworkin to say that there is always, in some objective way, a right answer to any one legal dispute.

That is, of course, a very sketchy summary, but it does reveal Dworkin's location of the epistemology of adjudication within and under the umbrella of law-as-discourse. It is interesting to notice just how much Dworkin wrestles with articulating the scope of the role of language in legal work. In his account, for example, of the stages of interpretation, Dworkin argues that the first stage is a 'pre-interpretive' one.<sup>331</sup> In this stage, 'the rules and standards taken to provide the tentative content of the practice are identified.'<sup>332</sup> Immediately, however, he qualifies this formulation: 'I enclose', he says, "'pre-interpretive'" in quotes because some kind of interpretation is necessary even at this stage. Social rules', he continues, 'do not carry identifying labels. But a very great degree of consensus is needed – perhaps an interpretive community is usefully defined as requiring consensus at this stage – if the interpretive attitude is to be fruitful, and we may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given in day-to-day reflection and argument.'<sup>333</sup> This is, it must be said, a slightly ambivalent explanation: Dworkin finds himself in a tangle precisely because he is forced into a position where he must resolve the priority of text and community, or, put another way, he reaches a point where an explanation is demanded that cannot be satisfied by a theory of meaning. It is perhaps unsurprising, given Dworkin's orientation to law-as-discourse, that this notion of a pre-interpretative stage receives little attention in *Law's Empire*, and that even when it does, Dworkin argues that 'some interpretation is necessary even at this stage.' Similarly so with the values that are said to be so important in the

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<sup>331</sup> *Ibid.*, 65.

<sup>332</sup> *Id.*

<sup>333</sup> *Ibid.*, 66.

process of legal work: these are, ultimately, for Dworkin, to be found in the concrete examples articulated in the narrative of the law.

Dworkin's notion of the development of precedent as a narrative, each precedent like another chapter written by a different author (forming a chain novel), posits the participants in law's empire as submerged in the world of discourse. Discourse is both the anchor and the oxygen of adjudication for Dworkin. Studies of legal reasoning as exercises in narrative imagination have, of course, been undertaken by many other scholars: once again, an examination of the rich array of views in the law *as* literature movement falls outside the scope of this thesis. For present purposes, such contributions can be said to be part of the family of those theorists who feel comfortable, both in their presentations of the nature of law and of the nature of legal work, within the domain of discourse.

Section IA1d, 'The Normativity of Law', above, had recourse to Soosay's critiques of Hart and Raz. Soosay is similarly critical of Dworkin, though he does applaud Dworkin for attempting a 'transformation of the field' of legal theory, placing hard cases at the centre (where easy cases once were), and putting emphasis on an interpretative approach rather than on the 'mechanical application of rules.'<sup>334</sup> However, says Soosay, the 'process envisaged is' still 'one of conscious interpretation', so that 'the overall change' of Dworkin's approach is 'not really so dramatic.'<sup>335</sup> The problem, says Soosay, is with Dworkin's account of 'easy cases', the reasoning of which, although Dworkin recognises is of an 'automatic' nature,<sup>336</sup> because of his alleged privileging of conscious and deliberative reflection, he is

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<sup>334</sup> Soosay 2005, 20.

<sup>335</sup> *Id.*

<sup>336</sup> *Ibid.*, 22.

nevertheless forced to explain ‘as a species of self-conscious reasoning.’<sup>337</sup> Soosay continues as follows:

Predictably enough, the result is unconvincing. Indeed, to make his account work, Dworkin is forced to invoke a judge of superhuman abilities, Hercules. Under this view, the fully self-conscious account he offers is true only of this superhuman judge, who explicitly reasons through all of the cases which come before him, whether easy or hard. Real judges fall short of this, though, and instead must rely on intuition, experience and something like a ‘common consciousness’, a sort of social understanding these judges share with their fellow citizens.<sup>338</sup>

Soosay’s criticism is, for present purposes, instructive, as is his own explanation as to what ‘real judges do.’ References to such explanations as ‘a sort of social understanding’ will be the focus of the sections below dealing with conceptions of legal-work-tradition. The only gripe – an important one in the context of this thesis as a whole – is with the spirit of Soosay’s critique. Soosay believes that theoretical explanations are able to capture what ‘real’ judges ‘really’ do. He argues that Dworkin is forced to ‘invent an alternative reality’ and that this sort of ‘contortion’ is a ‘sign that the theory in question is profoundly mistaken in its design.’<sup>339</sup> To the contrary, as may already be visible to some extent, this part of the thesis is designed to encourage the view according to which theoretical explanations lean towards certain explanatory tendencies, all the while also finding certain problems more important than others.

One of Soosay’s alleged counter-examples is as follows:

When we stop at traffic lights or board public buses, is the law in these instances essentially interpretative or argumentative? In such cases, do we seek to interpret the law, to make it the best that it can be, or do we, rather, seek simply to fall in line with it?<sup>340</sup>

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<sup>337</sup> *Id.*

<sup>338</sup> *Ibid.*, 23.

<sup>339</sup> *Ibid.*, 24.

<sup>340</sup> *Ibid.*, 21.

For Dworkin, however, as noted above, the aim of *Law's Empire* was to provide a 'plausible theory of theoretical disagreement in law.'<sup>341</sup> There is not much room for theoretical disagreement when stopping at traffic lights or boarding buses, but if there were instances of such disagreement (e.g., two lawyers, discussing whether to stop or not at some particular traffic lights), then Dworkin's scheme – particularly the device of interpretive concepts – may go some way towards explaining what is going on in such disagreements. In this respect, Soosay misses an alternative, and perhaps more charitable, reading of Dworkin, i.e., one that rephrases his view to be that *insofar* as we can think of our reflections on the law to be conscious and deliberative, then that conscious and deliberative reflection is best understood, according to Dworkin, as interpretive and argumentative. In this respect, one can see how certain explanatory tendencies are formed by the aims of a theory – which, in Dworkin's case, may perhaps also be explicable on the basis that he was responding to Hart's theory, which, as Dworkin understood it, had grossly underestimated the extent of disagreement in legal work.

Before concluding this section, and in order to further illustrate the importance of not forgetting the incompleteness of one's own theoretical picture, Soosay himself can be shown to work with certain assumptions. He states, for example, that 'if real judges say that they rely on intuition, experience and a common consciousness of some sort, then surely the task of legal theory is to work out just what this means.'<sup>342</sup> However, as is common to anyone familiar with debates in sociological method, it is by no means clear that such access – that of representations by the subjects themselves – should be privileged in any way.<sup>343</sup>

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<sup>341</sup> Dworkin 1986, 6.

<sup>342</sup> Soosay 2005, 23.

<sup>343</sup> Consider, for example, someone like Anthony Giddens who, despite placing a good deal of emphasis on the intelligence of agents, nevertheless argues that 'what actors can say about what they



## **IA2b. *The Defeasability of Universalisation***

As with Dworkin, the following account is not meant as a faithful summary of MacCormick's theory of legal reasoning. A more faithful account would need to take into account an incredibly wide range of writing, beginning with *Legal Reasoning and Legal Theory*,<sup>344</sup> including the important work done in *Interpreting Precedents*<sup>345</sup> and *Interpreting Statutes*,<sup>346</sup> and considering the place of the latest book, *Rhetoric and the Rule of Law*,<sup>347</sup> in the four-volume series of which it is part. Needless to say, such a task is outside the scope of this thesis.

It is, nevertheless, instructive for present purposes that the theme of *RRL*, announced already in the title, is the tension between the rule of law and what MacCormick refers to as 'the arguable character of law.'<sup>348</sup> The dilemma arises because it appears as if 'the proper interpretation and application of legal rules, and the proof and interpretation of facts relevant to law-application can be hugely problematic', and thereby pours 'cold water on any idea of certainty or security.'<sup>349</sup> And without the latter, how can there be the rule of law? In seeking to reconcile this problem – which itself arises from a dispute over the limits of language-based explanations of legal work, or more accurately, over the limits of explanations found within a theory of meaning for a theory of legal work – MacCormick draws on the resources of rhetoric.

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do, and why they do it, [is] only one small part of the immense knowledgeability involved in the conduct of everyday life': Giddens, in Giddens and Pierson 1998, 83.

<sup>344</sup> MacCormick 1978.

<sup>345</sup> MacCormick and Summers 1997.

<sup>346</sup> MacCormick and Summers 1991.

<sup>347</sup> MacCormick 2005; hereinafter, referred to as *RRL*.

<sup>348</sup> *Ibid.*, chapter 2.

<sup>349</sup> *Ibid.*, 13.

MacCormick's first step is to remind us that it does not necessarily follow from the arguable character of law that 'the law is not logical' or 'that logic contributes nothing to legal argument.'<sup>350</sup> On the other hand, its arguable character ought to make us recognise that legal argumentation is 'a practical skill, a practical art', and one that depends being 'intimately familiar with...a great body of legal learning' – though MacCormick's conception of what such learning entails is at least partly revealed when he says that 'legal science, the structured and ordered study of legal doctrine, is...one essential underpinning of law as praxis.'<sup>351</sup> The next step is to soften the requirement that needs to be achieved for the rule of law to be observed. This is done by suggesting that the rule of law is observed when 'people can have *reasonable* certainty in advance concerning the rules and standards by which their conduct will be judged, and the requirements they must satisfy to give legal validity to their transactions.'<sup>352</sup> The same 'reasonableness' obtains in the case of the security persons may find in 'their expectations of the conduct of others, and in particular of those holding official positions under the law.'<sup>353</sup> As will be familiar to us after the discussion above concerning law-as-discourse, MacCormick provides that the rule of law will be possible:

...provided there is a legal system composed principally of *quite* clearly enunciated rules that *normally* operate only in a prospective manner, that are expressed in terms of general categories, not particular, indexical, commands to individuals or small groups singled out for special attention. The rules should set realistically achievable requirements for conduct, and should form overall some coherent pattern, not a chaos of arbitrarily conflicting demands.<sup>354</sup>

The third, and most significant, step, however, is made in asking us to acknowledge 'a fundamental constraint on the process of legal argumentation', i.e., that legal

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<sup>350</sup> *Ibid.*, 15.

<sup>351</sup> *Ibid.*, 14.

<sup>352</sup> *Ibid.*, 15; emphasis added.

<sup>353</sup> *Ibid.*, 16.

<sup>354</sup> *Id.*; emphasis added.

argumentation ‘must conform to conditions of rationality and reasonableness that apply to all sorts of practical reasoning’ – this being an acknowledgement, as MacCormick states, first pressed upon on us by Alexy.<sup>355</sup> Of course, the requirement itself does not guarantee that ‘any actual advocates and judges in any particular state confine their use of argumentation to the practically reasonable’ (otherwise there would be no point in asking us to acknowledge the constraint).<sup>356</sup> But the requirement does impose ‘at least that there may not be assertions without reasons’,<sup>357</sup> as well as, significantly, but not noted by MacCormick, providing legal scholars with tools for the evaluation of the actions of legal officials, and with a justification for engaging in that evaluation (i.e., to protect and further the rationality and reasonableness of legal argumentation).

The tool of reconciliation between this reasonably achievable rule of law and the reasonably arguable character of law (which obtains ‘wherever there is a process of public argumentation’<sup>358</sup>) ought not to be understood ‘as reducing the rational acceptability of an argument to its actual persuasiveness.’<sup>359</sup> What MacCormick is after, instead, is ‘what is persuasive in an objective sense.’<sup>360</sup>

The key move made by MacCormick is to suggest that though there is objectivity, it is not static, but dynamic; although it obtains at any one time, it can be changed; it forms an order of certainties that are defeasible. It is this notion of defeasibility, which is itself a combination of two ideas, i.e., certainty at any one time and possibility of change at any time, that in the end plays the role of creating the

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<sup>355</sup> *Ibid.*, 17.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Ibid.*, 20.

<sup>360</sup> *Ibid.*, 21.

common ground upon which both a reasonably achievable rule of law and the reasonably arguable character of law can be reconciled.

To see this one must first notice how MacCormick sets up the requirement for a certainty at any one time. This extract is exemplary:

What we see is how legal processes move through a chain of putative certainties that are at every point challengeable. No claim or accusation may be made without proper citation of the legal warrant that backs it and without giving notice of the allegations of fact in virtue of which it is asserted that the law warrants the conclusion proposed (by prosecutor or by plaintiff). This has the full logical certainty that inheres in syllogistic form. There is a rule 'Whenever OF then NC', cited by prosecutor or plaintiff in indictment or in pleadings, and it is there also alleged that OF has occurred in a concrete case at a specified time in a way that materially involves the accused person or defendant. So the relevant normative consequence ought to be demanded. This is the standard legal syllogism variously embodied in criminal or civil pleading and procedure.<sup>361</sup>

The certainty, at one point, is captured in the syllogistic form. In other words, the syllogism functions as a carrier of universalization, but is also produced by the requirement for decisions to be universalised. These syllogisms can be relied on by citizens, as the laws that will be used to evaluate them, such that if the facts as proved show their conduct obtains (i.e., the facts are operative, hence OF above), then the normative conclusion (NC above) follows. Further, this universalization does not float mid-air: it takes its place amidst a newly formed order within the rules and principles that together form the legal system. The principle of that order, in turn, is coherence:

In a legal argument, no one starts with a blank sheet and tries to work out a reasonable conclusion a priori. A solution offered must ground itself in some proposition that can be presented with at least some credibility as a proposition of law, and such a proposition must be shown to cohere in some way with other propositions that we take to state established laws. Legal argument makers and decision makers do not approach problems of decision and justification in a vacuum, but rather in the context of a plethora of material that serves to guide and to justify decisions, and to restrict the range within which the decisions of public agencies can legitimately be made.<sup>362</sup>

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<sup>361</sup> *Ibid.*, 27.

<sup>362</sup> *Ibid.*, 23.

Crucially, however, this coherence is defeasible coherence: in allowing ‘everything that is arguable be argued’, but demanding that any solution be universalizable both in form (as a syllogism) and context (of an already existing body of doctrine), the two sides meet, i.e., the reasonably achievable rule of law and the reasonably arguable character of the law. Once again, by allowing – partly, says MacCormick because legal materials are communicated ‘in natural languages’ and ‘these are afflicted with ambiguity, vagueness and open texture’<sup>363</sup> – ‘the rights of the defence’ to raise doubts ‘concerning fact or concerning law’, i.e., by providing for ‘contests over proper interpretation of legal materials, over evaluation of conflicting pieces of evidence, over the proper characterisation of facts proven or agreed, or over their relevance to the legal materials adduced’,<sup>364</sup> but by requiring, at the very same time, that the arguments raised on either side be reasonably arguable, i.e., be universalizable in a way that forms a coherent order of the re-interpreted materials, the system, almost itself as it were, re-creates the conditions for a marriage between a reasonably achievable rule of law and the reasonably arguable character of law.

The argument is a pleasing one, at least partly because it appears to keep a good deal of voices in contemporary legal theory happy, though not without concessions on both sides: the formalists must come to recognise the reasonably arguable character of the law, and the critics must recognise the gravitational pull of universalizability fitting into a coherent order. But the argument is in fact deeper, and it is one that returns us to the section above concerned with the political life of law-as-discourse. Ultimately, MacCormick is not as interested in beginning with and working towards a theoretical picture of legal work, or more accurately, he is concerned to do

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<sup>363</sup> *Ibid.*, 26.

<sup>364</sup> *Ibid.*, 27.

so, but only in the course of a jurisprudential inquiry that can only be characterised as thoroughly political. Consider the following passage:

No legal norm can be interpreted reasonably in abstraction from its place in a larger whole. As will be seen in Chapters 7 to 11, this accounts for the omnipresence in law of arguments from coherence. These look to ensuring that a proposed rules or interpretation makes good sense, indeed the best sense possible, in the context of the 'local' part of the system – the statute read as a whole, the particular branch of common law, and the closely comparable cases. They also concern, more generally, an effort to ensure that the system as a whole hangs together well. *The idea of 'system' or 'order' is itself an internal element in practical legal argumentation, not just in theoretical conceptions of law.*<sup>365</sup>

One can, and one is appropriately urged, to proceed through *RRL* as a source of much wisdom about legal reasoning. But one must be warned that this is legal reasoning insofar as it conforms to certain ideals, themselves, as MacCormick admits above, part and parcel of what has been referred to above as the political life of the conception of law-as-discourse. It is no surprise, then, to read MacCormick's endorsement of Dworkin's statement, as paraphrased by the former, that it is 'out of rival conceptions of legality rather than by way of some kind of empirical descriptions of things as they are or of the semantics of ordinary language that we develop different possible philosophies of law.'<sup>366</sup> To cite this is not necessarily to agree with Dworkin (or MacCormick) as to what creates plurality in theoretical conceptions of law and legal work. But it is certainly to agree that in the case of conceptions of law-as-discourse, the political values of legality, modelled on, as discussed above, the explanatory paradigm of discourse, influence deeply, if not overrun, associated conceptions of legal work, i.e., those conceptions that are here called legal-work-as-discourse.

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<sup>365</sup> *Ibid.*, 47-8; emphasis added.

<sup>366</sup> *Ibid.*, 28. See also, Dworkin 2004.

### **IA2c. Rule-Following**

It will be useful to turn, finally, to Pavlakos' account of legal epistemology, not only because it offers the most sophisticated recent theory of legal knowledge, on the back of an obvious familiarity with analytical philosophy, but also because, as we shall see, it will help us to bring out some more of the arguably deeply rooted intuitions of those working not only under the conceptions of legal-work-as-discourse, but also law-as-discourse. The connection between the two conceptions is immediately visible in Pavlakos' work, particularly insofar as he sets out to offer a theory of legal knowledge – 'of our knowledge of the law,' as he puts it – that is at once objective and normative. We can see how the two ambitions (i.e., securing objectivity and normativity) are connected in Pavlakos' definition of the Practice Theory of Law (hereinafter, 'PTL'). PTL, Pavlakos asserts, offers the following answer to the twin requirements of the objective and normative existence of law: it 'argues that legal facts can be known objectively, if we conceive of legal practice as a normative activity of making assertions (judging).'<sup>367</sup> Normativity 'generates standards which "guide" practice' and the 'ability to judge...makes it possible to refer to legal facts through well-formed sentences.'<sup>368</sup> 'Combine the two', Pavlakos promises, 'and what you get is the possibility to make reference [as required by normativity] to legal facts through sentences whose truth can be grounded by adducing objective standards.'<sup>369</sup>

There are a number of important steps that, taken together, contribute to Pavlakos' overall account. The first is the particular understanding of objectivity that Pavlakos advances. Central to this notion of objectivity is the notion of intelligibility. The first step, then, will require an examination of the role of the notion of intelligibility in Pavlakos' idea of objectivity. The second step will require unpacking

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<sup>367</sup> Pavlakos 2007, 2.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

the notion of intelligibility, which itself will need to be broken up into a discussion of, first, the device of intentional realism, and second, the notion of grammar. The third and fourth steps are linked to Pavlakos' conception of practice, which is designed to satisfy the requirement of normativity. The first is the notion of rule-following, which, as we shall see, depends on the notion of the internality of rules. This notion of rule-following is at once the bridge between grammar and the conception of practice. The fourth and final aspect is that of the 'rationalist understanding of normativity', which relies on the language of reasons. The last two aspects combine to provide an account of content that Pavlakos calls 'pragmatic rationalism.' These four steps are the principle building blocks of Pavlakos' account of PTL, and it is time now to consider them in sequence.

First, then, let us turn to Pavlakos' idea of objectivity. For Pavlakos, an understanding of objectivity rests upon how we conceive of the relationship between the mind and the environment.<sup>370</sup> Pavlakos identifies two philosophical traditions, both of which he criticises for 'fanning scepticism': first, the tradition of representationalism; second, the tradition of realism. Representationalists, he asserts, 'submit that in order to gain access to the environments and its constituents we need to delve in our minds and study some special mental objects that are capable of representing to the mind what lies outside it.'<sup>371</sup> Almost always, those mental objects are thought to consist in propositional representations, resulting in the philosophy of representation becoming subsumed under the empire of the philosophy of language.<sup>372</sup> According to Pavlakos – relying on the famous work of Saul Kripke and Hilary Putnam – representationalism is beset by problems to do with the instability of

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<sup>370</sup> *Ibid.*, 23.

<sup>371</sup> *Ibid.*, 24.

<sup>372</sup> *Ibid.*, 25.



reference of linguistic signs,<sup>373</sup> which lead ultimately to ‘the more general problem of scepticism.’<sup>374</sup> The resulting scepticism, which Pavlakos discerns from Donald Davidson’s writings, appears in two forms:

If mental definitions are conceived as being independent of the environment, there is no guarantee they say anything about the world; what is more, there is no way of checking them against the world, since they themselves are the vehicle of thought, of what we know (or can know) and what not. On the other hand...representations are, from their nature, supposed to be representations of something. Accordingly, if they are conceived as being independent of what they represent, representations are prevented from being representations of anything, hence they fail to materialise in the first place.<sup>375</sup>

The second tradition, realism, asserts – to the contrary of representationalism – that ‘thoughts are not individuated by self-standing, environment-independent mental constructs (definitions, representations) but, instead, by what they stand for in the environment.’<sup>376</sup> Here, ‘certain constituents of our thoughts (names such as “Aristotle” or “gold”) acquire their meaning through a direct causal link with their referents in the environment.’<sup>377</sup> Although realism avoids some of the problems associated with representationalism, it is accompanied by its own paradoxes: e.g., if it is the environment which determines meaning, then how do we explain the meaning of the term ‘unicorn’? Pavlakos argues that paradoxes such as the above problem of non-referring names are the result of two further philosophical positions: essentialism and first person authority. Realism relies on essentialism because ‘in removing meanings from the head’ it argues that ‘what fixes meaning lies in the intrinsic nature (essence) of the entities denoted by the words.’<sup>378</sup> The problem here is that of indeterminacy: ‘microstructures [as in the vocabulary of physics] are no more certain

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<sup>373</sup> *Id.* Pavlakos says: ‘...definitions are not suitable for individuating the meaning of signs for they do not exhaust the nature of the entities or events (in the environment) signs refer to’ – *Id.*

<sup>374</sup> *Ibid.*, 26.

<sup>375</sup> *Id.*

<sup>376</sup> *Ibid.*, 27.

<sup>377</sup> *Id.*

<sup>378</sup> *Ibid.*, 29.

or determinate as guides of thought-content than are mental representations.<sup>379</sup> Even acknowledging attempts made by realists, such as Putnam, to rely not on microstructures but on stereotypes (i.e., paradigmatic cases without final definitions) – which may or may not work in the context of the philosophy of science – Pavlakos thinks that the same problems remain, particularly for law: most legal requirements, such as that of causation in cases of tortious liability, cannot be seen, he says, to be necessary, but at most, only sufficient.<sup>380</sup> The second problematic position – upon which realism is said to rely – is that of first person authority. This position refers to the ‘ability of thinkers to have access to their own thoughts.’<sup>381</sup> If, as in realism, the ‘content of one’s thoughts...is fully individuated by the environment...then the absurd conclusion would follow, that they do not know what they are thinking of’ – thus undermining first person authority.<sup>382</sup> In ‘expelling content from heads’ realism leads to the ‘ignorance of the standards that guide content and meaning, hence thoughts become elusive.’<sup>383</sup>

Pavlakos asserts that what is common to both representationalism and realism is that both ‘require a strong link between thoughts and whatever they take to determine thought-content, be it representations in the former or essences of things in the latter.’<sup>384</sup> This ‘fundamentalism’, says Pavlakos, places ‘the entire weight of the account [of objectivity] on the two ends of an otherwise continuous activity.’<sup>385</sup> In a significant passage, he summarises his position as falling between the ‘two extremes’:

Viewing the two extreme moments in isolation obscures the fact that thoughts acquire their content as a result of a more complex and continuous practice, where minds interact with the environment under certain constraints or

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<sup>379</sup> *Id.*

<sup>380</sup> *Ibid.*, 31.

<sup>381</sup> *Ibid.*, 33.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Ibid.*, 34-5.

<sup>385</sup> *Ibid.*, 35.

conditions of intelligibility. These conditions are dynamic and static at the same time: dynamic in that they always allow for new information to make its way into our thoughts and concepts; static in the sense that they provide for a normative structure which constrains the practice of content formation, making out of a regulated or normative activity, as opposed to one that happens randomly, or for no reason.<sup>386</sup>

Intelligibility, then, is of central importance to Pavlakos. It is intelligibility – falling, allegedly, between what Pavlakos sees as extremes (as above, representationalism and realism), that is to provide the foundation of objectivity. The notion of intelligibility, however, is complex and is propped up by a series of other ideas – and it is that which we must now examine in this, the second step.

On the one hand, as mentioned above, there is the idea of grammar, which is said to guarantee intelligibility ‘through a network of rules which determine what linguistic move is allowed in making sense and which is not.’<sup>387</sup> Where sentences are well-formed, they guarantee intelligibility and ‘are capable of effecting communication.’<sup>388</sup> Further, ‘the rules of grammar form the background against which error and correction can be accounted for.’<sup>389</sup> Finally, grammar is also – especially insofar as it ‘abides by the slogan...*semantics exhausts ontology*’<sup>390</sup> – that which ‘guarantees’ the ‘intelligibility of content and, hence, knowledge.’<sup>391</sup> Apart from grammar, however, which shall be returned to below, the other concept used to prop up the notion of intelligibility is intentional realism. Thus, chapter two of the book ‘opens with a restatement of the requirement of the intelligibility of thought through the idea of intentional realism.’<sup>392</sup> Thus, before turning to the concept of grammar, it will be useful to consider, briefly, Pavlakos’ account of intentional realism.

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<sup>386</sup> *Id.*

<sup>387</sup> *Ibid.*, 37.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *Ibid.*, 49; original emphasis.

<sup>391</sup> *Id.*

<sup>392</sup> *Ibid.*, 38.

The first step in explicating intentional realism is to explain how it is that intentional states are real. The second, but ultimately inseparable, step – for Pavlakos – is to show how these real intentional states are ‘embedded within linguistic structures.’<sup>393</sup> The first step is broken down into the following argument: first, ‘intentional behaviour is a fact’ or, put another way, the reality of intentional states is ‘self-evident’;<sup>394</sup> second, for ‘intentional behaviour to be possible, one has to assume the existence of intentional states’;<sup>395</sup> third, therefore, ‘there are intentional states.’<sup>396</sup> The second step then kicks in with the effect that intentional states are explicable by way of intentional content, where that content is understood as being possible only when it ‘exhibits certain patterns of logical structure (grammar).’<sup>397</sup> We then come back full circle to the importance of grammar because it is grammar that Pavlakos uses to offer what he calls a non-representationalist theory of the individuation of content.

Although a proper evaluation of Pavlakos’ picture is beyond the scope of this section, it must be said that it is difficult to identify an argument for accepting the basic premise that ‘intentional behaviour is a fact’ – except to say, as per Pavlakos above, that it is ‘self-evident.’ Perhaps the best explanation for the need for a bare assertion comes from Pavlakos’ insistence this claim (i.e., for the reality of intentional states) ‘enjoys the status of a necessary pre-supposition “projected” upon the trivial fact of the existence of human behaviour that interrupts, as it were, the causal flow of the physical universe.’<sup>398</sup> It is, says Pavlakos, ‘this necessity to account for human behaviour coherently or meaningfully, as an intervening-factor-in-the-world, that

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<sup>393</sup> *Ibid.*, 42.

<sup>394</sup> *Ibid.*, 43.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

forces on one some version of realism about thoughts, beliefs and other intentional states.<sup>399</sup> Otherwise, Pavlakos thinks, we simply cannot ‘support a rational account of human behaviour.’<sup>400</sup> What one can see, emerging already from the discussion is Pavlakos’ deep identification with ideas falling under the canopy of the explanatory paradigm of discourse. His retention of, as in some sense fundamental, the notion of intentionality, is linked, as we can see, to the theoretical ambition (again, a typically discourse-oriented ambition) to account for human behaviour as rational, coherent, and relatively consistent over time – as if behaviour itself formed a ‘rational discourse.’

Let us return, however, to this brief exposition of Pavlakos’ view. It was noted above that the second step in accounting for intentional realism – i.e., that ‘intentional states are embedded in linguistic structures’ – relies on the notion of grammar, to which it was promised the discussion would return. Grammar, for Pavlakos, is that ‘set of norms which govern the form and inferential relations between judgements.’<sup>401</sup> It is important for Pavlakos to assert that nothing else, aside from grammar, is given priority when it comes to determining the content of our thoughts. The content of our thoughts for Pavlakos must exist only in the form of propositions, for if it did not, there would be something else that would be determining the content of those thoughts and that thing would not be grammar – for, obviously enough, the rules of grammar apply only to those thoughts that exist in the form of propositions. This is also the significance of the slogan referred to above, namely, ‘semantics exhausts ontology.’ Pavlakos wants to avoid the idea that anything in the environment (the world) determines the content of our thoughts – an idea, that we shall see, is dear to some of those working within the legal-work-as-tradition paradigm, but not in the

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<sup>399</sup> *Id.*

<sup>400</sup> *Ibid.*, 43-4.

<sup>401</sup> *Ibid.*, 87.

guise of a determinative relation, but more so on in the form of an informing, constraining ground, that offers possibilities for mixing and matching (allowing, thereby, for an explanation of the emergence of the idea of unicorns). There may very well, then, be some theorists who work with the idea of realism that Pavlakos criticises (again, an idea demanding a deterministic relation flowing from the environment to the mind), but this is not the only kind of realism available.

Pavlakos' notion of the 'semantics exhausts ontology thesis' is that it 'substantiates the idea that the structure of thought precedes that of the structure of the world.'<sup>402</sup> Grammar is tied intimately to this thesis because it is via the study of grammar that we can study 'the patterns of thought and to the extent that thought is individuated through language, a study of language.'<sup>403</sup> 'The whole programme', then, 'of studying semantics or the grammar of thought before or instead of ontology boils down to the claim that there is no non-conceptual or transparent experience of reality.'<sup>404</sup> It is this basic notion, of the structure of the mind (conceived itself on the model of a structure of a discourse, regulated by grammar), imposed on the structure of the world, that renders Pavlakos an excellent example of the conception of legal-work-as-discourse.

We have so far proceeded through two of the projected four steps: first, the notion of intelligibility as the foundation for the claim of objectivity of knowledge, and, second, the notions of intentional realism and grammar as the ideas that unpack the concept of intelligibility. It is time to consider the third and fourth steps, both linked intimately to the notion of practice. The third step, rule-following is said to bridge the gap between grammar and the concept of practice. The fourth step,

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<sup>402</sup> *Ibid.*, 49.

<sup>403</sup> *Ibid.*, 50.

<sup>404</sup> *Id.*

‘pragmatic rationalism’, is designed to help us understand the practice of evaluating assertions, i.e., judging.

Rule-following is an important element of Pavlakos’ picture. He states that he will ‘proceed to identify the capacity to follow a rule, as the capacity to engage in normative activity, as the foundation of all content.’<sup>405</sup> Further, he says, rule-following ‘constitutes a practice which constrains the ascription of content to mental states, linguistic signs and token of behaviour.’<sup>406</sup> The key to Pavlakos’ account of rule-following lies in the notion of the internality of rules in practice (practice, to recall, is constituted by rule-following). Rules, Pavlakos asserts, ‘bear an internal relation to their applications.’<sup>407</sup> ‘Internality’, he continues, ‘guarantees that rule-following constitutes the most fundamental level as regards intentionality.’<sup>408</sup> Using a famous phrase of Wittgenstein’s – namely, that ‘there is a way of grasping a rule which is not an interpretation’<sup>409</sup> – Pavlakos argues that there is a way of understanding the production of meanings that is not an interpretation (for one can only assert that some production of meaning is an interpretation from the outside).

It is significant, however (in a way that shall be explained below), that Pavlakos feels compelled to add something to this ‘pragmatic concept of practice.’ That addition – at once the fourth step and final aspect of Pavlakos’ picture – is ‘a rationalist understanding of normativity.’<sup>410</sup> This ingredient combines with the above exposition of rule-following to produce ‘an account of content I shall call pragmatic rationalism.’<sup>411</sup> The relevant terminology at play in this rationalist understanding of normativity is, as one would expect, the terminology of reasons. Reasons, Pavlakos

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<sup>405</sup> *Ibid.*, 88.

<sup>406</sup> *Id.*

<sup>407</sup> *Ibid.*, 89.

<sup>408</sup> *Id.*

<sup>409</sup> Wittgenstein 2001 (1953), §201.

<sup>410</sup> Pavlakos 2007, 127.

<sup>411</sup> *Id.*

promises, will ‘specify the structure and nature of rationalist constraints’, which will ‘create a space between membership or participation in the practice and exhaustive appreciation of its contents’, such that ‘notwithstanding one’s competent use of a concept in everyday communication, one may still fail to have full knowledge of the concept’s content.’<sup>412</sup>

There are three steps here: first, it is argued that reasons ‘guide judging as a form of activity’; second, it is argued that ‘the idea of rationalist constraints requires that grammar be conceived of as the most fundamental content-giving practice’; and third, ‘it will be suggested that a grammatical structure, in whose light content formation emerges as a normative activity, renders all agents who partake of it autonomous.’<sup>413</sup> The constraints that Pavlakos has in mind are represented by him ‘as reasons for abiding by the rules of the practice.’<sup>414</sup> Reasons, he explains, reflect ‘better the fact that the ascription of content to thoughts is the result of an activity, for activity is constrained by reasons rather than causes.’<sup>415</sup> These constraints are ‘intelligible...only within practice.’<sup>416</sup> In this respect, they resemble the ‘internality’ of the rules of grammar, and, indeed, at times Pavlakos refers to reasons as ‘the constraints of rule-following.’<sup>417</sup> However, here, Pavlakos goes further – and in a way that makes it clear that the rules of grammar are quite different to reasons. He asserts that the ‘basic constraints (reasons) of rule-following are facts.’<sup>418</sup> They include, Pavlakos says, facts that ‘refer to the naturalistic aspects of the environment,’ as well as ‘legal, moral or other social facts.’<sup>419</sup>

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<sup>412</sup> *Ibid.*, 127-8.

<sup>413</sup> *Ibid.*, 128.

<sup>414</sup> *Ibid.*, 130.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Ibid.*, 131.

<sup>419</sup> *Id.*



What Pavlakos is struggling with here is a way to retain the rationality of behaviour – of the notion of human beings as intervening in the causal structure of the world – but without that turning us into solipsists or idealists. Thus, he says, a ‘fact-as-reason can stand in a causal relation to a token of thought or action without amounting to a full causal explanation.’<sup>420</sup> Similarly: ‘where causal explanation purports to illustrate a strict causal connection between constraints which are conceived of naturalistically [e.g., the fact that the red pen is on the table determines the content of my thought that there is a red pen on the table], and tokens of thought or action’,<sup>421</sup> rationalistic explanations, it is said, ‘purport to explain content by linking thought and action with non-naturalistic reasons.’<sup>422</sup> The example provided by Pavlakos is the thought of someone who realises that if he parks in front of the delivery entrance of a shopping centre he will be fined, in which case Pavlakos asserts that the content of that thought is caused by the knowledge of the non-naturalistic fact that parking in front of the delivery entrance is forbidden.<sup>423</sup>

A detailed analysis of Pavlakos’ concept of reasons is impossible here. He certainly surrounds this concept with a great deal of conditions. To be reasons, in Pavlakos’ sense, ‘reasons must simultaneously be motivationally efficacious and objective’<sup>424</sup> – where that capacity to motivate is said to reside in the ‘reasons’ universality.<sup>425</sup> That universality, in turn, is said to be guaranteed by three further conditions that reasons ‘must meet’: independent identifiability, direct readability, and fallibility.<sup>426</sup>

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<sup>420</sup> *Id.*

<sup>421</sup> *Ibid.*, 132.

<sup>422</sup> *Ibid.*, 131.

<sup>423</sup> *Id.*

<sup>424</sup> *Ibid.*, 133.

<sup>425</sup> *Id.*

<sup>426</sup> *Ibid.*, 133-4.

What is interesting for present purposes is that Pavlakos' insistence on a rationalist understanding of normativity – and on the correlate positing of reasons – has immediate repercussions on his picture of legal work. Thus, for example, the condition of independent identifiability mentioned above, 'expresses the idea that any reason must be identifiable or determinable by a finite subject independently of any particular instance of application.'<sup>427</sup> This requires 'judging-subjects' to be capable 'of generalising a reason to future cases.'<sup>428</sup> Further, in accordance with the condition of direct readability, 'judging-subjects' must be able to 'read straight off what [reasons] require.'<sup>429</sup> The point is not to disagree with whether this picture of 'judging-subjects' is accurate: the point is to see how a picture of legal work is built, from the direction of abstract phenomena to certain capabilities.

To summarise: the rules of grammar, with which we comply intentionally, but not self-consciously (explained by Pavlakos courtesy of the internality of these rules), are necessary, because without them we could not think. Our following of these rules explains intelligibility, which is the foundation of objectivity. On top of this, however, is another layer, namely, reasons. Reasons, of the form, say, of a prohibition on parking outside a street – a form, furthermore, that must be generalisable (as this prohibition is), directly readable (let us say it is articulated in a statute or case), etc. – not only motivate (they are practical; they function pragmatically), but also determine content, and thus lay the groundwork for evaluation as either correct or incorrect. It is these reasons, functioning in such a manner, that guarantee normativity. Together, these explanations of objectivity and normativity constitute an explanation of how knowledge of the law is possible.

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<sup>427</sup> *Ibid.*, 133.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

Pavlakos himself gets to his picture of the work performed by judges in the following way. At the highest level of generality is what he calls judging simpliciter. At the level of legal work is judging in a domain. Judging simpliciter ‘is the thinnest or most general way of conceiving of the practice of judging as reflexive.’<sup>430</sup> Reflexivity ‘refers broadly to the ability to supply reasons which constrain ascription of content’,<sup>431</sup> doing so in two ways: first, by laying ‘down the rules which delineate the semantic structure of judgements as well as the inferential relations that hold between them (rules of grammar)’; and second, by revealing to us that ‘grammar points out the need for depicting reasons when judging.’<sup>432</sup> Judging in a domain refers to the notion of distinct ‘cognitive contexts (e.g., law, morality, physics etc).’<sup>433</sup> These domains are made up of ‘substantive rules.’<sup>434</sup> Here, ‘substantive rules constitute a more specialised level of normativity which regulates adequately the practice of judgement formation with respect to a cognitive domain.’<sup>435</sup> In the domain of law, these substantive rules may take the form of Hart’s primary and secondary rules, and it is these rules that ‘prescribe the formation of judgements within a legal domain.’<sup>436</sup>

Recall now the definition of PTL (as cited at the outset of this section). PTL ‘argues that legal facts can be known objectively, if we conceive of legal practice as a normative activity of making assertions (judging).’ Normativity ‘generates standards which “guide” practice’ and the ‘ability to judge...makes it possible to refer to legal facts through well-formed sentences.’ ‘Combine the two’, says Pavlakos, ‘and what you get is the possibility to make reference to legal facts through sentences whose truth can be grounded by adducing objective standards.’

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<sup>430</sup> *Ibid.*, 137.

<sup>431</sup> *Ibid.*, 137.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Ibid.*, 137-8.

<sup>435</sup> *Ibid.*, 138.

<sup>436</sup> *Id.*

The above discussion has proceeded through Pavlakos' account fairly carefully because it is the most sophisticated recent account, drawing on philosophical resources, of legal epistemology. Despite its complexity, the account does help us to reveal some features of the legal-work-as-discourse orientation. These basic features include: 1) the insistence on intentionality; 2) the desire for a retention of a theoretically-describable account of the coherence of human behaviour, meaning an account that creates room for human beings as self-movers, intervening in the causal structure of the world; 3) the postulation of the primacy of a rational structure in the mind imposed on the world (or the environment); 4) the need to retain the problem of normativity, which also allows for explanatory primacy to be given to abstract phenomena (reasons, as above, that are generalisable and directly readable, etc.), which guide human beings; and 5) the view that thought is not possible without language, no matter how softened by the constitutive role of rules of grammar that we need not be conscious of.

Indeed, the last requirement – that of a sense of intentionality without self-consciousness – is, as mentioned above, one that may very well appeal to certain theorists working under the tradition paradigm. The crucial difference, however, is as follows. Pavlakos explains this phenomenon as due to the property of rules themselves. He argues, as above, that rules (at least certain rules, i.e., in this case, the rules of grammar) have an internality that renders it impossible for us to step outside them – to see our following them as interpretations. There is a way of going on, as Wittgenstein put it, that is not an interpretation – for there is no one who can stand outside the practice to such an extent that they would have the authority, or the insight, to say that that way of going on is such-and-such an interpretation of such-and-such a rule. What is happening here is that we are being witness to the very limits

of rule-based explanations of behaviour. 'Knowing how to go on' is not a notion that requires or will be satisfied by a rule-based explanation. It is, primarily, an ability. However, abilities are notoriously difficult to fit into or use as part of an account of human behaviour that wants to present it as rational, coherent and consistent over time, and thus as capable of being evaluated by reference to standards. Perhaps it is the desire to give those standards themselves some authority that impels theorists to situate them, to force them into every kind of explanation. Perhaps it is the desire for retaining the image of human beings as self-movers, as in some sense above and beyond the causal patterns of the environment, that is fundamental. This need not be decided upon here; nor, more likely, is it possible to decide for certain. This notion of idolising rationality and the associated idea of humans-as-self-movers shall, in any even, be returned to in section IIC, 'Philosophy and the Examined Life.' For present purposes, what is sufficient is that some basic features of legal-work-as-discourse have, by this discussion, been revealed.

## **IB. TRADITION-ORIENTED JURISPRUDENTIAL INQUIRIES**

### **IB1. LAW-AS-TRADITION**

In a paper entitled ‘Mute Law’<sup>437</sup>, Rodolfo Sacco outlines some of the features of what shall be referred to here as the explanatory paradigm of law-as-tradition. Significantly, for present purposes, Sacco does not limit his concept of mute law geographically or historically – even if both geographical and historical considerations play a large part in his explication of the concept of mute law.

‘Law may live,’ Sacco argues, ‘and lived, even without a lawgiver.’<sup>438</sup> The very notion of a ‘law-giver’, he says, is ‘a recent innovation, in the actual meaning of a central authority entrusted with overall legislative powers.’<sup>439</sup> At other times, and in other places, the creation of law was left to other sources: in Chinese and Japanese law, for example, he says, ‘the rules of social interaction were thought to mirror a cosmic order.’<sup>440</sup> In Roman law, at least in its origins, and in the customs of the common law, we find a law that precedes any individual design.<sup>441</sup> In some respects, the conception of mute law and the absence of a law-giver coincide, but they do not overlap perfectly. To the extent that there is an overlap, it may remind us of the criticisms of those who argue that the myth of given meaning in legal texts, and the correlate restriction of those who resolve disputes in accordance with those texts ‘merely’ to ‘revealing’ that given meaning, goes hand in hand with the safeguarding not only of authority, but also of the authority of the profession. As we might recall, these critics noted that ‘law as language is aimed principally at reasserting the

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<sup>437</sup> Sacco 1995.

<sup>438</sup> *Ibid.*, 465.

<sup>439</sup> *Ibid.*, 455.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

autonomy of law—at returning law to lawyers by claiming that law is a specialised language that only lawyers can speak.<sup>442</sup>

But law, says Sacco, can and has existed and evolved without lawyers.<sup>443</sup> We do not find the more or less bureaucratised, centralised, professionalized structures of law that we are used to everywhere, ‘nor—more importantly—have they always existed everywhere. And even where they do exist, they can influence the life of society to greater or lesser extent.’<sup>444</sup> Looking back, Sacco argues that ‘when the Homo Habilis produced the first pebble tools...ceremonies and acts constituted legal acts. Adherence to the rule implied its existence and validity (manifested by spontaneous conduct of the members of the group). The law’, continues Sacco, ‘was mute, except for yelling accompanying ceremonies and self-help. Sources were mute. Acts were mute.’<sup>445</sup> At that time, Sacco suggests, ‘the dichotomy between law and enforcement did not exist.’<sup>446</sup>

Sacco does argue that ‘the biggest legal revolution took place when a descendent of the Homo Habilis began to use an articulated language.’<sup>447</sup> Even then, however, he says, it is unclear ‘whether man began immediately to use it for purposes of law.’<sup>448</sup> Significantly, as mentioned above, Sacco does not limit his concept of mute law to the above historical or geographical illustrations. He says, for example, that ‘except for the two typical ceremonies, i.e., appropriation of land and courtship, unspoken acts and mute sources continue to operate today.’<sup>449</sup> Sacco acknowledges that language does make a difference; for example, it ‘introduces questions about the

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<sup>442</sup> Shapiro 1981, 1200.

<sup>443</sup> Sacco 1995, 456.

<sup>444</sup> *Ibid.*, 457.

<sup>445</sup> *Ibid.*, 459-60.

<sup>446</sup> *Ibid.*, 459.

<sup>447</sup> *Ibid.*, 460.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

future, abstract questions about law not yet applied, principles unrelated, at least for the moment, to realities.<sup>450</sup> But Sacco is certainly careful and circumspect about placing too much emphasis on the text and on those who administer it. Thus, he says, for example, that ‘the advent of legal science did not modify operative relationships, it simply improved the conceptual definition of the relationship between masters and dependents.’<sup>451</sup>

Turning to more contemporary legal systems, Sacco argues that ‘a combination of both spoken and mute elements can...be found at work.’<sup>452</sup> Sacco reminds us that ‘our legal system is familiar with spoken sources (the written rules, of splendid form and content, produced by legislative assemblies) as well as’, importantly, ‘unspoken sources (commercial uses, determination of standards of conduct, construction, by an interpreter, of concepts such as fault, reasonableness, bad faith).’<sup>453</sup> We are familiar, says Sacco, ‘with acts carried out through words (contracts made by fax, deeds, wills),’ but we ought also to recognise that there are ‘acts carried out with words (deliveries, contracts made through devices that allow the buyer to pay and receive merchandise).’<sup>454</sup> There are categories with both spoken and mute elements: ‘such are contracts that can be made by declarations, but also by material acts; such are confirmations; such are acceptances of inheritance, which can be express or implied.’<sup>455</sup> However, Sacco points out, ‘lawyers are primarily interested in spoken sources and acts and feel uneasy with mute sources and acts’;<sup>456</sup> ‘when we refer to mute acts,’ says Sacco, ‘we do it by analogy to spoken acts.’<sup>457</sup>

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<sup>450</sup> *Id.*

<sup>451</sup> *Ibid.*, 461.

<sup>452</sup> *Ibid.*, 464.

<sup>453</sup> *Id.*

<sup>454</sup> *Ibid.*, 464-5.

<sup>455</sup> *Ibid.*, 465.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*



It is instructive to begin with Sacco for several reasons. The first has already been mentioned directly above, i.e., that although Sacco uses historical and geographical illustrations, he does not limit his notion of mute law to other times and places – especially times and places where legal materials were not articulated and recorded in the way we are accustomed to today. Were the concept of law-as-tradition to apply only to such times and places, it would hardly be an alternative conception to law-as-discourse. Secondly, and in a related fashion, the conception of law-as-tradition does not rely on either the presence or absence of textual legal materials, or on explaining how textual legal materials are valid (though it may be interested in the circumstances under which certain legal materials are effective), or on using concepts used to explain features of language to explain other things by analogy. Sacco is right to warn us above that contemporary legal theorists are prone to find such ceaseless reference to the text and such textual analogies attractive.<sup>458</sup>

There are nine sections below, all of which attempt, as with the case of the discussion of law-as-discourse, to bring out some basic features of those working under the conception of law-as-tradition. The nine sections are: 1) the Living Law; 2) Stabilised Interactional Expectancies; 3) Projections of Experiences; 4) Concepts of Legal Culture; 5) the Turn to Activities; 6) the Authoritative Presence of the Past; 7) Customary Law and the Common Law; 8) Pluralism, Process and Evolution; and 9) the Political Life of Law-as-Tradition. Each is, naturally, brief and does not purport to represent or summarise the views of the theorists discussed in any detailed or ‘faithful’ manner.

Two preliminary points should be noted. First, the conception of law-as-tradition is not as well represented as that of law-as-discourse, at least not in Anglo-

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<sup>458</sup> There is much more to be learnt from Sacco’s conception alone, though it shall not be discussed any further here. This is largely because the paper in question is short, and Sacco’s recent full-length treatment of this theme in Sacco 2007 has appeared only in the original Italian version.

American legal theoretical literature, and certainly not in its contemporary manifestations. Indeed, some theorists may argue that the basic features of law-as-tradition do not belong to ‘jurisprudential inquiry’ properly so-named, but to sociology or anthropology of law. Nevertheless, it is an important aim of this part of the thesis to point to some of the available resources and to suggest that these resources ought to be seen as making a contribution to our understanding of law. As above, the aim here is not to either endorse or criticise these contributions, but to reveal some of their commonalities, including some of their common problems, common assumptions, and common sources of explanatory refuge.

Second, the aim here is not to be faithful to, or discuss in any detail, the literature on the concept of tradition in sociology and social theory. Interestingly, even in these fields, a recent paper suggests that ‘insufficient attention’ has been paid to ‘the topic of tradition.’<sup>459</sup> Nevertheless, there have been important works here, perhaps most prominently, Edward Shils’ 1981 volume, entitled simply *Tradition*.<sup>460</sup> A number of preliminary points and discussions made by Shils will be useful to mention at this point. The first is that Shils is careful to distinguish ‘tradition’ from ‘traditionalism’, the latter being ‘the support of traditional rules and beliefs on the grounds of their originating from a sacred source.’<sup>461</sup> According to Shils, the former, by contrast, refers to ‘transferring the patterns of belief and images or models of conduct from “the past into the present” in which these are respectively rethought and embodied in actions, to be taken into the future.’<sup>462</sup> The transferral of these patterns need not be a conscious one – indeed, drawing on figures such as Edmund Burke, Alfred Whitehead, and Michel Polanyi, Shils suggests we are often ‘irremediably

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<sup>459</sup> Jacobs 2007, 139.

<sup>460</sup> Shils 1981.

<sup>461</sup> Jacobs 2007, 140.

<sup>462</sup> *Id.*

ignorant’ of facets of the traditions of which we are part.<sup>463</sup> We participate in traditions because of ‘deep seated “impulses”, “needs”, and “dispositions”.’<sup>464</sup> The ‘learning’ involved consists in the preservation and conveyance of ‘bodies of knowledge and skill’<sup>465</sup> – where that preservation and conveyance is not be understood as the passing on of ideas or practices (which, Shils says, without the bedrock of tradition, ‘are ephemeral’),<sup>466</sup> but rather, and in keeping with other theorists such as Max Radin and Michael Oakeshott, is an active process, ‘a concrete...manner of living in all its intricateness.’<sup>467</sup> Finally, unlike for some, such as Anthony Giddens and Eric Hobsbawm for whom traditions are inventions that originate as objects of design or planned creation, for Shils, traditions are partly evolutionary, i.e., they are ‘successful adaptations to changes in the environment’ and partly ‘spontaneous.’<sup>468</sup> The last of these points deserves special re-iteration, and will be addressed as the political life of the conception of law-as-tradition, though not, as with the previous discussion, at the outset of this part, but at its conclusion. As the discussion proceeds below, the echoes of some of these basic features in legal theoretical literature will become prevalent.

### **IB1a. *The Living Law***

Eugen Ehrlich, an important figure in the law-as-tradition conception, defined law as consisting ‘of rules of conduct followed in everyday life—the customary practices and usages which give rise to and maintain the inner ordering of associations (the family, village community, corporations, business associations, professions, clubs, a

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<sup>463</sup> *Id.*

<sup>464</sup> *Ibid.*, 143.

<sup>465</sup> *Ibid.*, 144.

<sup>466</sup> *Id.*

<sup>467</sup> Oakeshott quoted in *Ibid.*, 157.

<sup>468</sup> *Ibid.*, 145.

school or factory).<sup>469</sup> Famously, he dubbed his concept that of ‘the living law,’ which he described as ‘the law which dominates life itself even though it has not been posited in legal propositions.’<sup>470</sup> The living law was not, he said, ‘part of the content of the document that the courts recognise as binding when they decide a legal controversy, but only that part which the parties actually observe in life.’<sup>471</sup> The centre of gravity of the development of law, he continued, was custom, and this made him look upon legal texts, and the efforts of legal scientists, with some scepticism.<sup>472</sup> In the case of Roman law, for example, he argued that the texts of Roman law were nothing more than decisions about which customs to consider valid – those texts were not themselves the source of law.<sup>473</sup>

In a paper published in 1922 – and prefaced by ‘An Appreciation of Eugen Ehrlich’ by Roscoe Pound<sup>474</sup> – Ehrlich brought some of his ideas to a much wider audience.<sup>475</sup> His running theme, in that paper, is the relationship between what he calls Legal Provisions and the Social Order. A ‘Legal Provision’ is ‘an instruction framed in words addressed to courts as to how to decide legal cases or a similar instruction addressed to administrative officials as to how to deal with particular cases.’<sup>476</sup> In other writings, Ehrlich refers to these instructions as ‘norms for decision.’<sup>477</sup> It is no surprise, says Ehrlich, that because these instructions are part of the everyday practice of ‘the modern practical jurist’, that it is these instructions that he or she understands to be law.<sup>478</sup> Social Order, on the other hand, not only predates,

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<sup>469</sup> See, Ehrlich 2002, 455-71.

<sup>470</sup> *Ibid.*, 442.

<sup>471</sup> *Ibid.*, 497.

<sup>472</sup> *Ibid.*, 442.

<sup>473</sup> *Id.*

<sup>474</sup> Pound 1922.

<sup>475</sup> Ehrlich 1922.

<sup>476</sup> *Ibid.*, 132.

<sup>477</sup> See, Ehrlich 2002.

<sup>478</sup> Ehrlich 1922, 132.

but also exists in the absence of any such instructions.<sup>479</sup> Further, ‘even today the whole of law is incapable of being included in Legal Provisions’, for to attempt to ‘embrace the whole variegated body of human activities in Legal Provisions is about as sensible as trying to catch a stream and hot it in a pond.’<sup>480</sup>

Ehrlich’s discussion raises an issue that will accompany us throughout this discussion. It is, in fact, a mirror issue to the one discussed above in relation to the conception of law-as-discourse. Where, in the explanation of law, ought we to place articulated norms? We have seen, above, how law-as-discourse theorists have struggled with accounting for the role of laws – conceptualised as articulated norms – in the everyday life of the citizenry, sometimes reluctantly, as in Endicott, covering up the problem of a seemingly unrealistic explanation of that role with a reference to the importance of articulated norms (with their various properties) for constraining the conduct of evaluation of citizens by officials. The beginning point here, however, is different. Theorists working under the law-as-tradition conception begin with the experience of everyday life – both amongst the citizenry and officialdom – and place a good deal less explanatory power in the hands of discourse, not only because they do not explain the happenings in question by reference to articulated norms functioning as reasons for action, but also because they do not tend to place as much emphasis on a rational or rationally reconstructed order.

As we saw above, Ehrlich’s picture, at least in this 1922 paper, is one that contains an explanatory split between the citizenry and those ‘modern practical jurists’ (Legal Provisions taking priority in the case of the latter), but as we shall see, not all law-as-tradition theorists make this move. Indeed, as we shall also see, whereas the discourse-oriented theorist is more likely to stress the ontological aspects in his or

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<sup>479</sup> *Id.*

<sup>480</sup> *Ibid.*, 133.

her explanations, the tradition-oriented theorist is more likely to situate his or her explanations at the epistemological level, often to the extent that articulated norms are subsumed in the explanation by the epistemological tradition of legal officials.

One further illustration of the lack of an appeal to articulated norms in Ehrlich's paper is his criticism of explaining both the emergence and the continuity of such features of social life as 'marriage' or 'contracts' by reference to Legal Provisions. 'The great mass of law', he asserts, 'arises immediately in society itself in the form of a spontaneous ordering of social relations, of marriage, the family associations, possession, contracts, succession, and most of this Social Order has never been embraced in Legal Provisions.'<sup>481</sup> Therefore, 'it is entirely wrong to believe that social institutions, marriage, family associations...have been called into existence through Legal Provisions, or, worse yet, through statutes.'<sup>482</sup> Although state institutions, and indeed 'only' state institutions, 'are created through statutes', (though to say this is not to say that the state is created by law, for Ehrlich states explicitly that 'the state is older than state law')<sup>483</sup> the great mass of Legal Provisions is made 'not through forethought, but through afterthought', 'for in order that the judges and jurists may become occupied with a juristic dispute, the institution involved must already have its existence in life and must have given rise to the dispute.'<sup>484</sup>

It is also important that for Ehrlich too much focus on the Legal Provisions valid at any one time may make one miss the dynamism of the Social Order, and the changes that are perceptible only when one considers longer periods of time in one's explanations. He repeatedly stresses that the Social Order is 'not fixed and

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<sup>481</sup> *Ibid.*, 136.

<sup>482</sup> *Ibid.*, 139.

<sup>483</sup> *Id.*

<sup>484</sup> *Id.*

unchangeable... It is in a constant flux.<sup>485</sup> ‘In the short period of human life’ he continues, changes such as the emergence of the ‘workman’s contract’, or the ‘competition clause in commercial contracts’, or the ‘railroad freight contract’ (terms that, significantly, are by no means surprising, and indeed sound antiquated to us in 2008) – these changes are ‘rarely recognisable, but in the course of centuries, they assume the proportions of tremendous revolutions.’<sup>486</sup> It is almost as if, for Ehrlich, Legal Provisions are like our vision of stars: we see their light, but it has taken so long for it to arrive in our retina that we could be looking at non-existent objects.

We can recognise Ehrlich’s ideas in a wide range of legal theoretical literature – some of which refers explicitly to him. For example, in a very recent paper (published in July 2008), David Nelken traces Ehrlich’s influence to everything from the ‘law in context’ series (published in the UK from the 1960’s onwards),<sup>487</sup> Pound and the realists on the ‘law in action’, (though in other work Nelken criticises the equation between living law and law in action),<sup>488</sup> to work by Philip Selznick, Lon Fuller and Lauren Edelman on law emerging from interaction and organisational life and recent work by Marc Hertogh on ‘legal consciousness.’<sup>489</sup> Space will not permit an examination of all – Selznick and Fuller are discussed in sections below – but it will be worthwhile to briefly mention Hertogh’s work, if only because he has been probably the most determined adherents, amongst contemporary legal theorists, of Ehrlich’s work.<sup>490</sup>

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<sup>485</sup> Ehrlich 1922, 139.

<sup>486</sup> *Ibid.*, 140.

<sup>487</sup> Nelken 2008, 447.

<sup>488</sup> *Ibid.*, 448. Nelken criticises the equation of the two in Nelken 1984.

<sup>489</sup> Nelken 2008, 459-50.

<sup>490</sup> For example, Hertogh is editing a collection entitled *Reconsidering Ehrlich*, due in either 2008 or 2009.

Hertogh calls on Ehrlich in developing his account of ‘legal consciousness.’<sup>491</sup> A popular definition of the term, he suggests, is one that encompasses ‘all the ideas about the nature, function and operation of law held by anyone in society at a given time’,<sup>492</sup> but as he quickly points out, such an explanation remains ambivalent about the conception of law in question. Hertogh considers the analysis of legal consciousness by reference to works by Sally Engle Merry, Patricia Ewick and Susan S. Silbey, and others,<sup>493</sup> for whom the primary focus is ‘How do people experience (official) law?’<sup>494</sup> However, Hertogh’s focus is on Ehrlich’s conception of law, which, Hertogh says, enables the study of ‘legal consciousness “from below”’.<sup>495</sup> The metaphor is not a coincidence. As we shall see in the section below on Fuller’s work, whereas conceptions of law-as-discourse tend to proceed top-down, proceeding downward from a central authority, conceptions of law-as-tradition proceed bottom-up, proceeding from the interactions of persons themselves. Whether these conceptions meet is another matter (MacCormick’s theory, as we shall see in section IC4, tries to accommodate both, with a definition of law, i.e., as institutionalised normative order, that tries to find such a meeting place). The metaphor has also been used as a marker in other theories, perhaps most prominently in recent times, the bottom-up legal cosmopolitanism of Bonaventura de Sousa Santos. Santos argues that we can think of law, or at least some law, as ‘very informal, unwritten, so deeply embedded in family relations that it is hardly conceivable as an autonomous dimension thereof.’<sup>496</sup> One such kind of law is what Santos calls domestic law: ‘the

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<sup>491</sup> Hertogh 2004.

<sup>492</sup> *Ibid.*, 460.

<sup>493</sup> See, Merry 1990; and Ewick and Silbey 1998.

<sup>494</sup> Hertogh 2004, 463.

<sup>495</sup> *Ibid.*, 472.

<sup>496</sup> Santos quoted in Tamanaha 2001, 183; see also, Santos 1995.



set of rules, normative standards and dispute settlement mechanisms both resulting from and in the sedimentation of social relations in the household.<sup>497</sup>

Ehrlich similarly makes much of the ‘the household and how it organises its social relations by norms.’<sup>498</sup> Hertogh’s purpose is to push an interpretation of Ehrlich’s theory according to which ‘law is a notion that lives in people’s heads and which can be identified “on the basis of people’s attitudes”.’<sup>499</sup> Under this conception, ‘law is considered a dependent variable; the definition of law is not provided by the researcher, but is part of the empirical enquiry itself.’<sup>500</sup> The contrast with Luhmann’s methodological position could not be more stark, i.e., to recall from chapter one of Luhmann’s *Law as a Social System*, entitled ‘The Location of Legal Theory’, Luhmann argues that it is law itself that determines its own boundaries and thus the demarcates the object of legal theoretical concern.<sup>501</sup> Of course, there have been others – not necessarily all of whom would be sympathetic to Ehrlich’s account – who have accepted and argued for this methodological postulate, such as Frederick Schauer<sup>502</sup> and Brian Tamanaha.<sup>503</sup> As we will see, it is also an idea familiar to students of legal pluralism and critical legal pluralism, which is returned to below in section IB1h.

Hertogh’s analysis cannot be considered here in any more depth. One further point he makes, however, deserves to be mentioned. Hertogh’s Ehrlich-inspired legal consciousness method allows him to unearth a value remarked upon by those he interviews when examining house regulations systems in the Netherlands. The value

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<sup>497</sup> Santos quoted in Tamanaha 2001, 183.

<sup>498</sup> Ziegert 1979, 238.

<sup>499</sup> Hertogh 2004, 474.

<sup>500</sup> *Ibid.*, 475.

<sup>501</sup> See, Luhmann 2004.

<sup>502</sup> Schauer 2005.

<sup>503</sup> See, Tamanaha 1995.

in question is ‘responsiveness’, which those interviewed described variously in the following ways:

Town government should be at the heart of society, outward-looking and cooperative. Policy is not made from behind a desk; public officials know what’s going on in Zwolle and their work is directed at the needs of the client. There is a very close cooperation with all partners in the city.<sup>504</sup>

Our golden rule is: listen to what the residents say. Our second rule: do not shy away from creative solutions.<sup>505</sup>

These are significantly different political ideals than those invoked by the law-as-discourse conception. The value of ‘responsiveness’ that Hertogh says they express will be returned to in section IB1i below (‘The Political Life of Law-as-Tradition’).

### **IB1b. *Stabilised Interactional Expectancies***

Lon Fuller, one of the most underrated of legal theorists, deserves much more attention than can be given here. In his paper, ‘Human Interaction and Law’, we can recognise a good deal of Ehrlich’s ideas.<sup>506</sup> Fuller opens the paper with the announcement that his conception of law includes not only ‘the legal systems of states nations’, but also ‘smaller systems...to be found in labour unions, professional associations, clubs, churches, and universities.’<sup>507</sup> A good part of Fuller’s discussion is concerned with revealing the limitations of jurisprudential accounts of ‘customary law’ for the proper understanding of his wider conception of law. The core of his critique is his attack on those who ‘reduce’ the concept of customary law to ‘mere habit or usage’,<sup>508</sup> as opposed to those who recognise that it is best described in the ‘language of interaction’, meaning an order composed of predictable patterns and

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<sup>504</sup> Hertogh 2004, 477.

<sup>505</sup> *Ibid.*, 478.

<sup>506</sup> Fuller 1969a.

<sup>507</sup> *Ibid.*, 1.

<sup>508</sup> *Ibid.*, 2.

supported by ‘intermeshing anticipations’<sup>509</sup> and ‘complementary expectations’ (a term Fuller borrows from Talcott Parsons).<sup>510</sup> What Fuller sets out to do, then, is to provide some account of ‘the actual social processes through which law’<sup>511</sup> emerges from these contexts of human interaction – or, one might say, with Ehrlich, from the associations of human beings.

In a move commonly made in law-as-tradition conceptions, but not, as we saw above, in law-as-discourse ones, Fuller insists that we must not conceive of that ‘interactional expectancy’ as actively entering our consciousness.<sup>512</sup> Indeed, Fuller asserts that ‘the anticipations which most unequivocally shape our behaviour and attitudes towards others are often precisely those that are operative without our being aware of their presence.’<sup>513</sup> ‘Our conduct towards others, and our interpretations of their behaviour towards us,’ he notes, in anticipation of a good deal of contemporary cognitive science (particularly of the socially-embodied school), are ‘constantly shaped by standards that do not enter consciously into our thought processes.’<sup>514</sup>

Elsewhere in the paper, and in another move common to law-as-tradition conceptions, Fuller is keen to reject a picture of law as exclusively an instrument of social control emanating from a central authority. Such a picture for him skirts over important complexities that emerge when one takes a longer period of time as one’s window onto the world of law. The law-as-an-instrument-of-social-control view, says Fuller, is sometimes

...coupled with the notion that the necessity for law arises entirely from man’s defective moral nature; if men be counted on to act morally, law would be unnecessary. As for the way law is conceived to come into existence, it is by an exercise of authority and not from anything like an interplay of reciprocal

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<sup>509</sup> *Id.*

<sup>510</sup> *Ibid.*, 3.

<sup>511</sup> *Ibid.*, 5.

<sup>512</sup> *Ibid.*, 9.

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

expectancies. The law does not invite the citizen to interact with it; it acts upon him.<sup>515</sup>

At first blush, such a conception may seem well-suited to explaining criminal law. To do this, however, would be to forget, says Fuller, that ‘interactional issues that were once central have...been pushed to the periphery’ (thus, for example, the law against murder is said to have emerged out of the regulation of blood feuds).<sup>516</sup> It is not the exclusive or even essential characteristic of law that ‘it is an exercise of authority’,<sup>517</sup> as those who conceive of law-as-an-instrument-of-social-order tend to take for granted. In later work, Fuller made more of this bias towards a centralised authority as the exclusive source of law. Indeed, he attributes to that the bias the difficulty legal theorists have in dealing with customary law.<sup>518</sup> Seeing law as ‘a species of control imposed from above’, as ‘if it derives from, and is dependent upon, some established centre of authority’<sup>519</sup> is to miss the existence of and significance of ‘social processes from which rules can emerge and become effective as law without receiving the imprimatur of any explicitly legislative organ of government.’<sup>520</sup>

A major part of the message here for Fuller is that enacted law or statute law itself depends on those stabilised interactional capacities. Thus, he says, ‘the existence of enacted law as an effectively functioning system depends upon the establishment of stable interactional expectancies between lawgiver and subject.’<sup>521</sup> The following passage is exemplary:

On the one hand, the lawgiver must be able to anticipate that the citizenry as a whole will accept as law and generally observe the body of rules he has promulgated. On the other hand, the legal subject must be able to anticipate that government will itself abide by its own declared rules when it comes to

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<sup>515</sup> *Ibid.*, 20.

<sup>516</sup> *Ibid.*, 21.

<sup>517</sup> *Ibid.*, 23.

<sup>518</sup> See, Fuller 1975, 93.

<sup>519</sup> *Ibid.*, 94.

<sup>520</sup> *Ibid.*, 95.

<sup>521</sup> Fuller 1969a, 24.

judge his action, as in deciding, for example, whether he has committed a crime or claims property under a valid deed. A gross failure in the realisation of either of these anticipations – of government towards citizen and of citizen toward government – can have the result that the most carefully drafted code will fail to become a functioning system of law.<sup>522</sup>

As is well-known, Fuller's vision of what criteria lawmakers, i.e., those central governmental authorities, had to fulfil for law to become efficacious received its full treatment in *The Morality of Law*,<sup>523</sup> where Fuller articulated the conditions of the internal morality of law, which included prohibitions against unclear, retrospective, impossible-to-comply-with, and other such undesirable features of laws. What is instructive for present purposes is that although one may, at a stretch, characterise Fuller's conditions of the internal morality of law as criteria for the validity of laws (without them, Fuller says, laws do not deserve the name of law, for they cannot command the respect of the citizenry), they are better understood, and indeed explained by him as facilitating, the efficacy of law. It is not that validity does not matter – it can still be used as a conceptual placeholder for certain criteria that determine the existence of abstract phenomena as laws – but it is just that efficacy matters more.

A closer examination of this aspect, and other aspects, of Fuller's work lie outside the scope of this thesis. Some of his writings use concepts that may resemble ideas falling under the law-as-discourse conception. Thus, he is happy to explain 'systems of stabilised interactional capacities' as shaped by 'standards', or even more clearly, by reference to an 'unwritten "code of conduct."'”<sup>524</sup> A closer reading of his work, then, may very well reveal that he is more profitably read as a theorist

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<sup>522</sup> *Id.*

<sup>523</sup> Fuller 1969b.

<sup>524</sup> Fuller 1969a, 2. But even here, one must be careful, for Fuller explains (at 2-3) that he finds 'the word 'code'...appropriate here because what is involved is not simply a negation, a prohibition of certain disapproved actions, but also the observe side of this negation, the meaning it confers on foreseeable and approved actions, which then furnish a point of orientation for ongoing interactive responses.'

struggling with the tension between the two explanatory paradigms – as with the other five theorists looked at in sections IC1 – IC5 below. Fuller has been referred to here, however, for a purpose. What is of significance in the context of the present discussion from Fuller’s work are the following features: 1) Fuller’s insistence on the explanatory power of, and importance of explaining, the emergence of law from stable interactional expectancies; 2) his recognition that those interactional expectancies need not, indeed often the most powerful do not, play any role in our conscious deliberations; and 3) his location of the dependence of the efficacy of enacted law on those interactional expectancies (and thus generally, as above, his prioritising of the problem of efficacy). All three are features that are common to most conceptions of law-as-tradition.

### **IB1c. *Projections of Experiences***

Like Ehrlich and Fuller, Leon Petrazycki is an important figure for law-as-tradition conceptions. His theory is rich and wide-ranging.<sup>525</sup> He certainly deserves more attention than he received in Anglo-American legal theory. For present purposes, his significance lies not only in his understanding of language as ‘an essentially practical tool of interpersonal communication moulded by practical non-scientific considerations, full of metaphors and hypostates’,<sup>526</sup> but more so in his criticism of those theories that locate law ‘in the misty realm of abstract norms and rules in the field of mental, ideal entities’, and in his insistence that legal (and moral) norms ‘can be found and observed much nearer in our consciousness.’<sup>527</sup> According to Rudzinski, for Petrazycki, ‘law and morality consist...of...psychological human experiences

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<sup>525</sup> For a representative text available in English, see Petrazycki 1955. For discussions and further references see Motyka 2007; Podgorecki 1980-1; and Rudzinski 1976.

<sup>526</sup> Rudzinski 1976, 110-1.

<sup>527</sup> *Ibid.*, 111.

containing negative or positive valuation and a dynamic consciousness of duty.’<sup>528</sup> The ‘moral or legal norm is a projection of our moral or legal “emotional” experience, its reflection, its mirror image partly intellectual in content projected outwards and viewed as objective reality.’<sup>529</sup> Put another way, in the paraphrase of Krzysztof Motyka, for Petrazycki, ‘law, and likewise morality, has its real existence only in the human psyche, where it takes the form of legal experiences, while norms, rights and duties, are nothing more or less than an “emotional phantasmata” or a “projection,” which results from the inclination of man, including the legal scholar, to objectify the content of his or her psychical experiences.’<sup>530</sup>

Petrazycki’s theory is important for law-as-tradition concepts because it not only resists, but also positively and explicitly distances itself, from those tendencies for projection mentioned above, i.e., from those tendencies to reify and give explanatory priority to abstractions (e.g., norms, rules, laws, etc.). By seeing those abstractions as products of experience – we shall see later, how this fits in well to contemporary theories of cognition that argue that language is made up of metaphors built up from experience (see section IB2d) – Petrazycki liberates himself from remaining dependent upon them as basic or constitutive elements of law. He also saw other tendencies – such as ‘the tendency to develop a single pattern of norms...the tendency toward precision and definiteness of content and compass of legal concepts,’ and others<sup>531</sup> – as psychological tendencies, whereas, as we saw above, these tend to be seen by those working under the conception of law-as-discourse as features (even if ideal) of law itself.

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<sup>528</sup> *Id.*

<sup>529</sup> *Id.*

<sup>530</sup> Motyka 2007, 30.

<sup>531</sup> *Ibid.*, 33.

Petrażycki's theory is astoundingly rich and complex, and a proper study of his work would need to take into account the often idiosyncratic meaning he gave to terms that were important to him, e.g., a typical example offered of an emotion in Petrażycki's sense is that of 'hunger-appetite',<sup>532</sup> which is quite different to the contemporary understanding (which would presumably refer to fear, anger, joy, shame, etc.). Like Ehrlich and Fuller, Petrażycki wanted to bring law 'directly into the sphere of every face-to-face interaction.'<sup>533</sup> Perhaps unlike Ehrlich and Fuller, he focused more on the psychological, as opposed to socio-historical, context in which that interaction functions. What he helps to bring out is the possibility of resisting the reification and explanatory reliance on abstractions, themselves conceptualised as nothing but projections of experiences.

Further, it is important to remember that Petrażycki influenced an impressive generation of Russian scholars, including Nicholas Timascheff, Pitirim Sorokin, Georges Gurvitch, and Bronislaw Malinowski. Malinowski is particularly important to mention because he extended Petrażycki's own pluralistic and anti-statist perspective on law, but did so in the context of impressive empirical studies that made their way into Anglo-American legal theoretical literature. In his famous *Crime and Custom in Savage Society*,<sup>534</sup> Malinowski argued that 'legal rules consist of a class of binding rules which control most aspects of tribal life, which regulate personal relations between kinsmen, clansmen, and tribesmen, settle economic relations, the exercise of power and of magic, the status of husband and wife and of their respective families.'<sup>535</sup> As an aspect of tribal life, the law, for Malinowski, was to 'be found in

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<sup>532</sup> *Ibid.*, 27.

<sup>533</sup> *Ibid.*, 53.

<sup>534</sup> Malinowski 1926.

<sup>535</sup> Malinowski quoted in Tamanaha 1995, 504.



the customary practices that people actually follow in their social behaviour.<sup>536</sup> For Ehrlich, as we saw above, the enforcement mechanism at play here was to be found in social relations, while for Malinowski, it was to be found in ‘concatenation of the obligations, in the fact that they are arranged into chains of mutual services, a give and take extending over long periods of time and covering wide aspects of interest and activity.’<sup>537</sup> In either case, what we can see in Malinowski, as in Ehrlich, Fuller, Petrazycki and others, is a deep interest in the location of law in actual and effective interaction amongst human beings.

Perhaps unsurprisingly, these theorists have been criticised for producing a concept of law ‘of unrestricted scope, which tends towards absurdity by including all rules of conduct as law.’<sup>538</sup> In answering this attack, some theorists, such as Alex Ziegert, have suggested that the conception is deliberately provocative in seeking to ‘run counter to any experience of a lawyer.’<sup>539</sup> In the context of the present discussion, however, what we may be entitled to say is that the very anxiety over the scope of a conception is an anxiety likely to afflict those working under the conception of law-as-discourse, in neat contradistinction to those attracted to law-as-tradition.

### **IB1d. *Concepts of Legal Culture***

Caution is required when approaching the idea of legal culture. There are several possible ways of developing this concept. Indeed, there are also several ways of suggesting the different uses of the concept. One broad distinction sometimes made is between law-in-culture and law-as-culture – a distinction that mirrors the law-in-

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<sup>536</sup> Tamanaha 2001, 176.

<sup>537</sup> Malinowski quoted in *Ibid.*, 176.

<sup>538</sup> Banakar 2002, 44.

<sup>539</sup> Ziegert said this with respect to Ehrlich’s work in particular: Ziegert 2002, 45.

literature and law-as-literature division. Another set of distinctions would find the following uses of the concept: 1) one that focuses on the dependence of law on culture; 2) one that treats law as an expression of the culture at the relevant time; 3) one that argues that law emerges from a culture – that culture is in some sense the source of law; 4) one that observes and analyzes the attitudes to and beliefs about law amongst the citizenry; 5) one that considers the professional legal culture – of attitudes and beliefs about law amongst legal officials; and 6) a way of understanding legal work, namely as not a knowledge of the rules, but as a stock of embodied skills and abilities that emerge over long periods of time in certain communities or institutions of legal professionals (including academics).

The purpose of the discussion below, however, is not to provide an overview of the concept of legal culture. Such overviews have been provided before.<sup>540</sup> Rather, it is to consider, in the writings of those who have used the concept, ideas and approaches that may bring to light some features of the law-as-tradition conception. As we shall see, some of the above aspects are at play in the various treatments of the idea of legal culture and by no means are all of them of relevance here.

One source in which the opaqueness of the idea of legal culture is visible is that of the work of Friedrich Carl von Savigny, and the historical school of jurisprudence. Savigny argued that ‘Law grows with the growth, and strengthens with the strength, of the people.’<sup>541</sup> On the other hand, he also, very famously, argued that law (together with language) was an expression of the *volksgeist*, the spirit of the people. As Cotterrell explains it, ‘the spirit of a nation or people is the encapsulation of its whole history, the collective experience of the social group extending back

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<sup>540</sup> See, for example, Cotterrell 2004; Nelken 2004; and (a source not discussed here) Hoecke and Warrington 1998.

<sup>541</sup> Savigny quoted in Tamanaha 2001, 29.

through the ages of its existence.’<sup>542</sup> Cotterrell suggests that the concept of culture used by Savigny was to be understood ‘in its widest anthropological sense’, i.e., as ‘that complex whole which includes knowledge, belief, art, morals, law, customs, and any other capabilities and habits acquired by man as a member of society.’<sup>543</sup> Savigny also famously used his theory to fight against the attempts at codification in Germany in the early nineteenth century. The proposed codification was, for him, ‘disastrous because it sought to fix in immutable principle legal ideas which, as an expression of culture, should be allowed to develop spontaneously.’<sup>544</sup> At the same time, Savigny had a historical argument to the effect that where ‘customs’ were written down as ‘rules’, it lost its character as custom.<sup>545</sup> It also went arm-in-arm with ‘the rise of political authorities’ and with the increasing division of a society into class and functional subgroups, with the double effect that the ‘common consciousness of the people’ does not provide the same ‘impetus for the spontaneous creation of new law’ and the law that is enacted by authorities becomes so complex that it leaves that ‘common consciousness’ far behind ‘the details and technicalities of the rules concerned.’<sup>546</sup> Savigny’s conception is useful to take note of, not least because of its political uses, placing emphasis on the need for law to be adaptive, responsive and spontaneous. This is a theme that shall be returned to below (see section IB1i).

Before turning to treatments of the legal culture that will be more useful for present purposes, it will be instructive to consider some examples where the use of the concept of legal culture resembles more closely ideas belonging to law-as-discourse conceptions. Doing so will also allow us to realise that conceptions of law-as-discourse and law-as-tradition do not fit neatly into an analytical philosophy –

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<sup>542</sup> Cotterrell 1992, 21.

<sup>543</sup> Walter Tylor quoted in *Id.*

<sup>544</sup> *Id.*

<sup>545</sup> *Ibid.*, 22.

<sup>546</sup> *Id.*

sociology divide. Many sociologists of law who speak of legal cultures work with a conception of law much closer to the conception of law-as-discourse. Consider, for example, Volkmar Gessner's conception of legal culture.<sup>547</sup> Although Gessner begins with a promising (for law-as-tradition pictures) concept of culture as consisting of both 'learned behaviour, attitudes and values,' as well as 'institutionalised forms of individual responses' (e.g., in families, enterprises, etc.), which, when repeated, lead to cultural stabilisation,<sup>548</sup> his application of this legal culture does not move any further away from the law-as-discourse tradition as it might have. Thus, whereas Gessner's general examples of the learned behaviour, attitudes and values includes learning 'how to build houses, how to flirt with the other sex, how to treat foreigners, how to distinguish work and leisure', etc.,<sup>549</sup> his description of European legal culture is a description of the regulatory scope of European Community (as it then was) rules, and observations of such activities as the 'systemisation of the new European normative order' by legal science.<sup>550</sup>

Another example is the well-known work of Lawrence Friedman – sometimes called 'the acknowledged father of the term' legal culture.<sup>551</sup> Legal culture, for Friedman, are 'the ideas, values, attitudes and opinions, people in some society hold, with regard to law, and the legal system.'<sup>552</sup> However, Friedman goes further; he goes on to say that 'legal culture is the source of law – its norms create the legal norms; and it is what determines the impact of legal norms on society.'<sup>553</sup> This thesis flows for Friedman from the observation that the subjects of law, persons, 'are not robots or inert lumps of clay; they are living human beings, with thoughts, ideas, minds, habits,

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<sup>547</sup> Gessner 1994.

<sup>548</sup> *Ibid.*, 132.

<sup>549</sup> *Id.*

<sup>550</sup> *Ibid.*, 134.

<sup>551</sup> Nelken 2004, 8.

<sup>552</sup> Friedman 1994, 118.

<sup>553</sup> Friedman 1994, 118.

behaviours; they react to orders and institutions of law, and their reactions determine the effect of these orders and institutions.’<sup>554</sup> Friedman’s conclusion, and the clearest statement of his conception of legal culture, is as follows:

In short, legal culture is a kind of intervening variable. Social forces make law, but they do not make it directly. A war or a depression, a technological change (the computer, the telephone) – these do not automatically result in shifts in the legal order. What they do, rather, is to change the social configuration, the way things are in the world, or in some society; this in turn changes the way people see their society, the things they expect from it. And this then changes their orientation toward law as well.<sup>555</sup>

As may have become obvious, despite the usage of some ideas belonging to law-as-tradition conceptions, Friedman is working not only with a conception of law as a realm of articulated norms, but has also inherited a problem typical of law-as-discourse conceptions, namely, the problem of the source of law. It would not be productive to list other examples, although there are many, not only of those discourse-oriented conceptions of legal culture, but also of legal tradition.<sup>556</sup>

The views of Gessner and Friedman – at least in the no doubt unfair caricatures offered here – are not representative views of law-as-tradition, despite their uses of the term itself or its obvious analogues (i.e., culture). To say this, of course, is not to criticise their views – on the contrary, it is to express a limitation of the process of coming to understand the history of jurisprudential inquiries, i.e., of establishing distinctions and oppositions (such as that between law-as-discourse and law-as-tradition) that makes one see certain features of certain contributions as more salient than others. For present purposes, then, more luck is to be found in the writings of Jeremy Webber, David Nelken and Roger Cotterrell.

In his reply to Nelken’s overview and use of the concept of legal culture, Jeremy Webber offers a summary of his own view, expressed in greater length in

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<sup>554</sup> *Id.*

<sup>555</sup> *Ibid.*, 118-9.

<sup>556</sup> See, for example, Merryman 1985; see also, Ehrmann 1976, 2-19.

other writings.<sup>557</sup> Webber is responding to Nelken's broad definition of legal culture. Legal culture, Nelken had suggested, 'is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes.'<sup>558</sup> The elements of legal culture so conceived may include 'the number and role of lawyers or the way judges are appointed and controlled' as well as 'various forms of behaviour such as litigation or prison rates', and 'ideas, values, aspirations and mentalities.'<sup>559</sup> Webber argues that there are two aspects of the concept that are at play here – once again, an illustration of the conceptual difficulties at play in the concept of legal culture.

The first, says Webber, treats culture as an 'explanatory concept'; the second as an 'interpretive one.'<sup>560</sup> The explanatory aspect 'treats culture as a discrete explanatory variable alongside such other causal factors as institutional structure or the funding of the courts', and here the central question is 'what contribution does culture make to a particular outcome?'<sup>561</sup> The interpretive aspect, on other hand, 'treats culture as an aggregating concept, capturing everything relevant to the operation of law in a specific social field' – it becomes, in other words, 'a vision of the whole', so that factors treated as separate in the explanatory aspect, such as levels of funding, institutional structure or number of judges, are 'under the second treated as components of culture.'<sup>562</sup> In his paper, Webber attempts to reconcile the interpretive and explanatory aspects into a version he thinks both implicitly underlines Nelken's use of the concept of legal culture and also better captures his own.

What is of note for present purposes is the way Webber uses the interpretive dimension of the concept of culture to bring out the dynamics of social life. The

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<sup>557</sup> Webber 2004. For more of Webber's view, see Webber 1995.

<sup>558</sup> Nelken 2004, 1.

<sup>559</sup> *Id.*

<sup>560</sup> Webber 2004, 27.

<sup>561</sup> *Id.*

<sup>562</sup> *Ibid.*, 27-8.

interpretative aspect, for Webber, focuses on the ‘way in which participants draw lessons from the contexts in which they act and shape their conduct accordingly.’<sup>563</sup> He calls it the ‘process of institutional feedback – of normative reflection and re-incorporation – in which all social actors engage.’<sup>564</sup> The distinctiveness of the concept of culture, at least in this interpretive dimension, consists in the ‘intersubjective dimension of human understanding’ – a process of making sense of social interaction, of constructing meaning and the influence of those constructions (or interpretations) on action<sup>565</sup> – which, importantly, ‘derives not just from the body of articulated concepts and beliefs one inherits, but also from the patterns of interaction existing in any society, even when these have not been articulated in conceptual terms or when they remain the subject of only partial and pragmatic articulation.’<sup>566</sup>

The interpretive concept of legal culture is not designed, Webber argues, to capture ‘a single, constant and bounded content – for example, a specific set of beliefs that all members of that culture hold in common.’<sup>567</sup> On the contrary, ‘the concept focuses...on the processes by which individuals draw on what has gone before, confront new experience, revise their preconceptions, and fashion through (often through collective discussion and debate) how to proceed.’<sup>568</sup> We may recognise this sense of dynamism in other terms used by those working under the conception of law-as-tradition, e.g., efficacy. Indeed, Nelken himself, writing soon after Webber’s reply,

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<sup>563</sup> *Ibid.*, 29.

<sup>564</sup> *Id.*

<sup>565</sup> *Ibid.*, 30.

<sup>566</sup> *Id.*

<sup>567</sup> *Ibid.*, 31.

<sup>568</sup> *Id.*

says that at work in the concept of legal culture may be ‘the very idea that law is something which does or should work.’<sup>569</sup>

It is also important to see that this dynamism is only visible over long periods of time: it is not, in other words, a matter of compliance, as the very idea of efficacy might be interpreted by law-as-discourse conceptions – thereby, once again, revealing the tendency to reify norms, to use norms as if they unproblematically picked out features of human behaviour (i.e., that it is straightforward whether some behaviour complies or not, rather than always a judgement made in certain circumstances), and to focus on short-term action (rather than long-term activities). Thus, Webber argues, ‘the degree of commonality – the depth and richness of the particular culture – will be shaped by the intensity of interaction over time’, with the proviso that we can recognise that ‘any pattern of sustained interaction will produce its own distinctive vernaculars.’<sup>570</sup>

In a way that resembles, as we shall soon see, Cotterrell’s notion of law-and-community, Webber’s understanding of contexts of interaction is broad. It includes any ‘context that involves repeated social interaction over time’, including workplaces, neighbourhoods, cities, families, religions, states, and so on.<sup>571</sup> And because we all participate in many of these, often times simultaneously, the boundaries of such ‘cultures’ are ‘going to be indistinct and porous.’<sup>572</sup> However, as is typical of law-as-tradition conceptions, Webber does not display any anxiety over the difficulty or impossibility of clear and distinct demarcation. Instead, he says:

The concept of culture is not so much a way of identifying highly specified and tightly bounded units of analysis...as a heuristic device for suggesting how individual decision-making is conditioned by the language of normative discussion, the set of historical reference points, the range of solutions

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<sup>569</sup> Nelken 2006, 27.

<sup>570</sup> Webber 2004, 31-2.

<sup>571</sup> *Ibid.*, 32.

<sup>572</sup> *Id.*



proposed in the past, the institutional norms taken for granted, given a particular context of repeated social interaction.<sup>573</sup>

What we can see, then, in Webber, as in other law-as-tradition conceptions, is the disappearance, or at least much stifled voice, of the ontological ambition, replaced by the interest in the epistemological dimension (indeed, it is no coincidence that following the above general summary of culture Webber applies it to theories of legal reasoning), though understood dynamically as a matter of transmission of embodied skills, habits and dispositions emerging over long periods of time in patterns of interaction (hence the need, also, for a broader term than ‘legal reasoning’, i.e., legal work). As we shall see later, these ideas are at the heart of the conception of legal-work-as-tradition, but are also indicative of the artificiality of the ontological-epistemological distinction in jurisprudential inquiries, where, depending on the explanatory orientation, either one or the other disappears.

Cotterrell’s instructive paper, ‘Law in Culture’, begins by noting the opacity of the concept of legal culture, locating at least six different uses, including: 1) law’s dependence on culture; 2) law’s recognition of culture; 3) law’s domination of culture; 4) law as an object of cultural competition or struggle; 5) law as a cultural projection; and 6) and law’s stewardship of culture.<sup>574</sup> Cotterrell’s task in the paper is to take what he finds as most persuasive in certain of the above treatments of the concept to explain his own notion of law-and-community. Some of these features include ‘a sense of shared cultural inheritance of some kind’, ‘a sense of convergence or commonality in ways of thinking, commitments, outlooks or attitudes’, all of which may also be infused with ‘an effective (emotional)’ element.<sup>575</sup> Echoing Fuller, Cotterrell says that this vision of culture helps to avoid seeing law as ‘a technical

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<sup>573</sup> *Ibid.*, 32.

<sup>574</sup> Cotterrell 2004, 1-6.

<sup>575</sup> *Ibid.*, 6.

instrument of control.<sup>576</sup> It helps us, instead, Cotterrell says, to see it as ‘part of a way of life, a means of interpreting social relationships, a component of an entire outlook, deeply rooted in all kinds of experience (not just juristic).’<sup>577</sup> Further, it helps us to avoid wanting to see it as a unity, and accepting instead ‘a fragmented diversity of influences, experiences, understandings, environments, expectations, and constraints.’<sup>578</sup>

As mentioned above, Cotterrell prefers to use the term community rather than culture. His views in this respect are complex and span a sizeable literature in its own right.<sup>579</sup> He speaks, for example, of various ideal types of community, such as communities of belief or value, traditional communities, affective communities, and instrumental communities. The concept of community, then, allows him to distinguish between kinds of interaction that he believes the “blanket” category of culture’ cannot.<sup>580</sup> At bottom, however, his definition of his law-and-community approach uses many of the ideas he takes, as above, to be most persuasive in uses of the concept of culture. Thus, he says, that the ‘law-and-community approach sees law as rooted in community life; as an ever-changing web of norms expressing and influencing the interactions of many different networks of community.’<sup>581</sup> It is important to acknowledge, as well, that Cotterrell’s work contains elements that fall under both law-as-tradition and law-as-discourse conceptions. In the context of his work on law-and-community, for example, he often uses the concept of law as if it had its own autonomous life, not only constituted by, but also constitutive of social reality. Thus, he says, ‘Law is not neutral about’ the above-mentioned networks of community; ‘it

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<sup>576</sup> *Ibid.*, 7.

<sup>577</sup> *Id.*

<sup>578</sup> *Ibid.*, 8.

<sup>579</sup> See, Cotterrell 2006. Some aspects of Cotterrell’s view are discussed in section IC3.

<sup>580</sup> Cotterrell 2004, 11-12.

<sup>581</sup> *Ibid.*, 11.

judges the particular norms arising in them, in terms of its existing doctrine, and it represses, adopts, integrates, modifies, or comprises these norms.’<sup>582</sup> Section IC3 will return to reading a certain aspect of Cotterrell’s work by reference to ideas falling under both conceptions.

### **IB1e. *The Turn to Activities***

Although one must be careful – as we saw above with respect to uses of the concept of legal culture – it would certainly be amiss for a discussion of the conception of law-as-discourse to neglect to discuss legal theorists who themselves had had recourse to the term ‘tradition.’ There are two contemporary legal theorists who have had recourse to term, and who, more significantly, have used it in a way that will help us bring out some features of the law-as-tradition conception. The first, discussed in this section, is that of John Bell and the second, considered in the next, is Martin Krygier.

John Bell has also made extensive use of the concept of legal culture. Indeed, recourse shall be had in section IB2c below (‘Institutional Contexts’) to his important recent book, *Judiciaries Within Europe*,<sup>583</sup> which itself leans on the conceptual apparatus first articulated at length in his *French Legal Cultures*.<sup>584</sup> In the paper that will form the present focus of the discussion, Bell prefers the concept of ‘law as tradition.’<sup>585</sup> The paper sets out to ‘draw from the methodology of comparative law some lessons for a general theory law’ – lessons which lead Bell, ultimately, to the suggestion that ‘law is best viewed as a tradition within a legal community, rather than essentially as rules or norms of conduct.’<sup>586</sup> Drawing partly on Patrick Atiyah’s

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<sup>582</sup> *Id.*

<sup>583</sup> Bell 2006.

<sup>584</sup> Bell 2001.

<sup>585</sup> Bell 1994.

<sup>586</sup> *Ibid.*, 20.

and Robert Summers' *Form and Substance in Anglo-American Law*,<sup>587</sup> Bell asserts that 'rules function and operate as part of a tradition of legal ways of doing things which has various complex relations to the kind of society in which it operates and the functions it accords to law.'<sup>588</sup> In making this remark, Bell articulates a central plank of the law-as-tradition conception, namely, the characterisation of rules and other abstract phenomena as subsumed not only under ways of doing, abilities and skills, but also within the context of particular institutions or communities, and visible as such only over relatively long periods of time.

Bell's notion of tradition is, however, yet richer. He argues that it has three features: 'it is a process in which actors are engaged, it sets the context for decision-making, and it is a group of people engaged in the activity of the tradition and shaping it.'<sup>589</sup> Further, tradition does not signify the 'inertia of routine', and it is not inherently conservative. On the contrary, at least according to Bell, tradition 'has a dynamic and life-giving possibility.'<sup>590</sup> Bell's clearest statement of the definition of tradition is 'as a complex of rules, concepts, institutions, and practices which characterise the way law works in a particular area',<sup>591</sup> but one ought not take the reference to rules, for example, as in any way part of an ambition to focus on the articulated norms valid at any one time in a legal system. Rather, as Bell is at pains to point out, all these features (rules, concepts, etc.) 'build together into a process'; as above, they are 'ways of doing things, which is handed down and shapes the way in which the law operates.'<sup>592</sup>

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<sup>587</sup> Atiyah and Summers 1988.

<sup>588</sup> Bell 1994, 24.

<sup>589</sup> *Id.*

<sup>590</sup> *Ibid.*, 25.

<sup>591</sup> *Id.*

<sup>592</sup> *Id.*

Importantly, then, Bell does not neglect the importance of legal textual materials. Instead, he incorporates them into a broader vision. In this respect, he reminds us that just as law-as-discourse is not to be confused with the identification of law with articulated norms alone, so law-as-tradition conceptions are not ones that apply or seek to explain law in the absence of authoritative texts. Bell's discussion here takes us somewhat further into legal-work-as-tradition conceptions, but as noted above, this is inevitable – it is inevitable in the same way that law-as-discourse conceptions exhausted a good deal of the legal-work-as-discourse picture.

Bell acknowledges that 'the central feature of most modern legal systems is the text – of statute, case-law or legal doctrine', and he acknowledges that the 'activity of reading and interpreting these texts is central to the activity of law.'<sup>593</sup> Importantly, however, he places more explanatory priority on the activity of reading and writing rather than on the alleged inherent properties or characteristics of the texts. Furthermore, he places these activities in long-term temporal contexts, as well as social and institutional spaces, or, in other words, forums for the interaction of the present between past and future.

Bell also acknowledges that 'different geography' (echoing Montesquieu, who is, however, not referred to in Bell's paper), 'historical accident', as well as differences in 'ideas of justice' can lead to very different solutions, in different legal traditions, to similar problems.<sup>594</sup> In essence, for Bell, the tradition is 'the practice of people who operate and perpetuate the tradition.'<sup>595</sup> 'Law', he says, 'is what specific institutions and professions do, and how they operate'<sup>596</sup> and again 'law is what

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<sup>593</sup> *Ibid.*, 26.

<sup>594</sup> The idea that legal problem in different legal traditions may be similar is controversial, and has been discussed by proponents and critiques of functionalism in comparative law. This is a topic that falls outside the scope of this thesis.

<sup>595</sup> *Ibid.*, 29.

<sup>596</sup> *Id.*

lawyers do.<sup>597</sup> There could be no clearer illustration of the disappearance of the ontological ambition and the prioritisation of the epistemological level of explanation. Helpfully for present purposes, Bell distinguishes, though in a characteristically modest fashion, his approach from numerous ideas revealed above to fall under the law-as-discourse paradigm:

It is, of course, possible and valuable to analyse law in terms of the reasons for action it provides, or in terms of its paradigm role within society: providing stability and state coercion, or guiding individual conduct in situations of problems of coordination. Various legal theorists have done so. This paper has been suggesting that, if we want to look at the phenomenon of law in its own right, then we are best focusing on it as a tradition situated among a legal community which both mediates its pastness to the present, and offers an authoritative standard for its interpretation and development.<sup>598</sup>

In more recent work, Bell has continued to focus on the activities of legal officials in institutional contexts, and it would be a worthwhile project, though it falls outside the scope of this thesis, to examine the links between the concept of law-as-tradition in the paper discussed here, and his subsequent work on the judiciary.<sup>599</sup>

#### **IB1f. *The Authoritative Presence of the Past***

Apart from Bell, the other prominent legal theorist who uses the term ‘tradition’ – and is perhaps better known for it than Bell (who also acknowledges him) – is Martin Krygier. The papers focussed on here are ‘Law as Tradition’<sup>600</sup> and ‘the Traditionality of Statutes.’<sup>601</sup>

Krygier begins the former by lamenting the lack of concepts in legal theory ‘which address the traditionality of law and life.’<sup>602</sup> He does not denigrate, but he does distinguish his own position, from those traditions of legal theory that have conceived

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<sup>597</sup> *Ibid.*, 30.

<sup>598</sup> *Ibid.*, 31.

<sup>599</sup> See Bell 2001 and 2006.

<sup>600</sup> Krygier 1986a,

<sup>601</sup> Krygier 1988. See also Krygier 1986b.

<sup>602</sup> Krygier 1986a, 239.

of law ‘as a species of...commands, norms, rules, rules-and-principles, principles and policies, and so on.’<sup>603</sup> In its most general terms, his position, or more accurately, his ‘project’ is as follows:

Law is a profoundly traditional social practice, and it must be. This is not merely to say that particular legal systems embody traditions, which of course no one would deny. To understand much that is most central to and characteristic of the nature and behaviour of law, the ‘time-free’ staples of modern jurisprudence are not enough. One needs to understand the nature and behaviour of traditions in social life.<sup>604</sup>

Krygier acknowledges the project of conveying law’s traditionality is a large one, and he confines himself in the paper to examining three of its elements: the first element refers to the pervasiveness of traditionality in legal systems; the second refers to the presence of change within the very concept of traditionality; and the third refers to the notion that ‘tradition is inescapable in law’ and that although not always, this is ‘frequently...a good thing.’<sup>605</sup> In order to establish the first of these, Krygier posits three characteristics of tradition: 1) its pastness; 2) its authoritative presence; and 3) the fact that it is transmitted. Each will need to be considered very briefly.

‘Every tradition’, says Krygier, ‘is composed of elements drawn from the real or imagined past.’<sup>606</sup> This pastness may be composed of ‘beliefs, opinions, values, decisions, myths, rituals’, all deposited over generations, and all, importantly for present purposes, ‘frequently inconsistent.’<sup>607</sup> The institutionalisation of these deposits – in the form of written recordings of them, some classified as authoritative, others persuasive – is not a necessary, but nevertheless is an important feature of

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<sup>603</sup> *Ibid.*, 237.

<sup>604</sup> *Ibid.*, 239. By “‘time-free” staples of modern jurisprudence’ we should perhaps not understand the absolute absence of temporality in jurisprudential inquiries, for even though there are examples, within the law-as-discourse conception, of ambitions to eradicate time (recall the momentary legal system), temporality does play a role, but it is often a short-term temporality, i.e., in the thought-contexts of the problem of legal normativity where what is privileged is the short-term temporality of deliberation by reference to laws as reasons for action.

<sup>605</sup> *Ibid.*, 239-40.

<sup>606</sup> *Ibid.*, 240.

<sup>607</sup> *Ibid.*, 241.

many legal systems. This pastness also has a power in the present, though this power ‘is not absolute’,<sup>608</sup> if only because ‘the past speaks with many voices.’<sup>609</sup>

Krygier’s identification of the inevitability of inconsistency or incoherence is important – certainly it tends to be a feature not feared by law-as-tradition conceptions, unlike law-as-discourse ones – but it is also significant that Krygier argues that sometimes these inconsistencies ‘amount to a crisis’ and sometimes they do not, and that *when* this occurs is an important question for legal and social theory.<sup>610</sup>

The second feature of tradition is that of its authoritative presence. This notion emerges from contrasts, such as the notion that ‘much of the past enters into no tradition’, and a lot that does is not necessarily authoritative.<sup>611</sup> In law, Krygier continues, ‘the past has profound present significance’, and this present significance or this authoritativeness manifests itself in two ways: it can be ‘known or thought to be the past’, or it can be ‘unnoticed by participants.’<sup>612</sup> The latter is of particular interest to law-as-tradition conceptions. ‘The past’, says Krygier, ‘is often most powerfully and pervasively present when it is not known to be past or present.’<sup>613</sup> In this latter sense, Krygier strays into a discussion that is also relevant for legal-work-as-tradition conceptions, or the epistemological level of tradition-oriented explanatory paradigms. He cites, with approval, Watson’s suggestion that ‘to know a legal system is not just to have learned its rules but to understand how the rules are put together, how the system is structured, how the rules are interpreted.’<sup>614</sup> Krygier calls such knowledge ‘tacit knowledge’, and in elaborating upon this notion, he acknowledges

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<sup>608</sup> *Ibid.*, 242.

<sup>609</sup> *Id.*

<sup>610</sup> *Id.*

<sup>611</sup> *Ibid.*, 245.

<sup>612</sup> *Ibid.*, 246.

<sup>613</sup> *Id.*

<sup>614</sup> *Ibid.*, 246.



the work of Michel Polanyi,<sup>615</sup> as well as the legal scholar and comparativist Bernard Rudden. The latter is approvingly quoted to have observed the following:

Not only is the individual judge conditioned by his background, but...the decades, or even centuries, of a traditional training, of particular methods of recruitment, even of the physical characteristics of the place where the job is done, create a corpus of professional habits and assumptions which affects judicial method and, through it, the legal order, and so all the more stronger for being so rarely made articulate.<sup>616</sup>

Interestingly, Krygier characterises this picture of legal knowledge to be analogous to the knowledge human beings have for ‘knowing and understanding a language.’<sup>617</sup> Knowing language, in this sense, is to have the ability to use it; what explains the process of communication is not some inherent property or properties of language itself, but our abilities, which are both constrained and enabled – indeed, enabled in being constrained – by the authoritative presence of language as a mode of communication. ‘Language’, says Michael Oakeshott as cited by Krygier, ‘is not a fixed stock of possible utterances, but a fund of considerations drawn upon and used in inventing utterances; a fund which may be used only in virtue of having been learned, which is learned only in being used, and which is continuously reconstituted in use.’<sup>618</sup> What is significant here is the explanatory priority given to the concept of learning – a concept that itself necessarily relies on a temporality level of explanation as stretching out over time, and thus not merely the action of a mind (leading, say, to a mental state consisting of a proposition or set of propositions), but rather of an activity, embodied and affective, that infuses and influences future behaviour in ways that the actor may not at all be aware of.

At first blush, one might think that the notion of ‘learning’ links in neatly with the notion of ‘transmission’, the third general feature of tradition according to

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<sup>615</sup> See, Polanyi 1967.

<sup>616</sup> Rudden quoted in Krygier 1986a, 247; see also, Rudden 1974.

<sup>617</sup> Krygier 1986a, 247.

<sup>618</sup> Oakeshott quoted in *Ibid.*, 248.

Krygier. However, transmission, in Krygier's sense, and in the context of the legal systems he is interested in examining, refers to the 'sophisticated and complex means of recording, preserving, editing and transmitting a legally authorized past for present and future use.'<sup>619</sup> Krygier's elaboration here is brief, and it is unclear what is the relationship in his account between the notion of 'learning' – itself a kind of 'passing on', a mode of transmission – and the 'formalisation and institutionalisation,' as he himself puts it,<sup>620</sup> of law. Again, as we have seen throughout, it matters a great deal for legal theories just where they place their explanatory priority: on the 'ability' of the text itself to be transmitted to future generations, or on the practices of persons that are at best nourished by texts, producing, as Krygier himself puts it, and thus in keeping with Bell and Geoffrey Samuel, 'substance, models, exemplars and a language in which to speak within and about law.'<sup>621</sup>

Such are the three elements of tradition that together assist Krygier to illustrate the pervasiveness of traditionality in law. The second and third parts of Krygier's paper, to recall, are the presence of change in the very notion of tradition, and the inescapability of tradition in law. The second is designed to defend the concept of tradition against the charge of conservatism. It is an ironic charge given that, as we shall see (in section IB1i), law-as-tradition conceptions, at least as characterised here, tend to argue for the importance of spontaneity, adaptation and responsiveness. Krygier fights off this 'Enlightenment' misunderstanding of tradition by arguing that 'it is impossible for traditions to survive unchanged',<sup>622</sup> and that 'even in traditions which permit no such change, it occurs, always and inevitably.'<sup>623</sup> Indeed, this observation goes hand-in-hand with the earlier one that most of what is authoritatively

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<sup>619</sup> *Ibid.*, 250-1.

<sup>620</sup> *Ibid.*, 250.

<sup>621</sup> *Ibid.*, 244. See, Samuel 2003. Samuel is further discussed below in section IB2b.

<sup>622</sup> *Ibid.*, 252.

<sup>623</sup> *Id.*

present is not accessed by us self-consciously, with the result that the most important changes may be ones we are, perhaps necessarily, unaware of. Finally, it is also an observation that is supported by an epistemological explanation that points to the active, rather than passive, dimensions of the life of the law, i.e., as Krygier puts it, ‘the interpreter is not a passive recipient of meanings. He is active in seeing to understand them in terms of what he knows, values, understands, and seeks to do with them’,<sup>624</sup> the point also being that he or she may not be aware of that which he or she ‘knows, values, understands and seeks.’

Indeed, the above points are related to the third part of Krygier’s discussion, namely, that of the inescapability of tradition in law. So, Krygier remarks, ‘the major cognitive contribution of transmitted inherited tradition is, at were, to have done our thinking for us and to have done it ahead of time.’<sup>625</sup> It is an illusion – sometimes used for ideological purposes<sup>626</sup> – to think that we start afresh. Traditions provide us, says Krygier, ‘with storehouses of possibly relevant analogies’,<sup>627</sup> i.e., salience, our always and already being oriented in some specific way, is deeply historical, deeply embedded in us, as a result of the ‘when, where and with whom’ we learnt, and although not determinative of future actions, it is, in this sense, simultaneously inescapable.

In his later ‘Traditionality of Statutes’, Krygier continues to press home the point that his thesis is not merely that ‘law includes traditions’, but that ‘legal systems should be understood as traditions.’<sup>628</sup> Further, and as with Sacco, Krygier is at pains to point out that his thesis is not to be geographically and historically delimited, i.e., that it applies equally to all legal systems, and that it ought not to be thought that it is

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<sup>624</sup> *Ibid.*, 254.

<sup>625</sup> *Ibid.*, 257.

<sup>626</sup> See, on this difference between the uses of the concept of origin and beginning see Said 1975.

<sup>627</sup> Krygier 1986a, 257.

<sup>628</sup> Krygier 1988, 19.

only capable of explaining the phenomena of custom, case law and precedents, but, just as well, contemporary statutes. Krygier presents the ‘submergence’, in contemporary times, of both common and civil law systems in statutory law as a challenge for his concept of traditionality, which, to recall, he defines as ‘the authoritative presence of real and purported past.’<sup>629</sup>

Krygier does not depart from a characterisation of statutes as ‘deliberately made...at a particular time’, possessing a ‘legal authority’ that ‘stems from formal sources not historical origins.’<sup>630</sup> He does not disagree with views that suggest that statutes ‘need not refer to what went before’ or that they ‘can change the legal landscape swiftly, radically and broadly.’<sup>631</sup> The kernel of his argument for the traditionality of statutes lies in the idea that statutes are ‘situated in and deeply affected by contexts which they presuppose, from which they cannot escape, and which make it possible for them to have such effects as they do.’<sup>632</sup> For Krygier, the ‘facts’ that statutes are ‘conceived and born into a world they did not make’ and that ‘they are designed to control the behaviour of large numbers of people, in a variety of circumstances, that they do not know’ have important consequences.<sup>633</sup>

What do statutes presuppose? First of all, and most obviously, they presuppose language – but it is important to see that language, for Krygier as for other tradition-oriented theories, is made up of activities, i.e., ‘ways of speaking and writing, and ways of thinking about, reading, interpreting...etc.’<sup>634</sup> Conceptualising language in this manner also makes it inseparable from the ‘particular community of speakers and

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<sup>629</sup> *Ibid.*, 22-23.

<sup>630</sup> *Ibid.*, 23.

<sup>631</sup> *Ibid.*, 24.

<sup>632</sup> *Ibid.*, 27.

<sup>633</sup> *Id.*

<sup>634</sup> *Id.*

readers' from which the statute emerges.<sup>635</sup> In the case of statutes, which use 'legal language,' their meaning is given life, and dwells in the activities of, the particular community of lawyers who, often and at least sometimes necessarily without any awareness or self-consciousness, use 'conventions' containing 'expectations' (e.g., about how some term or phrase is used).<sup>636</sup> Statutes also presuppose the entire panoply of 'substantive law, procedures, remedies, methods of interpretation', such that even if may be correct to say that the 'Code' itself does not 'depend upon pre-existing law', nevertheless its 'content almost invariably does',<sup>637</sup> meaning that without being able to 'be made to fit the existing canon' the statute will have a difficult time playing the role it is designed by the legislators to play.

Although there are elements here of the tradition-oriented explanation (e.g., the explanation of language via activities and ways of doing, and the acknowledgement of a lack of self-conscious awareness of those conventions), it is important to note that certain other features may more readily strike us as discourse-like, e.g., the idea of a statute fitting in coherently into a whole web of law. The fact that Krygier argues that, following James Boyd White, those rules are 'invisible', is indicative of the grip of the discourse conception. Indeed, Boyd White's term for such rule structures that govern the language that statutes presuppose – a term that Krygier endorses and uses – is 'invisible discourses.'<sup>638</sup>

Krygier's contribution to law-as-tradition conceptions is important. His focus on the presuppositions of statutory law answers a common rebuttal to such conceptions, namely, that they are but of historical interest in applying to, say,

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<sup>635</sup> *Id.*

<sup>636</sup> *Ibid.*, 28-9.

<sup>637</sup> *Ibid.*, 30-1.

<sup>638</sup> See, White, 'The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education' in White 1985. We will see later, in section IC4, how this notion of invisible discourses echoes MacCormick's concept of norm-users.

customary law or so-called judge-made law. The notion of tradition has been echoed by others who have focused on problems of interpretation – Krygier himself reminds us some of these figures when he quotes Hans-Georg Gadamer,<sup>639</sup> and Gerald Burns, the latter of whom echoes the former when he says:

Tradition is the mode of being of the law. The law comes down to us from the past, that is, from a world of situations different from our own, and our hermeneutical task is to determine the applicability of the law to the situation in which we now find ourselves, where we are called upon to address issues and resolve dilemmas that are particular to the moment at hand, or where we are required to provide for what the law, up until now, had never foreseen.<sup>640</sup>

A good many of these contributions have remained within the idea of interpretative communities (Burns, for example, offers a combination of Dworkin and Gadamer, and the other well known example here, as we know from above, is Fish), but though Krygier does place some emphasis on interpretative communities, he does not rely on them exclusively. What is more significant for present purposes is the more general strategy Krygier utilises, i.e., explaining statutory law by giving priority to activities and ways of doing. Language here is not conceived of as independently existing structure, but rather as something deeply embedded, and deeply reliant, on the dynamism of activities and ways of doing that are themselves only visible in the context of generous time-frames, transmissions, i.e., of the authoritative presence of the past.

### **IB1g. Customary Law and the Common Law**

At first blush, a promising resource for law-as-tradition conceptions might seem to be the philosophy of customary law and the philosophy of the common law. The two are discussed together, for, at least in a good deal of Anglo-American legal theory, the

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<sup>639</sup> See, Gadamer 1982.

<sup>640</sup> Burns quoted in Krygier 1988, 37; see also, Burns 1983.

first has been seen to be a subset of the latter. William Blackstone, for example, insisted that we see the common law as an ‘ancient collection of unwritten maxims and customs.’<sup>641</sup> The source focused on here, Brian Simpson’s ‘Common Law and Legal Theory’,<sup>642</sup> follows on in Blackstone’s footsteps. Of course, as usual, the aim is not to be comprehensive. The aim is merely to consider Simpson’s paper, as at least partly representative of the wider literature, looking out for features of the law-as-tradition conception. In focusing exclusively on Simpson, other important works will not be able to be considered, e.g., including such important individual contributions as Gerald Postema’s *Bentham and the Common Law Tradition*,<sup>643</sup> Harold Berman’s *Law and Revolution: the Formation of the Western Legal Tradition*,<sup>644</sup> and J.H. Baker’s *The Law’s Two Bodies*,<sup>645</sup> and collections as *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*<sup>646</sup> and more recently, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*.<sup>647</sup>

Simpson begins his paper with a complaint that there has been ‘to date no very satisfactory analysis of the nature of the common law...provided by legal theory; indeed’, he suggests, ‘the matter [has] received remarkably little sustained attention by theoretical writers.’<sup>648</sup> Where it has, at least been commented on, as in the work of Kelsen, common law is conceived of, according to Simpson, under two assumptions: first, it is said that the norms of the common law are, like statutory law, posited. In the words of Kelsen himself, ‘since custom is constituted by human acts, even norms created by custom are created by acts of human behaviour, and are therefore like the

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<sup>641</sup> Tamanaha 2001, 7.

<sup>642</sup> Simpson 1994.

<sup>643</sup> Postema 1986.

<sup>644</sup> Berman 1983.

<sup>645</sup> Baker 2001.

<sup>646</sup> Dundes Renteln and Dundes 1994.

<sup>647</sup> Perreau-Saussine and Murphy 2007.

<sup>648</sup> Simpson 1994, 120.

norms which are the subjective meaning of legislative acts – “posited” or “positive” norms.’<sup>649</sup> Second, it is thought that all law, including common law, is to be ‘identified with a notional set of propositions which embody the corpus of rules, principles, commands, norms, maxims, or whatever, which have, at any given time, been laid down’ – law, it seems, however we look it, is a ‘sort of code.’<sup>650</sup> As Simpson notes, ‘combining these two assumptions...the common law must be conceived of as existing as a set or code of rules which have been laid down by somebody or other, and which owe their status as law to the fact that they have been so laid down.’<sup>651</sup> We are thereby led, says Simpson, ‘to conceive of the common law, somewhat perversely, as if it had already been codified, when we know it has not.’<sup>652</sup>

It would certainly make life simpler – says Simpson, not without a sense of mischief, for he is clearly addressing what he sees as the legal positivistic inability to capture the nature of the common law – ‘if the common law consisted of a code of rules, identifiable by reference to source rules, but’, he says, ‘the reality of the matter is that it is all much more chaotic than that, and the only way to make the common law conform the [positivistic] ideal would be to codify the system, which would then cease to be common law at all.’<sup>653</sup> Bentham was perhaps, and characteristically, the most vehement critic of this ‘chaos’ of the common law, calling it ‘a fiction from beginning to end’; ‘mock-law’, ‘sham-law’, ‘quasi-law’; no more than a ‘mischievous delusion.’<sup>654</sup> It is, as we have seen, one of the hallmarks of the law-as-discourse conception, to fear the inconsistency, disorder or incoherence of a system of norms.

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<sup>649</sup> Kelsen quoted in *Ibid.*, 123.

<sup>650</sup> *Id.*

<sup>651</sup> *Id.*

<sup>652</sup> *Id.*

<sup>653</sup> *Ibid.*, 127.

<sup>654</sup> *Ibid.*, 129.



Simpson endeavours, however, to face the ‘chaos’ and to offer what he describes as a non-positivistic conception of the common law. In doing so, he calls on the assistance of two theorists – most commonly now only attended to by legal historians: Sir Mathew Hale and the above-mentioned William Blackstone. As Simpson notes, Hale divided the law of England into the *lex scripta* and the *lex non scripta*: where the former was restricted to statutes, the latter included ‘not only general customs, or the common law properly so called, but even those particular laws and customs applicable to certain courts and persons.’<sup>655</sup> Blackstone’s view was similar; he categorised three kinds of unwritten or common law: ‘1. General Customs, which are the universal rule of the whole kingdom and form the common law, in its stricter and more usual signification. 2. Particular customs which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.’<sup>656</sup>

Of course, Simpson is quick to point out – in keeping with Blackstone – that not all the rules of the common law are customary, in the sense of regularly observed practices, such as that of drinking the health of the Queen after dinner.<sup>657</sup> However, where they are not – such as the rule against perpetuities, or the doctrine of anticipatory breach – their authority nevertheless rests ‘entirely upon general reception and usage.’<sup>658</sup> Unlike in the law-as-discourse paradigm, then, what is prioritised here is the value of efficacy. As has already been seen from the opening salvo provided by a discussion of Sacco, under the conception of law-as-discourse the gap between law and enforcement disappears. Whether one dubs it living law, mute

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<sup>655</sup> *Ibid.*, 131.

<sup>656</sup> Blackstone quoted in *Id.*

<sup>657</sup> *Ibid.*, 132.

<sup>658</sup> Blackstone quoted in *Id.*

law, or customary law, under the law-as-tradition conception law is already built with a normative engine.

However, what one notices in discussions of customary law is that unlike in some other theories said here to fall under the law-as-tradition conception, the validity problem does not disappear. On the contrary, it begins to acquire such proportions that it threatens any non-discourse like treatment of custom. Even if one states, as Blackstone does above, that the authority of a norm rests entirely upon usage, by introducing the problem of authority – by demanding the examination of the authority of the norm (which is more authoritative, indeed one might even say, obtains its power from the fact that, it is not examined, that it is simply accepted), one begins to treat custom outside of the realm in which it is most comfortable (i.e., the realm of tradition). Thus, one may argue, for example, in the following terms: it is the efficacy of a practice that is said to lead to the validity of the norm; it is not the validity of the norm that, say, demands or requires it be adopted in practice. In saying so, one might be giving a reasonably accurate picture of customary law, but by importing the very idea of validity, the essence of the idea of efficacy (i.e., not being problematised, its authority not called for to be justified) begins to disappear.

Let us return to Simpson. Though sympathetic to Blackstone and Hale, Simpson does distance himself somewhat from them. He does so primarily on the grounds that the view of these earlier theorists is not conducive to identifying ‘the theoretical propositions of the common law – putative formulations of these ideas and practices.’<sup>659</sup> Seeking to bring a sense of cohesion to what he calls the ‘customary system’, Simpson asks us to accept that the ideas and practices of the common law ‘exist only in the sense that they are accepted and acted upon within the legal

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<sup>659</sup> *Ibid.*, 134.

profession...and transmitted both by example and precept as membership of the group changes.’<sup>660</sup> A large part of Simpson’s motivation is the viability of a scholarly study of customary law: he cites, as a welcome example, D.A. Thomas’s *Principles of Sentencing*,<sup>661</sup> which published ‘in comprehensive literary form the customary laws of the criminal appeal in England.’<sup>662</sup> He expresses anxiety about the extent of disagreement, and on the lack of procedures for establishing consensus. Accordingly, he calls for the student of the common law not merely to study the common law scientifically, but to participate in it: a form of engagement with the common law that, particularly in tightly cohesive groups of professionals, is more likely to lead to a cohesive picture of the common law. He points out that the increasing popularity of citation rules in the common law is a result of a much larger community of judges (rather than the twelve men in scarlet of past times); for, as he notes, where ‘agreement and consensus actually exist, no such rules’, as to the proper sources of the common law, are needed.<sup>663</sup>

On one reading, what Simpson is wrestling with here is the lack of any conceptual and methodological tools within legal theory and legal scholarship for any account of customary law that does not subsume them under concepts and methods better suited (in his view) to legal textual materials, such as statutes. Such a reading, however, would assume that that is indeed the best or only way to imagine statutes, and we have already seen from the previous sections that there are many other ways to incorporate textual resources, such as statutes, under a law-as-tradition conception. But Simpson could also be said to be struggling with something arguably more fundamental, something about the nature of theoretical practice itself. In making

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<sup>660</sup> *Ibid.*, 133.

<sup>661</sup> See, Thomas 1970.

<sup>662</sup> Simpson 1994, 136.

<sup>663</sup> *Ibid.*, 137.

custom an object of inquiry, a theoretician already sets out to make explicit that which, to retain its peculiar mode of existence, must remain implicit. However one reads it, though, what one can witness in Simpson's discussion of the treatment of customary law are the basic features of both law-as-tradition and law-as-discourse conceptions in tension with each other. Although this cannot be illustrated here, one can also see these tensions at play in the most recent collection devoted to the topic.<sup>664</sup>

### ***IB1h. Pluralism, Process and Evolution***

Before turning to the promised discussion of the political life of the law-as-tradition conception, it would be amiss not to mention a number of other resources of the law-as-tradition conception that have received little attention so far. Although one can remain reasonably confident that a good many of the principal features of the law-as-tradition conception have been unearthed in the above sections, a more elaborate discussion would need to investigate the burgeoning literature of legal pluralism, evolutionary jurisprudence, the process theory of law, some versions of natural law, and other individual figures, such as Sir Henry Maine and Emile Durkheim. A few brief comments on these will be in order.

The contemporary legal pluralist literature is significant not only because many of the figures considered above, such as Ehrlich, have been discussed, and interpreted, within it in specific ways. The legal pluralist literature is at crossroads both political and philosophical – the first because of the fight, even within the ranks of legal pluralists, as to how much explanatory priority should be given to the state,<sup>665</sup> and the second, as to how to deal with the implications of globalisation and its alleged

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<sup>664</sup> See, Perreau-Saussine and Murphy 2007.

<sup>665</sup> See, for example, Roberts 2005.

production of various kinds of supra-national or trans-national legal orders.<sup>666</sup> Of course, the very term ‘legal pluralist literature’ ought not to mistake us into thinking it all deals with the same kinds of problems, uses the same kinds of methods, and finds the same phenomena particularly revealing. On the back of a section dealing with customary law, it will be useful to note here that Tamanaha distinguishes between two kinds of legal pluralist movements: the ‘older version which refers to the incorporation of customary law regimes in colonial and post-colonial legal systems; and the newer version which refers to the coexistence of more than one legal system in all social arenas.’<sup>667</sup>

One should also not think that all of legal pluralist literature would fall under the explanatory paradigm of law-as-tradition. One must, as the above sections have tried to, look more carefully at the underlying explanatory tendencies in theoretical inquiries. Consider, for example, Cotterrell’s recent division of approaches to legal pluralism.<sup>668</sup> He presents them as four, but reluctantly (in a footnote), acknowledges a fifth: 1) monistic; 2) agnostic; 3) statist; 4) conventionalist; and 5) his own, community-based approach. The monist approach, signified by Kelsen, argues that ‘there must be a single criterion of law to be applied to the diversity of legal regimes and this criterion will then determine the relationship between those regimes.’<sup>669</sup> The agnostic ‘avoids any final determination of the criteria of law and merely recognises the interaction of various normative regimes with various degrees of practical effectiveness and authority’ – Twining represents this view for Cotterrell.<sup>670</sup> The statist view, represented by Andre-Jean Arnaud, is said to ‘recognise some regime as law by reference to particular criteria usually modelled on those applicable to nation-

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<sup>666</sup> For a recent overview, see Twining 2007.

<sup>667</sup> Tamanaha 2001, 171.

<sup>668</sup> Cotterrell 2008.

<sup>669</sup> *Ibid.*, 8.

<sup>670</sup> *Id.*

state law, and would see other regimes as merely non-legal regulation.<sup>671</sup> The conventionalist – the one acknowledged reluctantly by Cotterrell – is signified by Tamanaha’s notion that we ought to ‘accept as law whatever people identify and treat through their social practices as law.’<sup>672</sup> And, finally, Cotterrell’s own view, namely, that we ‘adopt criteria of the legal that are sufficiently flexible to recognise many different forms of law in currently indeterminate but potentially developing relations with each other.’<sup>673</sup> One could argue that these disagreements mirror, at different times and by different persons, similar, but no doubt not the same, conceptual difficulties to those sought to be unearthed in the sections above and below (i.e., tensions between features belonging to tradition or discourse paradigms).

Cotterrell’s own way of making sense of the diversity of views on offer is instructive. He suggests that they are driven by the differences in, on the one hand, juristic-philosophical and, on the other, sociological, concerns. The first of these has, he says, ‘always’ tried ‘to identify stable and – as far as possible – uncontroversial structures of authority.’<sup>674</sup> ‘If much legal philosophy’, he continues, ‘has been concerned to demonstrate the systematic unity of law, a major reason has been that it has tried to meet lawyers’ need for a clear specification of the location of legal authority and the criteria of legal validity’, seeking to do so by demonstrating law’s ‘systematic character or the hierarchical structure of legal rules or norms.’<sup>675</sup> Sociologists, on the other hand, ‘do not necessarily have juristic concerns with finding clear, uncontroversial sources of legal authority or criteria of legal validity. They are not necessarily disturbed by the idea of many such sources or criteria, competing or

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<sup>671</sup> *Id.*

<sup>672</sup> *Id.*

<sup>673</sup> *Id.*

<sup>674</sup> *Ibid.*, 6.

<sup>675</sup> *Id.*

remaining fluid or vague.’<sup>676</sup> Whether one presents them as theoretical concerns or explanatory tendencies, what emerges here is the very construction of one’s own theoretical position as a process of finding a middle ground between pictures one characterises as extremes. What one finds, however, as with Cotterrell’s discussion in the paper in question, is that such understandings of the traditions of inquiry themselves come to dominate the attempt at articulating the middle position. In the case of Cotterrell’s list, it is responses to juristic concerns that drive the various distinctive approaches, missing, thereby, other kinds of approaches that cannot neatly be subsumed to be responding to such concerns.<sup>677</sup> In other words, what we might have here is another illustration that the process of understanding traditions of inquiry is, at once, a process of constructing one’s view about the problems that matter.

Another potential promising approach for the law-as-tradition conception – particularly in its explanatory prioritisation of the temporally long-term and sense of ongoing dynamism and change, as first revived in modern times by Henrik Bergson and Alfred North Whitehead, but stretching back, in effect, to Heraclitus and Lucretius – is the process theory of law. David Cohen, writing on *Law, Violence and Community in Classical Athens*, argued that the process approach discloses that ‘legal systems are the continuing creation of human beings with various, shifting, and contradictory motivations and interests, motivations and interests which range from settling disputes to exacerbating them, from using the law as an instrument of social justice to honing it as a weapon of oppression, from making peace with one’s enemies to annihilating them with the help of legal institutions.’<sup>678</sup> The process approach has also received some attention in the international legal theoretical literature, with the most prominent contemporary being Rosalind Higgins, though, as usual, one must be

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<sup>676</sup> *Ibid.*, 7.

<sup>677</sup> For example, critical legal pluralism. See, Macdonald and Kleinhaus 1997.

<sup>678</sup> Cohen quoted in Tamanaha 2001, 50. See, Cohen 1995.

careful here not to take the label for granted.<sup>679</sup> James MacLean's very recent thesis at the School of Law at the University of Edinburgh, *Towards a Process Theory of Law*, building on the ontological and epistemological work of Alfred North Whitehead, also deserves special mention here.<sup>680</sup> Process theory of law might also find an ally in the evolutionary theory of law,<sup>681</sup> though in some versions, this theory has been assimilated with systems theory.<sup>682</sup>

From approaches in natural law, the most prominent example of a law-as-tradition oriented approach may well be Hugo Grotius, who famously defined natural law as forms of social interaction, already socialised, already inherent in the relationships between nations.<sup>683</sup> Under Grotius' conception, the aim of an exposition of natural law in the international sphere was to reveal the accepted usages of civilised nations.<sup>684</sup> For Thomas Aquinas, on the other hand, custom was indeed a primary source of law, but the aim of a theory of natural law was to subject all possible sources of law to the law of reason.<sup>685</sup>

There are many other key social theorists and historians of law who have not been addressed here, such as Emile Durkheim, who, himself building on the work of Sir Henry Maine, thought of law as 'nothing more than the most stable and precise element' in the organisation of social life.<sup>686</sup> Durkheim's claim that 'morality and law are only habits, constant patterns of action which come to be common to a whole society...it is like a crystallisation of human behaviour'<sup>687</sup> fastens on to an important

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<sup>679</sup> See, Higgins 1995. The domain of international legal theory is a quite distinct field of scholarship, and it falls outside the scope of this thesis to apply the conceptions of discourse and tradition to it.

<sup>680</sup> See, MacLean 2008. Unfortunately, this work was not accessible at the time of writing.

<sup>681</sup> See, Ratnapala 1993; and Ogus 1989. The latter is returned to below.

<sup>682</sup> See, Amstutz 2008. Indeed, this paper appears in a special issue of the *German Law Journal* devoted to 'Evolutionary Jurisprudence.'

<sup>683</sup> See, Grotius 1814 (1625).

<sup>684</sup> Tamanaha 2001, 22.

<sup>685</sup> See, Aquinas 1948 (1265-1274); see also Tamanaha 2001, 19.

<sup>686</sup> See, Tamanaha 2001, 34.

<sup>687</sup> Durkheim quoted in *Ibid.*, 8.



feature of the law-as-tradition conception – as is visible in such terms as living law, process theory, evolutionary theory, and others – namely, that explanations, of either the existence or knowledge of law, ought not to prioritise abstract phenomena, but rather the dynamics of associations, or forms of interaction, or processes, and the like.

### **IB1i. *The Political Life of Law-as-Tradition***

Though there may be other ways to articulate the political value at the heart of conceptions of law-as-tradition, the one emphasised here is that of responsiveness. The term comes from the work of Philip Selznick and Philippe Nonet, who, as summarised below, refer with approval to responsive law.<sup>688</sup> In later work on his own, especially in *The Moral Commonwealth*,<sup>689</sup> Selznick further developed the concept of responsiveness, using it more widely than in his work with Nonet. As we shall see throughout, neither Selznick himself, nor Selznick and Nonet, are unaware of the limitations of responsiveness as a political aim, or even as a value of forms of institutional and other social organisation.

Selznick and Nonet argue that the study of ‘the foundations of law’ cannot be divorced from ‘the place we give law in society’ and in that spirit they call for an integration of legal, political and social theory.<sup>690</sup> In writing their book, they offer their own view for ‘assessing the worth of alternative modes of legal ordering’,<sup>691</sup> that is, ultimately, for assessing the place of law in society. In setting the scene for responsive law, which they offer as the mode of legal ordering against which the current states of affairs should be evaluated, they criticise two other identifiable modes, namely, repressive law and autonomous law. In the case of the former, they

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<sup>688</sup> Selznick and Nonet 2001.

<sup>689</sup> Selznick 1992.

<sup>690</sup> Selznick and Nonet 2001, 3.

<sup>691</sup> *Ibid.*, 4.

argue that ‘every legal order has a repressive potential because it is always at some point bound to the status quo and, in offering a mantle of authority, makes power more effective.’<sup>692</sup> Under a repressive form of legal ordering, ‘short shrift’ is given to ‘the interests of those governed’, resulting in their position becoming particularly ‘precarious and vulnerable.’<sup>693</sup> They acknowledge that to some extent all modes of legal governing are repressive, and that the emergence of that repression depends on many factors including ‘the distribution of power, patterns of consciousness and much else that is historically contingent.’<sup>694</sup> Nevertheless, there are identifiable forms of avoidable repression, particularly where the use of coercion is unrestrained and results in the suppression of deviance and the putting down of protests.<sup>695</sup>

The emergence of autonomous law, the second alternative mode of legal ordering, assists in ‘taming repression.’<sup>696</sup> More commonly referred to as the Rule of Law, such taming is made possible when ‘legal institutions acquire enough *independent* authority to impose standards of restraint on the exercise of governmental power.’<sup>697</sup> Such autonomous institutions must themselves have only ‘qualified supremacy’, and be subjected to ‘defined spheres of competence.’<sup>698</sup> But there is a price, ultimately too high according to the authors, for the preservation of this kind of institutional integrity. Sharp lines are drawn between politics and law and, thus also, between the legislative and judicial function.<sup>699</sup> The legal order is understood as a model of legal rules, which does ‘enforce a measure of official accountability’, but also ‘limits...the creativity of legal institutions.’<sup>700</sup> Regularity and

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<sup>692</sup> *Ibid.*, 29.

<sup>693</sup> *Ibid.*

<sup>694</sup> *Ibid.*, 30.

<sup>695</sup> *Ibid.*, 31.

<sup>696</sup> *Ibid.*, 53.

<sup>697</sup> *Ibid.*; original emphasis.

<sup>698</sup> *Ibid.*

<sup>699</sup> *Ibid.*, 54.

<sup>700</sup> *Ibid.*

fairness, rather than substantive justice, become ‘the first ends and the main competence of the legal order.’<sup>701</sup> Finally, ‘fidelity to law’ is ‘understood as strict obedience to the rules of positive law.’<sup>702</sup>

Thankfully, however, according to the authors, the autonomous mode of legal ordering contains within it the seed for the development of responsive law. Where law is responsive to social needs, it is ‘competent as well as fair’, it helps to ‘define the public interest’ and it is ‘committed to the achievement of substantive justice.’<sup>703</sup> The vision of a responsive legal order is one which takes ‘affirmative responsibility for the problems of society.’<sup>704</sup> The ideal of responsive law does not entirely replace the warnings of repressing legal ordering and the aims of autonomous law, for it recognises that these levels of development may at times be historically necessary. It does, however, move the ideal beyond them, calling, ultimately, for ‘larger institutional competencies to the quest for justice.’<sup>705</sup>

The movement away or beyond the ideal of the rule of law is a significant one. It has emerged also in other literature, including most recently in a policy movement dubbed ‘the legal empowerment of the poor.’<sup>706</sup> Stephen Golub’s paper, entitled ‘Beyond the Rule of Law Orthodoxy’<sup>707</sup> provides a neat summary of the basic principles of ‘the legal empowerment alternative.’ By ‘rule of law orthodoxy’ Golub refers to an approach in the international aid field of law and development that ‘focuses too much on law, lawyers and state institutions, and too little on development, the poor and civil society.’<sup>708</sup> As a ‘top-down, state-centred approach’,

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<sup>701</sup> *Ibid.*

<sup>702</sup> *Ibid.*

<sup>703</sup> *Ibid.*, 74.

<sup>704</sup> *Ibid.*, 115.

<sup>705</sup> *Ibid.*, 116.

<sup>706</sup> See, the United Nations Commission on the Legal Empowerment of the Poor, [www.undp.org/legalempowerment](http://www.undp.org/legalempowerment).

<sup>707</sup> Golub 2003.

<sup>708</sup> *Ibid.*, 3.

it tends to concentrate ‘on law reform and government, particularly judiciaries, to build business friendly systems’, and it is a system ‘most prominently practiced by multilateral development banks.’<sup>709</sup> The problem with this approach, says Golub, is not with the ‘economic and political goals, *per se*’, but rather, ‘its questionable assumptions, unproven impact, and’, most relevantly for present purposes, ‘insufficient attention to the legal needs of the disadvantaged.’<sup>710</sup>

The alternative approach, i.e., legal empowerment, which Golub describes as ‘more balanced’, focuses on the ‘use of legal services and related development activities to increase disadvantaged populations’ control over their lives.’<sup>711</sup> It is ‘community-driven’ development, and ‘is grounded in grassroots needs and activities.’<sup>712</sup> More concretely, there are four further differences. Under the legal empowerment approach: ‘1) attorneys support the poor as partners, instead of dominating them as proprietors of expertise; 2) the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda; 3) addressing these priorities frequently involves nonjudicial strategies that transcend narrow notions of legal systems, justice sectors, and institution building; 4) even more broadly, the use of law is often just part of integrated strategies that include other development activities.’<sup>713</sup> What is key here is the lack of an anxiety concerning values of the legal order conceived as a discourse – i.e., coherence, consistency, and unity – and anxiety, instead, about the needs of the citizenry, particularly the poorest citizens. Golub does not, however, overstate his case. He argues that it is not his

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<sup>709</sup> *Id.*

<sup>710</sup> *Id.*

<sup>711</sup> *Id.*

<sup>712</sup> *Id.*

<sup>713</sup> *Ibid.*, 4.

position that ‘rule of law orthodoxy is the wrong path to take under all circumstances; nor is legal empowerment a panacea.’<sup>714</sup> The two are not mutually exclusive.<sup>715</sup>

Similar modesty is displayed by Selznick in his *The Moral Commonwealth*. As he explains it there, responsiveness invokes the challenge ‘to maintain institutional integrity while taking into account new problems, new forces in the environment, new demands and expectations.’<sup>716</sup> A responsive institution, in short, ‘avoids insularity without embracing opportunism.’<sup>717</sup> This richer picture of responsiveness recognises that what is required is ‘controlled adaptation’: all institutions must be, to some extent, isolated and inflexible, but responsiveness demands that this be balanced with openness to the needs of the citizenry. Thus a well-working legislature, for example, is at once open – it registers majority will; it is composed of representatives elected democratically and responsible to the people – but it also has its own ‘moral principles’ which ‘safeguard the deliberative character of legislation.’<sup>718</sup>

However, not only does Selznick offer a richer account of responsiveness than in previous work with Nonet, he also spends a considerable amount of time bringing out the limitations of the value. The ‘perils of responsiveness’, as he puts it, all centre around one big problem: selectivity. The strategy of responsiveness ‘entails a burden of choice...there is always a need to decide who shall be the privileged beneficiaries of help or forbearance.’<sup>719</sup> Selectivity, he reasserts, ‘is the Achilles’ heel of responsiveness’, and it is because of it that ‘what appears to be responsiveness may turn out to be a hidden form of domination or a screen for covert, opportunistic

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<sup>714</sup> *Id.*

<sup>715</sup> *Id.*

<sup>716</sup> Selznick 1992, 336.

<sup>717</sup> *Id.*

<sup>718</sup> *Ibid.*, 336-7.

<sup>719</sup> *Ibid.*, 338.

adaptation.<sup>720</sup> Selznick provides an illustration, which shall not be dwelt on here, and which he himself has developed at much greater length, concerning the Tennessee Valley Authority ('TVA').<sup>721</sup> The point to make here is a general one: responsiveness, adaptation and spontaneity are the values that drives the political life of the law-as-tradition conception, but their limitation is the problem of selection, of not being able to help all simultaneously, and not all to the same degree.

There is another problem, too, not addressed by Selznick, but one alluded to in Kapuscinski's reflections on communism in the USSR. Kapuscinski argues that 'the system depended on...punctiliousness, on a psychotic control of very detail, an obsessive desire to rule over everything',<sup>722</sup> illustrating this obsession with an example of the kind of detail engaged in by Stalin: 'Transfer', Stalin ordered, 'the sewing machine belong to tailor's shop number 1 to factory number 7.'<sup>723</sup> On this reading, then, a government can become too 'responsive', too involved in the affairs of everyday life, too intrusive into private affairs, and, even worse, act and justify its actions in the name of the people, believing it is concerned with and addressing their needs.

A reaction to this fear of intrusive government can be seen in the evolutionary theory of law, building on Friedrich von Hayek's support of governance in the form of 'spontaneous order', which he identified with the market and with common law, and his criticism of 'rational constructivism', which is associated with a planned economy and regulatory law.<sup>724</sup> Hayek was famously sceptical of the ability of human beings, and particularly those in government, to know the innumerable facts that would be necessary to know to support governance according to rational

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<sup>720</sup> *Id.*

<sup>721</sup> See, Selznick 1984.

<sup>722</sup> Kapuscinski 1994, 310.

<sup>723</sup> *Ibid.*, 311.

<sup>724</sup> Ogus 1989, 393.

constructivism. Our knowledge of those facts was ‘widely dispersed and fragmentary’; we relied at best ‘on limited information normally pertaining to localised environments.’<sup>725</sup> Given that the human mind cannot transcend the spontaneous order out of which it emerges, it is best to leave governance to such spontaneous orders, exemplified for Hayek by the market and the common law. Lawmaking is, ideally, ‘a continuous, adaptative process dealing with unforeseen consequences.’<sup>726</sup> Of course, matters are much more complicated in Hayek’s theory, but at the distance from which traditions of jurisprudential inquiry are herein being observed, Hayek’s scepticism about the possibility of making everything explicit and controlling society from the top-down, and his criticism on the alleged hubris behind the thought that we can reveal all the forces behind the regularities and patterns of interaction we form is representative of tendencies belonging to the law-as-tradition conception. To say all this is not to say, of course, that others within the law-as-tradition conception would agree with Hayek. Finally, none of this is to say that there are not dangers with spontaneous forms of governance, i.e., their capacity to create needs for us (as markets tend to do) or to perpetuate and further increase the power of those who manage, sometimes at first simply fortuitously, to enter the market with great and swift success.

What one can see from this brief discussion is that the political life of law-as-tradition, no less so than with law-as-discourse, is rife with difficulties, contradictions and inconsistencies. What appears as an advantage or an advancement can easily metamorphose into a nightmare. On one reading, responsiveness is openness to the needs of the citizenry; on another, it is said to result in the unwelcome intrusiveness of the government. On one reading, law-as-tradition is adaptive and spontaneous; on

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<sup>725</sup> *Ibid.*, 395.

<sup>726</sup> *Ibid.*, 396.

another, the very same structures make it difficult to change and perpetuate injustices. These matters are messy and difficult, as they must be. The very point is that politics is alive when it offers no easy answer; when all these various questions concerning the interrelationship between ways of characterising the structure of government, ways of suggesting how it should go forward, and ways of characterising the effects of its past, current or proposed endeavours, all interrelate, all are in tension with each other, and all feed off each other.



## IB2. LEGAL WORK-AS-TRADITION

On first blush, Arthur Leff's view that 'law is not something we know, but something we do',<sup>727</sup> appears to conform to certain features of the law-as-tradition paradigm: it signifies scepticism of abstractions as a source of knowledge, and it makes the knowledge of law disappear into an account of skills and abilities. In one respect this is correct, but in another it leaves the concept of knowledge unnecessarily behind. For legal-work-as-tradition conceptions, as we shall see, what is being explained by the development of skills and abilities in certain communities and institutions, and over long periods of time, is not 'merely' some nebulous 'doing', but indeed, 'knowing.' At stake, then, is not just the exposition of a different explanatory paradigm of legal work, but the appropriation of the concept of knowledge.

The philosophical roots of the legal-work-as-tradition conception run deep. Their perusal is outside the scope of the thesis. Nevertheless, a few brief indications can be given. One important feature is that knowledge, unlike in the law-as-discourse paradigm, cannot and should not be limited to the analysis of articulated thoughts, conceptualised as an introduction to action. Hayek, whose work was mentioned above, put it this way: 'man acted before he thought and did not understand before he acted.'<sup>728</sup> 'What we call understanding,' he continued 'is in the last resort simply his [sic] capacity to respond to his environment with a pattern of action that helps him persist.'<sup>729</sup> That capacity to respond is learnt over long periods of time, and the result, says Hayek, 'of this development will in the first instance not be articulated knowledge but a knowledge which, although it can be described in terms of rules, the

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<sup>727</sup> Leff quoted in Nelken 1994; see also, Neff 1979.

<sup>728</sup> Hayek quoted in Tamanaha 2001, 214.

<sup>729</sup> Hayek quoted in *Id.*

individual cannot state in words but is merely able to honour in practice.<sup>730</sup> Human conduct under this view, again following Hayek, is ‘constituted and coordinated through shared habits, modes of action, customs, practices.’<sup>731</sup>

There are, of course, others who have sought to reorient epistemology to a focus on skills, abilities and dispositions, as well as social habits, practices and customs. These include modern classics such as the work of Whitehead,<sup>732</sup> John Dewey,<sup>733</sup> Gilbert Ryle,<sup>734</sup> and Polanyi,<sup>735</sup> but also more recent philosophical work, such as that of Hubert and Stuart Dreyfus,<sup>736</sup> Alva Noë,<sup>737</sup> Andy Clark, and thus also much of the embodied knowledge literature in the cognitive sciences.<sup>738</sup> Another important recent source of insights is the work currently being conducted by the Max Planck Institute for Human Development in Berlin, where the picture being advanced is that of ‘adaptive behaviour in a fundamentally uncertain world.’<sup>739</sup> Some of this work has also addressed the picture of legal work resulting from such a general account of behaviour.<sup>740</sup> In all these theories, what one can witness is resistance to the idea that the knowledge of human beings can be exhausted by the propositional content of beliefs, thereafter subjected to testing by certain criteria of correctness (e.g., conformity to the laws of logic or the norms of grammar, or conformity to the standards of reliable evidence). What one sees, instead, is a focus on the conditions of possibility of acting in the world – on the skills, abilities and dispositions a person

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<sup>730</sup> Hayek quoted *Id.*

<sup>731</sup> Hayek quoted *Id.*

<sup>732</sup> See, Whitehead 1938.

<sup>733</sup> See, Dewey 2002 (1922).

<sup>734</sup> See, Ryle 1949.

<sup>735</sup> See, Polanyi 1967 and 1974.

<sup>736</sup> See, for example, Dreyfus and Dreyfus 2000.

<sup>737</sup> See, for example, Noë 2005 responding to Stanley and Williamson 2001.

<sup>738</sup> See, for example, Clark 2008.

<sup>739</sup> For the Institute, see: <http://www.mpib-berlin.mpg.de/index.en.htm>. For the International Max Planck Research School on Adapting Behavior in a Fundamentally Uncertain World (Uncertainty School) see <http://www.imprs.econ.mpg.de/>.

<sup>740</sup> See, Gigerenzer and Engel 2006. However, given the very nascent stage of this research endeavour, recourse shall not be had to it here

develops, over time, and in emotional and physical engagement with the world, all, furthermore, in company with others.

One important figure in this context, not just in general philosophy but also within legal theory, was John Dewey. Broadly speaking, one could argue that Dewey's picture of human knowledge prioritises the dynamics of conduct rather than the properties of some static structure of abstractions (or representations). When considered more carefully, however, Dewey is often more balanced. Consider, for example, his historically and philosophically important paper, entitled 'Logical Method and Law', in which he argues that human conduct falls broadly into two sorts.<sup>741</sup> 'Sometimes', he says, 'human beings act with a minimum of foresight, without examination of what they are doing and of probable consequences. They act not upon deliberation, but from routine, instinct, the direct pressure of appetite, or a blind "hunch."' <sup>742</sup> In the other type, he said, 'action follows upon a decision and the decision is the outcome of inquiry, comparison of alternatives, weighing of facts.'<sup>743</sup>

Although Dewey influenced the legal realists, some of the latter were arguably less nuanced in their accounts of legal knowledge. For some legal realists, all, or almost all, could be explained by focusing on the first type of conduct identified by Dewey. In typical anti-metaphysical, anti-presentist fashion,<sup>744</sup> Karl Olivecrona argues that 'we are, at best, 'dimly conscious of a permanent existence of the rule of law. We talk of them as if they were always there as real entities. But this is not exact. It is impossible to ascribe a permanent existence to a rule of law or to any other rule.

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<sup>741</sup> Dewey 1924.

<sup>742</sup> *Ibid.*, 560.

<sup>743</sup> *Ibid.*, 560. This Deweyan distinction continues to resurface in contemporary philosophical literature – a recent example is Baker 2008.

<sup>744</sup> 'Anti-metaphysical and anti-presentist' is contemporary philosophical language, unavailable to Olivecrona, that is popular among those influenced by Derrida. See, for example, Derrida 1974.

A rule exists only as the content of a notion in a human being.<sup>745</sup> ‘The written text,’ says Olivecrona, ‘—in itself only figures on paper—has the function of calling up certain notions in the mind of the reader. That is all.’<sup>746</sup> ‘In reality,’ he continues, ‘the law of a country consists of an immense mass of ideas concerning human behaviour, accumulated during centuries through the contributions of innumerable collaborators... The ideas are again and again revived in human minds, accompanied by the imperative expression: “This line of conduct shall be taken” or something else to that effect.’<sup>747</sup>

For present purposes, however, such views are better understood as responses to the excesses that certain of the legal realists found in those they themselves characterised as overly formalistic or mechanistic in their theories of law. In other words, the legal realists may not provide us with the epistemological detail we need to develop the legal-work-as-tradition explanatory paradigm, but they may be useful sources for revealing some of the explanatory limitations of the law-as-discourse and legal-work-as-discourse conceptions. In any event, as reiterated throughout, this thesis seeks to avoid adopting the term ‘legal realism’, or indeed the term ‘legal formalism’ – such terms provide not only their way of organising jurisprudential inquiries, but more importantly, they mask, as Tamanaha has recently argued, much mixing of realist and formalist features in the work of those often unreflectively classified as realist or formalist in outlook.<sup>748</sup>

My focus here, instead, is on four features we may take to be exemplary of the legal-work-as-tradition explanatory paradigm. These four features are: 1) the role of typical narrative images, as discussed by Bernard Jackson; 2) the construction of legal

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<sup>745</sup> Olivecrona quoted in Williams 1946, 85.

<sup>746</sup> Olivecrona quoted *Id.*

<sup>747</sup> Olivecrona quoted *Id.*

<sup>748</sup> See, Tamanaha 2008a and 2008b.

facts in historical perspective, as presented by Geoffrey Samuel; 3) the importance of institutional contexts, as discussed in the work of John Bell, Robert Summers, and others; and 4) the emergence of Cognitive Legal Studies, particularly as recounted by Steven Winter, and other related resources. As usual, my aim is not be comprehensive. Further, unlike the legal-work-as-discourse conception, there is not a great deal of engagement with or analysis or elaboration in contemporary legal theoretical literature of those features identified here under the legal-work-as-tradition conception – though this may very well change in the forthcoming decades.

### **IB2a. *Typical Narrative Images***

Bernard Jackson's target in a relatively recent paper, entitled 'Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence',<sup>749</sup> is what he characterises as the liberal modern law model of language-based rules. In this model, he says, 'people can rely ultimately on their disputes being resolved by court adjudication', which 'involves the application of linguistic rules', where the meaning of those linguistic rules, in turn, 'is normally available in advance, the assumption being that the "literal" meaning is that both intended by the legislator and to be applied by the court.'<sup>750</sup> Jackson argues that a very different model is discernible in the Bible. The features of this model include a view of 'dispute settlement as essentially private' which does not 'necessarily involve the application of linguistic rules', and where, significantly for my purposes, if 'linguistic rules are used, their application is not to be identified with the notion of "literal meaning", but rather with their narrative, contextual sense.'<sup>751</sup> Jackson's dissatisfaction is with a view of language that suggests that words – whether in rules or otherwise – have a 'literal' or

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<sup>749</sup> Jackson 2000.

<sup>750</sup> *Ibid.*, 434.

<sup>751</sup> *Ibid.*

a ‘core’ meaning, i.e., that there are ‘situations that the words “cover”.’<sup>752</sup> We have already seen evidence of this view under the legal-work-as-discourse conception, where the properties of legal language itself do the epistemological work for legal actors. Jackson urges and offers a different approach to the liberal model, namely one that does not ask ‘what situations do the words of this rule cover?’ but that inquires in the following way: ‘what typical situations do the words of this rule evoke?’<sup>753</sup> Formulating the question in this way, he says, signifies looking ‘to the narrative images – of situations within known social contexts – evoked by the words.’<sup>754</sup> As we shall see, what this entails is a movement away from the explanation of legal knowledge at the level of a theory of meaning, and towards the socio-historical context in which persons come to acquire knowledge of those typical narrative images.

Jackson provides some examples of passages from Biblical law where an approach bent on discovering the literal meaning necessarily fails: it neither captures the complexity of the language of the rule, nor the social context in which such rules were used (i.e., in largely private settlements of disputes). The role of courts in such a context, and within such a model of understanding the language of rules, ‘was restricted to cases perceived as too far distant from the typical narrative images evoked’ such that judges were ‘expected to deploy their intuitions of justice.’<sup>755</sup> In such a context, Jackson continues, ‘communication is characterised by the availability of common deployment of unspoken social knowledge, knowledge of what are the typical narrative images deployed within the group.’<sup>756</sup> Where that ‘social knowledge is sufficiently internalised within each of the members of a particular social group’

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<sup>752</sup> *Ibid.*, 437.

<sup>753</sup> *Ibid.*

<sup>754</sup> *Ibid.*

<sup>755</sup> *Ibid.*, 446.

<sup>756</sup> *Ibid.*, 447.

then the rules may be said to operate as a ‘semiotic code, based on the internalisation of images and feelings.’<sup>757</sup> Already, here, we see a central feature of the legal-work-as-tradition conception: the prioritisation of socialised abilities in the explanation of knowledge.

Jackson goes on to consider the applicability of this ‘semiotic’ model to modern law – an important task, given that that model developed in a context very different, at least at first blush, to the role of modern courts and tribunals. He argues that, contrary to positivistic models, the semiotic model can ‘inform the manner in which law actually works’<sup>758</sup> in the contemporary world. In saying so, he refers to a feature already identified above as belonging to tradition-oriented approaches, i.e., to pictures that attempt to make sense of how things work. Further, Jackson argues that both Hart and Fuller (the latter especially) ‘unwittingly acknowledge’ that ‘narrative images still underlie much of our case law and jurisprudential theorising about it.’<sup>759</sup> He invokes Fuller’s famous example of the ‘upright sleeper’<sup>760</sup> and argues that the question as to whether the upright sleeper can be found to be in violation of the rule against ‘sleeping in any railway station’ can be best understood not as an obvious instance of the rule but as a case of how close the image of the upright sleeper may be said to be to the typical narrative image invoked by the rule. Similarly so with Dworkin’s equally famous discussion of *Riggs v. Palmer*<sup>761</sup>: is not the initial classification, asks Jackson, of this case as a hard case best explained by ‘the feeling that the case of the grandson was so far distant from the “normal” narrative of testate succession that this could not be a straightforward instance of the rule,

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<sup>757</sup> *Ibid.*

<sup>758</sup> *Ibid.*, 450.

<sup>759</sup> *Ibid.*

<sup>760</sup> See, Fuller 1958, 664.

<sup>761</sup> *Riggs v. Palmer*, 115 NY 506, 22 NE 188 (1889). See, Dworkin 1986, 15-20.

notwithstanding the words in which the rule was expressed?’<sup>762</sup> Even if the judgement records a justification using the rhetoric of a literal interpretation, what is really happening, according to Jackson, is that the judge is ‘appealing to the values internalised within the “common sense” of a particular community. The literal meaning of the statute is filtered through the aesthetics or values which accompany narrative images at the subconscious level.’<sup>763</sup> Of particular interest here is Jackson’s prioritisation of communal emotions and his eagerness to locate these at a level below self-conscious awareness.

In his earlier book, *Law, Fact and Narrative Coherence*,<sup>764</sup> Jackson urges us to take seriously ‘the implications of linguistic scepticism in general, and doubts about the place of “reference” in particular.’<sup>765</sup> His criticism of the use of the concept of ‘reference’ also leads him to a criticism of a correspondence theory of truth – a position tellingly different from that of Kelsen’s and Hart’s (as discussed in section IA1e above). Jackson sets out to show how the problem of reference and the associated correspondence theory of truth underlie an approach to legal reasoning dominated by the device of the syllogism – a ‘formalisation of the process of (deductively) applying law to facts.’<sup>766</sup> In chapter four of *Law, Fact and Narrative Coherence* he sets out to offer an alternative. There, he argues that ‘rules are themselves meaningful as socially-constructed narratives, accompanied by particular (and increasingly institutionalised) forms of approval or disapproval.’<sup>767</sup> ‘The fact’, he continues ‘that legal rules have tended to become, in Western legal systems, increasingly abstract and conceptualised tells us more about the pragmatics of rule-

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<sup>762</sup> Jackson 2000, 453.

<sup>763</sup> *Ibid.*

<sup>764</sup> Jackson 1988.

<sup>765</sup> *Ibid.*, 1.

<sup>766</sup> *Ibid.*, 2.

<sup>767</sup> *Ibid.*, 3.



telling (its increasing bureaucratisation and specialisation) than about the nature of rules themselves.<sup>768</sup> Once again, what we can see here is the explanatory tendency towards placing forms of human conduct – in this case, institutionalised forms of approval or disapproval – in priority to alleged properties of the text.

Jackson is keen to establish a divide between his approach and that of those whose picture of legal work (particularly in the context of the judicial application of law) depends on the notion of the normative syllogism. Adopting his model, he says, entails seeing ‘the relationship between the general rule and the particular case’ as ‘one of inter-discursivity, not the application of a consequence to one particular referent, which the general rule states ought to be applied to all such referents.’<sup>769</sup> The underlying form of both rule and fact are, according to Jackson, narrativised, where the relationship between the two is ‘one of greater or lesser proximity, in terms of human experience.’<sup>770</sup> Indeed, he argues that the ‘further the form of the “rule” moves from the narrative model to a purely abstract, conceptual formulation, the more we are likely to encounter difficulties in both the application of law to fact and the interpretation of general rules, notwithstanding the clarity in which the rule is expressed.’<sup>771</sup>

We must not mistake, Jackson says, the process and expression of justification for the process of ‘how legal decisions are arrived at.’<sup>772</sup> If we do so, we make unwarranted distinctions between: ‘a) determination of fact, b) justification of determination of fact, c) determination of law, d) justification of determination of law, e) application of fact to law, and f) justification of application of fact to law.’<sup>773</sup>

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<sup>768</sup> *Id.*

<sup>769</sup> *Ibid.*, 89.

<sup>770</sup> *Ibid.*

<sup>771</sup> *Ibid.*

<sup>772</sup> *Ibid.*, 90.

<sup>773</sup> *Ibid.*

Instead, laws should be ‘regarded as a particular form of narrative representation of human behaviour’ that is then institutionalised as a ‘sanction’ signifying the community’s approval or disapproval of that narrative.<sup>774</sup> Further, there are two forms of narrativisation: the first relates to the semantics of the telling of stories in court (their content), and the second to the pragmatics of that story telling, i.e., the process of persuading the adjudicator of the truth of those stories.<sup>775</sup> Jackson illustrates the role of the narrative model, tracking in close proximity to human experience, and thus also exemplifying the ‘inseparability of law, fact and application’ in the now often-cited passage of Lord Denning’s judgement in *Miller v. Jackson*.<sup>776</sup> It is instructive to set this passage out in full and to follow Jackson’s analysis of it. Here is the passage first:

In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practise while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at week-ends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer.

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<sup>774</sup> *Ibid.*, 91.

<sup>775</sup> *Ibid.*, 92.

<sup>776</sup> *Miller v. Jackson* [1977] 3 All ER 338. See also, Twining 2005.

And all this because of a newcomer who has just bought a house there next to the cricket ground.<sup>777</sup>

The image of the intruding outsider is contrasted, negatively, with the overwhelmingly positive cricket-playing community, which is said to exemplify the very best of traditional practices. The newcomer seeks judicial disapproval of someone in authority who, him or herself, should he make a ruling in favour of the newcomer, would be interfering in a similarly disapproving manner to that of the newcomer. Further, such interference, causing the disappearance of traditional practices, is said to be likely to lead to young men turning to implicitly destructive forms of pleasure seeking.<sup>778</sup> As Jackson concludes, ‘Lord Denning has clothed his opposition to the application of the legal rule in a vivid, narrative presentation of the facts’<sup>779</sup>, and one, moreover, that already includes within it modes of persuasion. Of course, as he acknowledges, the example is a somewhat extreme one, but, significantly, not because of its use of the narrative mode, but because of its invocation of notions (such as the delight of village cricket) that are not recognised as being capable of being ‘used publicly in the process of justification.’<sup>780</sup>

Indeed, the above example sets the scene nicely for Jackson’s argument that the ancient forms of expression of rules, e.g., ‘If a thief is found breaking in, and is struck so that he dies, there shall be no blood guilt for him’<sup>781</sup>, and thus also more recognisably narrativised and concrete than the ‘modern, abstract legal rule’, have not only not completely died out (e.g., there are examples of the use of narrative illustrations in modern Criminal Codes), but in fact underlie and explain the understanding of rules expressed in that modern, abstract form. Our understanding of

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<sup>777</sup> *Miller v. Jackson*, 340-1.

<sup>778</sup> Jackson 1988, 96.

<sup>779</sup> *Ibid.*, 97.

<sup>780</sup> *Ibid.*

<sup>781</sup> Cited in *Ibid.*, 100.

rules expressed in such a manner is explicable on the basis of a stock of typical narrative images – narrativised models of behaviour – that contain within them ‘some tacit social evaluation: that such behaviour is good, bad, pleasing, unpleasing etc.’<sup>782</sup> Citing George Fletcher’s exposition of the ‘subjective criminality’ (i.e., that of attributing evil minds to agents when they act in certain ways) that infused the law of theft,<sup>783</sup> Jackson argues that however we analyse it, our understanding of legal language is explicable on the basis of the ever-developing stock of ‘collective images’ which ‘appear to be socially-constructed narrative models of human experience.’<sup>784</sup>

Jackson’s overall picture of legal work, then, is that it consists ‘in comparing a narrative constructed from the facts of the case with the underlying narrative pattern either explicit in or underlying the conceptualised legal rule.’<sup>785</sup> Where, as in modern Western legal systems, the formulation of the rules becomes ‘increasingly abstract and conceptualised’,<sup>786</sup> the more difficult is the task of adjudication.<sup>787</sup> There is much to be said, he concludes, for the formulation of ‘particular rules’ that ‘build upon social experience of typical behaviour-patterns, accompanied by what are considered appropriate institutional sanctions.’<sup>788</sup>

Of course, responding as he is to the dominance of the legal-work-as-discourse conception, which strives to remain at the level of a theory of meaning, Jackson is forced to translate some of his insights into insights about language or the nature of legal rules. Seeing past this manner of speaking, however, what we see in Jackson is the explanatory tendency towards community-located and thus socialised abilities as carriers of typical narrative images, with those images themselves being but

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<sup>782</sup> *Ibid.*, 99.

<sup>783</sup> See, Fletcher 2000.

<sup>784</sup> Jackson 1988, 101.

<sup>785</sup> *Ibid.*, 101.

<sup>786</sup> *Ibid.*, 106.

<sup>787</sup> *Ibid.*, 101.

<sup>788</sup> *Ibid.*, 107.

narrativised abstractions of ways in which human beings attempt to make sense of and learn from interactions with one another.

### **IB2b. *Historicising the Construction of Legal Facts***

The leap from Jackson to the work of Geoffrey Samuel, particularly in *Epistemology and Method in Law*,<sup>789</sup> is not a great one. Like Jackson, though in different terms and by reference to a different set of problems and contexts, Samuel criticises the ignorance of the role of images (he calls them ‘facts’) in accounts of legal work. Unlike Jackson, who translates his insights or communicates his explanatory tendencies into a theory of meaning, Samuel addresses theories of legal knowledge. He argues that contemporary theories of legal knowledge suffer from an overdose of the rule-model in which legal knowledge is said to be knowledge of rules, ‘that is to say, normative propositions capable of being expressed in symbolic language.’<sup>790</sup> Instead, Samuel says, we should pay more attention to non-symbolic forms of knowledge: that is, of the historical life of facts and fact-construction. The importance of the historical dimension – to that long-term perspective favoured by tradition-oriented explanations – shall be returned to below, with the focus at first on how Samuel articulates the relationship between rules and facts.

‘In order to relate to factual situations’, says Samuel, ‘rules must contain within them the means by which one can move from pure norm...to the world of social fact.’<sup>791</sup> Rules, he says, ‘delimit facts. They describe areas and boundaries.’<sup>792</sup> But acknowledging this requires us to consider what this world ‘beyond rules’ is like. Consider, he says, the development of the law of negligence from *Donoghue v.*

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<sup>789</sup> Samuel 2003.

<sup>790</sup> *Ibid.*, 1.

<sup>791</sup> *Ibid.*, 180.

<sup>792</sup> *Ibid.*, 181.

*Stevenson*<sup>793</sup> to *Grant v. Australian Knitting Mills*.<sup>794</sup> In the first case, as is well known, Mrs Donoghue was said to have suffered nervous shock on account of discovering a snail in her ginger beer (manufactured by the defendant). In the second, Mr Grant suffered acute dermatitis as a result of wearing underpants (also manufactured by the defendant), which contained an excess of a chemical harmful to human skin. There is nothing inherent – even if, and significantly so, trained lawyers by habit may think so – in the neighbour principle, i.e., nothing within the proposition itself, which may indicate that the two cases are related. Instead, there are relationships between images (once again, Samuel calls them ‘facts’): between the harm (nervous shock and acute dermatitis), the means (ginger beers and underwear) and the subjects (consumers and manufacturers). Where the relationships between them are sufficiently close, such that the latter situation can be imagined as an instance of the former, then the cases are sufficiently similar to warrant the use of the same justification for the decision (i.e., the applicability neighbour principle). The point, says, Samuel, is that it matters how facts themselves and the relationships between them are imagined.<sup>795</sup> He offers the following illustration:

A ship heavenly laden with a cargo of crude oil founders on a sandbank and in order to protect the lives of the crew the captain orders that the oil be discharged into the sea. The oil some time later is washed up on the beaches of a local holiday resort and the council spend much time, energy and money in clearing up the mess. Imagine that an employee of the council is looking through the facts of old cases to find an analogy with what has happened. The employee finds some old cases involving, not ships, but horse-drawn transport and, in the first case, he discovers a situation where the owner of a house has had his front wall, adjoining the roadway, severely damaged by a coach and horses crashing into it. In another case, he discovers that the owner of a café has suffered loss of business, plus increased gas light bills, as a result of a neighbouring transport firm having left its horses on the road outside the café, where they blocked the daylight, and the smell from their droppings and urine

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<sup>793</sup> *Donoghue v. Stevenson* [1932] AC 562.

<sup>794</sup> *Grant v. Australian Knitting Mills* [1936] AC 85.

<sup>795</sup> It is instructive, though outside the scope of this thesis, to compare this analysis to that of Jackson’s discussion of two contract cases (Jackson 1988, 101-106), where he talks of the comparison of narrative frameworks.

overpowered the customers. Which situation, the council employee asks herself, is the closer analogy to the problem of the stricken ship and dirty beach? Is it helpful to think in terms of ‘pollution’? What kind of image does pollution conjure up? Or should one be thinking more in terms of damage to an adjoining beach?<sup>796</sup>

But it is not a mere, though, of course also, no small matter, of how one envisages facts and relationships between them – a matter, as Samuel calls it, of analogy or analogical thinking. What matters also is how one categorises facts. In the case of Mrs Donoghue, for example, one needs to classify the harm, the persons and the things:<sup>797</sup> what kind of injury or damage is nervous shock? Does it matter that Mrs Donoghue is an elderly woman? What kind of product is a ginger beer? The very asking of these questions, says Samuel, is evidence enough of the dynamic relationship between facts (as in the *Donoghue* case) and certain categories taken to be fundamental for the purpose of classification (e.g., persons, things, actions and damages). The explanation of such a cognitive process, as Samuel acknowledges, is by no means an easy feat. But the difficulties, at the very least, should point us to the insight that ‘the linguistic proposition cannot in itself ever contain information about the imagery which surrounds the actual application process to the facts.’<sup>798</sup> Rules, for Samuel, are by no means useless: they help us, in a limited way, to orient ourselves. But what explains the orientation – what drives it – are the analogies persons make between sets of images, or the way they frame the image in the first place. Framing, for example, involves the scale of time with which some event is delineated as a stand-alone event. For instance, in the above case of the oil tanker, ‘one can look at the act of the captain *vis-à-vis* the discharged oil and the distressed ship or at the wider picture of a proprietor sending out his ships and cargoes.’<sup>799</sup> Adopting the latter, for example, is

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<sup>796</sup> Samuel 2003, 190.

<sup>797</sup> *Ibid.*, 197-8.

<sup>798</sup> *Ibid.*, 200.

<sup>799</sup> *Ibid.*, 207.

more likely to lead to the imposition of a normative structure that focuses on ‘the activity of the control of things.’<sup>800</sup> Another feature of the work of images is the relatively common device of an imaginary bystander, or the reasonable person: this is not a device explicable solely or even persuasively by the alleged priority given to ‘ordinary meaning.’ It is better explained as another way of constructing the facts: of making the images appear in a certain way, of using them to delimit the availability of normative structures.

What we see from the above very brief summary of a complex argument, Samuel gives explanatory priority to what persons do with images: how they frame them, how they imagine them, how they construct them, what analogies they find between them, and so on. The focus, in other words, is on abilities, and not on the content of propositions – though not, importantly, to the extent that the textual materials are neglected. The texts are there, as resources used by legal workers, but those texts must be seen as part of a much broader, more dynamic, context where the activities of persons is granted explanatory priority.

The above promised to return to the historical dimension. It will be impossible to do so in any detail here. What is significant to point out, however, is that Samuel is at pains throughout his work to point to the diachronic dimension of currently stable legal categories, such as family law or consumer law, tracing certain features of common law taxonomy to the tripartite distinction between things, persons and actions in the *Institutions* of Gaius.

At all times, Samuel’s eye is on practices, methods, and ways of solving problems. This is visible, for example, in his reference six different ‘schemes’, developed in the philosophy of social sciences, to construct facts: the causal scheme,

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<sup>800</sup> *Ibid.* As Samuel notes, this explanation follows the judgement of Lord Denning in *Esso Petroleum v. Southport Corporation* [1953] 3 WLR 773 (QBD).



the functional scheme, the structural scheme, the hermeneutical scheme, the actional scheme and the dialectical scheme. In presenting them, Samuel is not particularly concerned to hold on to the differences between the schemes, acknowledging that interrelate in complex ways, and reminding us – again in a pragmatist streak – that all these ought to be understood as methods that may be serving different purposes, aims, functions, interests, concerns, and so on.<sup>801</sup>

Legal work, then, for Samuel is a complex instance of constructing, categorising and comparing factual patterns in the context of certain traditionally-accepted terms (e.g., injury, damage, consumer, manufacturer etc.) and connectors (e.g., cause, intent, motive etc.), the operation (and thus also our understanding) of which is fundamentally inseparable from that complex process of fact construction. In his detailed analysis of rule-fact complexes in the common law, Samuel adds epistemological bite to legal-work-as-tradition conceptions.

### **IB2c. *Institutional Contexts***

One feature common to legal-work-as-tradition conceptions is the focus on the context, physical and material, where legal work is conducted. Those contexts are often referred to as institutions: law courts, law firms, barristers' chambers, Inns of Law, parliaments, and others. This section is devoted to a brief account of how some of those institutional contexts have been imagined in contemporary legal theoretical literature, in ways that remind us of certain explanatory tendencies in tradition-oriented conceptions. Again, the discussion shall be selective, and focus initially on two recent works: Summers' *Form and Function in a Legal System*,<sup>802</sup> and Bell's

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<sup>801</sup> Samuel 2003, chapter 8.

<sup>802</sup> Summers 2006.

*Judiciaries within Europe*.<sup>803</sup> The final part of the section shall draw some contrasts between more general theories of institutional contexts that reveal the differences between tradition- and discourse-oriented explanations.

In *Form and Function in a Legal System*, Summers criticises theories of law that claim legal systems are ‘essentially a system of rules’,<sup>804</sup> identifying Hart and Kelsen as the primary exponents of that theory. His theory of form is applied to what he calls the diverse functional units of a system, including institutions, legal precepts (rules and principles), nonperceptual species of law (such as contracts), interpretive and other methodology, sanctions, and remedies.<sup>805</sup> According to Summers, one cannot reduce the explanation of these functional units into sets of rules. Rather, one must employ a form-oriented analysis that allows one to break down the various elements of functional legal units, which include its purposes, overall form, constituent features thereof, and complementary material.<sup>806</sup> The overall form that comprises all these elements is represented as ‘the purposive systematic arrangement of the unit as a whole: its organisational essence.’<sup>807</sup> Identifying and reflecting upon the components and their interrelations within a functional unit allows one, amongst other things, to ‘organise further the mode of operation and the instrumental capacity of the unit.’<sup>808</sup>

In the case of the legislature, for instance, ‘internal committee structures and operational procedures within a legislature must be designed and internally coordinated to facilitate the study, debate, and adoption or rejection of proposed

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<sup>803</sup> Bell 2006.

<sup>804</sup> Summers 2006, 3.

<sup>805</sup> *Ibid.*, 3-4.

<sup>806</sup> *Ibid.*, 5.

<sup>807</sup> *Ibid.*, 5.

<sup>808</sup> *Ibid.*, 6.

statutes.<sup>809</sup> Not only do the various kinds of forms within functional units need to be considered, but so do the relationships between functional units themselves: so, Summers says, there are devices that ‘consist of basic operational techniques that integrate and coordinate institutions, precepts, methodologies, sanctions and other functional units’, where each of those devices is a ‘formal organisational modality of wide-ranging significance.’<sup>810</sup>

Thus, unlike rule-oriented analysis, form-oriented analysis of a legal system does not analyse the ‘contents of those reinforcing rules that are taken to prescribe the facets of functional legal units generally.’<sup>811</sup> Instead, it recognises that there ‘can be no legal content without form’,<sup>812</sup> placing emphasis on the need for the rational design of the components of functional units in order to fulfil the purposes of those units. Without, for example, a well-designed floor debate, statutes are less likely to beget good laws.

A proper study of Summers’ book would need to engage in the dense detail of analysis of the formal components of an enormous range of functional legal units. For present purposes, the important point is that Summers provides us with a theoretical framework within which the activities of making, interpreting, applying and generally understanding the rules of law – the textual materials used as resources by legal workers – cannot be understood outside and in neglect of their institutional life.

Bell’s book, *Judiciaries within Europe*, though primarily involving a comparative study of the judiciary in France, Germany, Spain, Sweden and England, is significant for present purposes in its enunciation and endorsement of an institutionally-oriented methodology for the understanding and explanation of the

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<sup>809</sup> *Ibid.*

<sup>810</sup> *Ibid.*, 8.

<sup>811</sup> *Ibid.*, 10.

<sup>812</sup> *Ibid.*, 14; following Rudolf von Jhering.

operation of judicial work. There are, says Bell, three possible ways of approaching the understanding of judicial work: first, the personal perspective, ‘looks at the way individuals perceive their role and career’; second, the institutional perspective, ‘looks at the judiciary as a collective and examines the way in which the structure of the career and the organisation of the judges, as well as legal processes, affect the judiciary as a social institution’; and third, the external perspective, which ‘looks at the judiciary from the perspective of its impact on the wider world.’<sup>813</sup> Bell’s preference for the institutional perspective is not merely pragmatic: it is not, in other words, merely a matter of facilitating what he considers to be an insightful comparison between judicial institutions. The institutional perspective, he says, is fundamental because ‘it relates to the nature of law...because this is how one operates as a legal actor...and because it is how the law relates to the wider world.’<sup>814</sup> Like Summers, Bell argues that the law ‘is something more than simply a system of rules or legal standards...[it] is as much about practices, what people do, as about what they think.’<sup>815</sup>

Bell does retain some features we may readily identify under discourse-oriented conceptions. Thus, making reference to his previous work on *French Legal Cultures*,<sup>816</sup> and using the term ‘legal culture’, Bell asserts that ‘on the one hand, legal culture is a pattern of behaviour or an activity’ and ‘on the other hand, there is a set of ideas and values, which are communicated through language and signs that express attitudes and values towards the activity.’<sup>817</sup> The very fact that Bell adopts a split is instructive, and perhaps a sign that for him explanations of judicial work cannot rely solely on ‘patterns of behaviour.’

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<sup>813</sup> Bell 2006, 2.

<sup>814</sup> *Ibid.*, 6.

<sup>815</sup> *Ibid.*

<sup>816</sup> Bell 2001.

<sup>817</sup> Bell 2006, 6.

Discourse-oriented features are also visible in Bell's adoption of the idea of institutional facts, first introduced by MacCormick and Weinberger,<sup>818</sup> though he appropriates this to argue that 'law is an interpretive reality' that is preceded and pervaded by institutionally-based practices within the legal community.<sup>819</sup> Bell thus develops his own meaning of what 'an institutional fact analysis' entails. He argues that it allows one to focus 'attention on the judge as an actor whose actions are invested with meaning by the legal community through shared understandings', only 'some of which are expressed in legal norms.'<sup>820</sup> Further, it would be artificial to separate out, let alone focus exclusively on, the products of legal work – the judgements produced by judges – from the expectations placed upon those judges in specific institutional contexts that they act in. To do so would be to disregard the role of judges as institutional actors operating within a specific community and working within a specific institutional culture. In providing a picture of judicial work, a theorist must first understand the various kinds of institutional pressures on a judge to 'interpret legal texts and perform legal procedures in ways that are considered appropriate not just by her, but by the legal community.'<sup>821</sup> And, one must understand how judges come to acquire and internalise, over long periods of time, that sense of appropriateness, embodied in activities and practices that themselves give rise to 'norms and standards for why the activity should be conducted in the future.'<sup>822</sup> As Bell emphasises, 'this structure of organisational learning does not deny change, but seeks to understand how deeply change operates.'<sup>823</sup>

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<sup>818</sup> See, MacCormick, and Weinberger 1986.

<sup>819</sup> Bell 2006, 7.

<sup>820</sup> *Ibid.*

<sup>821</sup> *Ibid.*, 8.

<sup>822</sup> *Ibid.*, 11.

<sup>823</sup> *Ibid.*

Both Summers and Bell provide accounts that reveal tradition-oriented explanatory tendencies. Both depict legal work as enmeshed in the forms of institutional life. Other theories of institutional contexts, however, see such contexts in quite a different way. Rather than allowing for, and indeed giving much explanatory power to, lack of awareness by persons of how deeply influenced they are by certain forms of institutional life, these theories see institutions as occupied by deliberating actors, choosing between alternatives, sometimes rationally, at other times not (according to the theoretician's criteria). Thus, for example, Robert Goodin's introduction to *The Theory of Institutional Design*<sup>824</sup> speaks of the ambitions of theories of institutional design to 'give social agents good reasons for shaping institutions in some ways rather than others. Insofar as they are convinced of those arguments and moved by those reasons, those social agents will try to act upon those design prescriptions. Insofar as they succeed, institutions shaped by their actions will end up bearing something of the mark of those theories of optimal design.'<sup>825</sup> 'Good reasons' might be provided, for example, by constitutional rules, which, as 'nested rules', establish 'stable and predictable' patterns of behaviour by functioning as reasons for action for rational actors.<sup>826</sup> Similarly constrained – in a manner that will remind us of the problem of law's normativity for law-as-discourse conceptions – is the chapter in the above-mentioned collection by Philip Pettit, entitled 'Institutional Design and Rational Choice.'<sup>827</sup>

As a contrast from general social theory, consider Selznick's *Leadership in Administration*.<sup>828</sup> At the outset, Selznick makes a distinction between an organisation, which he sees as a 'formal system of rules and objectives' in which

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<sup>824</sup> Goodin 1996.

<sup>825</sup> *Ibid.*, 36-7.

<sup>826</sup> *Ibid.*, 23.

<sup>827</sup> See, Pettit 1996.

<sup>828</sup> Selznick 1957.

‘tasks, powers and procedures are set out according to some officially approved pattern’<sup>829</sup> and an institution, which ‘is more nearly a natural product of social needs and pressures—a responsive, adaptive organism.’<sup>830</sup> Selznick is keen to stress awareness of the “‘informal structure,” which arises as the individual brings into play his own personality, his special problems and interests.’<sup>831</sup> There is, of course, a formal structure or ‘formal relations’, but these ‘co-ordinate roles or specialised activities, not persons.’<sup>832</sup> The distinction between organisation and institution also performs another task for Selznick. It allows him to talk of what he calls ‘institutionalisation’, which is an ‘infusion of value’ in an organisation that occurs over time – thus, it is a story about the development and change of organisations into institutions. The proper study of institutions, for Selznick, ‘is in some ways comparable to the clinical study of personality. It requires a genetic and developmental approach, an emphasis on historical origins and growth stages. There is a need to see the enterprise as a whole and to see how it is transformed as new ways of dealing with a changing environment evolve.’<sup>833</sup>

Treating as it does the issue of leadership in administration, Selznick’s work is designed to be somewhat inspirational, so that it attempts to characterise a leader as ‘an agent of institutionalisation, offering a guiding hand to a process that would otherwise occur more haphazardly, more readily subject to the accidents of circumstance and history.’<sup>834</sup> Nevertheless, it makes use of ideas that feel at home in the treatment of institutional contexts in tradition-oriented explanations. These are ideas, furthermore, that may also remind us of Fuller’s insistence – and Selznick has

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<sup>829</sup> *Ibid.*, 5.

<sup>830</sup> *Ibid.*

<sup>831</sup> *Ibid.*, 8.

<sup>832</sup> *Ibid.*, 80.

<sup>833</sup> *Ibid.*, 141.

<sup>834</sup> *Ibid.*, 27.

many times acknowledged a debt to Fuller – that we ought to see an institution as ‘an active thing, projecting itself into a field of interacting forces, reshaping those forces in diverse ways in varying degrees.’<sup>835</sup> Fuller’s remarks, however, are also warning. On the one hand, we cannot see ‘every social arrangement or institutional practice’ as ‘a means to some end’<sup>836</sup> that we ourselves can foresee and set in advance. On the other hand, ‘we should not conceive of an institution as a kind of conduit directing human energies toward some single destination’,<sup>837</sup> as if the institution lay completely outside of our control. As is often the case, a balance is required.

### **IB2d. *Cognition, Imagination and Constraint***

Lingering in the back of some of the accounts about has been the idea of abstractions as, at best, crystallisations or partial formalisations of socially grounded and emotionally involved experiences. Elaborating on this feature, by reference to an impressively wide range of literature in philosophy, psychology, neuroscience and other fields, is Steven L. Winter’s *A Clearing in the Forest: Law, Life and Mind*.<sup>838</sup> At over 400 pages, it is the most authoritative pronouncement, by a legal scholar and theorist, of what is becoming known as Cognitive Legal Studies. Winter’s principal aim is to bring out the implications of that strand of cognitive studies that emphasises the importance of conceptual metaphors for pictures of legal work. These conceptual metaphors are ‘part of the unconscious rules of our language-game.’<sup>839</sup> Without them, Winter asserts, ‘we could not even think.’<sup>840</sup> If we can ‘perform the operations of “legal reasoning”’, says Winter, ‘it is because we have assimilated the tacit

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<sup>835</sup> Fuller 1981, 55.

<sup>836</sup> *Ibid.*, 49.

<sup>837</sup> *Ibid.*

<sup>838</sup> Winter 2001.

<sup>839</sup> *Ibid.*, 2.

<sup>840</sup> *Id.*



knowledge that makes the rules comprehensible, defines the patterns of legal inference, and enables the productivity of crucial legal categories.’<sup>841</sup>

Winter sets very ambitious aims for Cognitive Legal Studies. He thinks it can make tacit knowledge explicit.<sup>842</sup> He thinks it can ‘explain how we do what we do.’<sup>843</sup> Interestingly, and in a move pointed to throughout this thesis, Winter positions his theory in the middle of what he sees as two extremes, i.e., where, according to one, the object (the law) constrains the subject, and, according to the other, the subject must command the object.<sup>844</sup> There are three broad moves that he makes that believes allows him to assert that his theory goes beyond ‘the assumptions of subject-object dualism that frame much of the current legal debate.’<sup>845</sup> The three moves are: first, that human thought is irreducibly imaginative; second, that imagination is embodied, interactive and grounded; and third, that imagination operates in a regularly, orderly, and systematic fashion.<sup>846</sup>

Winter’s contribution is important for legal-work-as-tradition conceptions. The first of his above moves allows him to distance himself from those theories for whom cognition is ‘primarily representational, propositional, or computational’, replacing this image of cognition with one that is ‘dynamic and adaptive’, and ‘involves processes that are imaginative, associative, and analogical.’<sup>847</sup> His second move allows him to argue that ‘imagination...is dependent on the kinds of bodies that we have and on the ways in which those bodies interact with our environment’, and in doing so, helps him to assert that there is no such thing as a higher faculty of reason that is separate or in some sense prior or not built on and grounded in the contingency

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<sup>841</sup> *Ibid.*, 3.

<sup>842</sup> *Id.*

<sup>843</sup> *Id.*

<sup>844</sup> *Ibid.*, 4.

<sup>845</sup> *Id.*

<sup>846</sup> *Ibid.*, 6-7.

<sup>847</sup> *Ibid.*, 5.

of our experiences.<sup>848</sup> Finally, his last move – and one that may recall the anxieties of discourse-oriented explanations – allows Winter to allay concerns that imagination so conceived is not ‘structured,’ providing proof of such a structure in such ‘mechanisms’ and ‘mental operations’ as ‘basic-level categorisation’, ‘conceptual metaphor’, ‘metonymy’, ‘image-schemas’, ‘idealised cognitive models’, and ‘radial categories.’<sup>849</sup> These steps taken together are designed to topple the long-standing dominance of the ‘higher faculty of reason’ in the history of philosophy, and to present ‘a picture of human rationality that is bottom-up rather than top-down, imaginative rather than linear, flexible rather than definitional, and characterised by openness rather than closure.’<sup>850</sup>

The great bulk of the ideas discussed at length by Winter fall neatly under the legal-work-as-tradition conception: his claim, for example, that ‘there is thought without language’ and that ‘this is possible because thought originates in our sense of spatial and kinaesthetic orientation in the world’<sup>851</sup> is instructively at odds with those discourse-oriented theorists, like Williams or Pavlakos, who, as we saw above, have claimed that thought without language is impossible. Furthermore, his insistence that we understand the motivation that acts as a constraint on law-makers,<sup>852</sup> as ‘a function of the existing background of sedimented cultural practice and social experience: the customs, conventions, roles, routines, institutions, objects and other artefacts that compose the repertoire of which a society is constituted’<sup>853</sup> echoes the preceding section’s insights on institutional contexts. His overall definition of law as ‘the unmistakable product of human interactions as they are institutionalised first in social

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<sup>848</sup> *Ibid.*, 6.

<sup>849</sup> *Id.*

<sup>850</sup> *Ibid.*, 9.

<sup>851</sup> *Ibid.*, 23.

<sup>852</sup> *Ibid.*, 191.

<sup>853</sup> *Ibid.*, 192.

practice and then as cultural and legal norms<sup>854</sup> may remind us of many law-as-tradition oriented theorists, including, perhaps most obviously, Fuller. Winter does not, however, stress the importance of the diachronic dimension (as does Samuel) of the legal imagination – a dimension that is of great importance to the legal-work-as-tradition conception.

Much, if not all, of the ‘evidence’ in cognitive studies that Winter relies on is very recent and hotly disputed. Hardly any of the implications that cognitive scientists themselves have drawn from their empirical research have been taken seriously, or if taken seriously, not examined at great length, by the majority of philosophers, let alone legal theorists. It is telling that the only dedicated acknowledgement of Winter’s contribution in a law journal is by Mark Johnson, a philosopher Winter relies on extensively. Johnson endorses Winter’s contribution, and adds his own insights. He argues that legal concepts ‘grow out of our problematic, historically and culturally situated communal practices and institutions.’<sup>855</sup> He reminds us that although, legal concepts are in this respect ‘constrained by communally embedded understandings and practices’, they are also ‘open-ended in important ways that make it possible for law to grow in response to significant changes in human history.’<sup>856</sup> Johnson is also just as convinced as Winter of the truth of Cognitive Legal Studies, arguing that what he calls ‘legal fundamentalism’ (i.e., ‘literalist and objectivist theories of thought and language’) is not only ‘wrong because it depends on a seriously mistaken view of how the mind works’, but also ‘dangerous because it tries to force law into dichotomous modes of thought and absolutist models that ignore the embodied social and cultural

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<sup>854</sup> *Ibid.*, 193.

<sup>855</sup> Johnson 2002, 952.

<sup>856</sup> *Id.*

bases of human understanding and value.<sup>857</sup> These are strong statements and we need not endorse them in order to learn from the insights of Cognitive Legal Studies.

One can see echoes of Winter's ideas in the writings of other legal theorists. One obvious parallel is the concept of legal mentalité by Pierre Legrand. As Cotterrell neatly summarises it, the notion of a legal mentalité refers to 'a way of life, a means of interpreting social relationships, a component of an entire outlook, deeply rooted in all kinds of experience.'<sup>858</sup> What Winter adds, that Legrand doesn't have, is a detailed conception of this notion of 'experience' as embodied. Whether that provides further fodder for Legrand's anti-unification and anti-harmonisation stance<sup>859</sup> remains to be seen.

In his book, Winter argues that 'the relentless rationalism of standard legal thought represents a futile quest to define things and pin them down in the face of a reality that is change and adaptation.'<sup>860</sup> In her paper, 'Is Practical Reason Mindless?', Linda Ross Meyer is similarly critical of attempts to 'keep the world still in order to measure it.'<sup>861</sup> She uses this criticism to argue for a theory of adjudication that does not attempt to control what judges will do, but rather, to come to terms with the unavoidable 'uncertainty and handiwork' involved in practical reason.<sup>862</sup> The concept of 'handiwork', taken from Martin Heidegger, is particularly important for Meyer, and she uses it to argue that 'judging cannot be made entirely self-conscious or reflective...described by rules, or governed by rules',<sup>863</sup> and in an echo of Jackson and Samuel, she notes that to apply a rule 'presupposes that one has already "seen" it

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<sup>857</sup> *Ibid.*, 961.

<sup>858</sup> Cotterrell 2006, 103; see also, Legrand 1999.

<sup>859</sup> See, Legrand 1996.

<sup>860</sup> Winter 2001, 21.

<sup>861</sup> Meyer 1997-1998, 667.

<sup>862</sup> *Id.*

<sup>863</sup> *Ibid.*, 662.

as relevant to the case.’<sup>864</sup> Like Winter, Meyer believes that the obsession with control (Winter says that ‘the obsession of the law is control’)<sup>865</sup> together with prediction and rationalisation, is ‘coming into vogue within areas of legal doctrine.’<sup>866</sup> Not always are these criticisms altogether clear, but Meyer’s ultimate aim is a noble one: she hopes to make us more aware of the limitations of our pictures of judicial behaviour, as is evident when she says: ‘However interesting or illuminating the results of social science, they are always descriptions of something less than ourselves.’<sup>867</sup>

Section IA2 above mentioned Robertson’s argument, building on Fish, that there is no such thing as an unconstrained legal actor.<sup>868</sup> Like Meyer, Robertson is keen to leave plenty of room for uncertainty in adjudication, while also leaving room for non-deliberative resolutions of that uncertainty. Following Fish he asserts that that uncertainty is resolved by ‘enterprise-specific’ ways of ‘doing what comes naturally.’<sup>869</sup> Thus Fish is quoted with approval by Robertson: ‘When I use phrases like “without reflection” and “immediately” and “obviously” I do not mean to preclude self-conscious deliberation on the part of situated agents; it is just that such deliberations always occur within ways of thinking that are themselves the ground of consciousness, not its object.’<sup>870</sup> Like Winter, then, Robertson claims that there are always and already constraints, not all of which (in fact, little of which, we can be aware of), but unlike Winter, he does not find the source of these mainly in the conceptual metaphors that emerged from embodied experience, but from a ‘shared in-place background of goals, fears, hopes, values, etc.’<sup>871</sup>

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<sup>864</sup> *Id.*

<sup>865</sup> Winter 2001, 21.

<sup>866</sup> Meyer 1997-1998, 668.

<sup>867</sup> *Ibid.*, 667.

<sup>868</sup> Robertson 2007b.

<sup>869</sup> *Ibid.*, 276.

<sup>870</sup> Fish quoted in *Id.*

<sup>871</sup> *Ibid.*, 277.

The above provides an occasion to clarify that the legal-work-as-tradition conception does not rely exclusively on their being sub-conscious or even unconscious biases that determine judicial decisions.<sup>872</sup> Rather, what the legal-work-as-tradition conception emphasises is that legal workers come to acquire certain skills, habits and dispositions – certain ways of constructing, framing, etc., facts, or typical narrative images – by involvement in and exposure to the customs, practices and other forms of interaction in institutional contexts. The reference to a lack of awareness or self-consciousness, or even intentionality, that one sometimes sees mention of in accounts that are oriented towards tradition, is rather a marker for the inability to act completely without constraints (social, embodied, affective) while nevertheless not being determined by them. It serves to remind us that we cannot step outside our mind, and control our every thought as if each one of us was a puppeteer conducting a puppet.

James Boyd White, in a paper entitled ‘Legal Knowledge’, provides a version of the above when he says that ‘Legal knowledge is an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity which is itself not reducible to a set of directions or any fixed description.’<sup>873</sup> Himself known for his account of ‘legal imagination’,<sup>874</sup> Boyd-White asks us to conceive of legal knowledge as a ‘competence’, which ought to enable us to resist the tendency to objectify, reify and even commodify legal knowledge.<sup>875</sup> What is more likely is that theorists will continue to exchange visions of knowledge, and thus also legal work, some focusing on abilities, and others characterising those same abilities as merely

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<sup>872</sup> For this way of speaking see, Lane 2007.

<sup>873</sup> White 2001-2, 1399.

<sup>874</sup> See, White 1973.

<sup>875</sup> White 2001-2, 1396.

forewords (lurking in the background)<sup>876</sup> to their production in the form of discourses.

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<sup>876</sup> This way of speaking comes from Searle 1995, who, in chapter six of that work, speaks of ‘background abilities’, but nevertheless rests on the thesis that it is language that constitutes social reality. Searle’s writings on social ontology have influenced some legal theorists, such as, most prominently, MacCormick, but he has also begun to influence development economics: see, e.g., Smith et al 2008.

## IC. TENSIONS AND FUSIONS

Having now completed the account of tradition- and discourse-oriented explanatory paradigms of law and legal work, and before considering the implications of the discussion, it will be instructive to show how both orientations can appear in individual works of legal theory. In considering the five works below, the hope is that something of the usefulness of the above two explanatory paradigms can be revealed. No doubt these works can be read and learnt from in many ways (indeed, that is one of the most significant points stressed by this thesis), and the argument in the five sections below is that the tension between discourse and tradition is one of those ways. The five inquiries referred to below are: first, Elizabeth Mertz's account of anthropological linguistics; second, Nicola Lacey's attempt to fuse analytical jurisprudence with descriptive sociology; third, Roger Cotterrell's call for a sociological analysis of legal ideas; fourth, Neil MacCormick's *Institutions of Law*; and fifth, Patrick Glenn's *Legal Traditions of the World*. As we shall see, none of the above can be neatly packaged into either a tradition- or a discourse-friendly picture of law or legal work. All, however, can, be profitably read as oscillating between the two.

Before proceeding, it also ought to be noted that all theoretical pictures of law or legal work may contain some of the basic features of discourse and tradition explanatory paradigms. Indeed, as explanatory paradigms, they are not necessarily mutually exclusive. Rather, it is a matter of explanatory priorities: if a theoretical picture is, for example, discourse-oriented, it may contain features of both paradigms, while nevertheless placing explanatory priority on the basic features of the discourse explanatory paradigm.



## IC1. ANTHROPOLOGICAL LINGUISTICS

Elizabeth Mertz locates her conception of anthropological linguistics beyond, rather than between, what she refers to as the reflectionist and instrumentalist views of language. In the case of the first, reflectionist, view, language itself is seen to be ‘important only because it provides a window on social process; language is [here] understood to be a straightforward expression of its social context.’<sup>877</sup> According to the second, instrumentalist, view, ‘people use language transparently to achieve social goals...[where] by transparent we mean that there is no distinctive effect imputed to language; linguistic forms operate as tools through which actors achieve certain social results.’<sup>878</sup> It is a distinction that, as she recognises, harks back to Ferdinand de Saussure’s long-standing division between *langue*, that sense of language as an abstract system with its own dynamics, and *parole*, that sense of language ‘as an instrument effecting social ends.’<sup>879</sup>

The kind of anthropological linguistics that Mertz has in mind is not a mere combination of these formal and functional, or reflectionist and instrumentalist approaches to language. Rather, she says, there is a third way: an integrative approach that provides a picture of what she calls ‘socially grounded linguistic creativity.’<sup>880</sup> Mertz introduces this conception with a number of preliminary remarks. Anthropological linguistics, she asserts, reverses ‘the usual assumption in the philosophy of language and other traditions that the dominant function of language is conveying semantic information.’<sup>881</sup> ‘As a result’ of this assumption, she says, ‘a great deal of work on language structure has proceeded with a blind eye to the social

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<sup>877</sup> Mertz 1992, 417.

<sup>878</sup> *Id.*

<sup>879</sup> *Ibid.*, 414.

<sup>880</sup> *Ibid.*, 419.

<sup>881</sup> *Id.*

grounding of language.’<sup>882</sup> What we ought to recognise, she argues, is that for ‘language to be actually used—for the abstract system of language to be translated into speech—there is a necessary move to the indexical or social contextual realm.’<sup>883</sup> ‘Conveying semantic information is but one of the things that [language] does...it can also express emotion, maintain social distance, etc.’<sup>884</sup> Language functions indexically, she argues, and when it is, ‘semantics becomes a subset, a special case of pragmatics.’<sup>885</sup>

There are three senses in which we can, says Mertz, speak of linguistic creativity. First, there is the capacity of language ‘to refer to and represent itself (the “meta” level of language)’<sup>886</sup> – e.g., reading ‘portions of the Bill of Rights...in a questioning tone of voice, making questions of sentences that are written declaratively.’<sup>887</sup> The second sense is brought out when we see that ‘any particular event of speaking functions against a backdrop of “presupposed” social knowledge that can be specified ahead of time.’<sup>888</sup> The creativity here emerges not when we use say, an endearing term for a loved one, for the presupposed social knowledge to which Mertz refers already contains a norm according to which we use terms of endearment to those with whom we are intimate. On the contrary, creativity emerges precisely when we begin using endearing terms in official or other non-intimate contexts, at which point the use may be insulting.<sup>889</sup> We can use the same example to bring out the third creative aspect. When I use a formal title with a friend – I call him, say, Mr President – it is not just that I am breaking a presupposed social norm; I am

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<sup>882</sup> *Ibid.*, 415.

<sup>883</sup> *Ibid.*, 420.

<sup>884</sup> *Id.*

<sup>885</sup> *Id.*

<sup>886</sup> *Id.*

<sup>887</sup> *Ibid.*, 421.

<sup>888</sup> *Id.*

<sup>889</sup> *Id.*

also, Mertz insists, creating ‘a social reality that did not exist prior to the act of speaking.’<sup>890</sup> Of course, to pick out such a creative use, the observer must know (though the observer may not be aware that she has such knowledge till after the creative use is noticed) something not only of the norms for the use of formal titles and nicknames, but also something of the previous relationship between the speakers, the current speech situation, and so on.<sup>891</sup>

What all these examples suggest, for Mertz, is that ‘if we focus only on the content (semantics) rather than the form (pragmatics) of speech, we miss a great deal about the creative function of language.’<sup>892</sup> We need to rid ourselves, says Mertz, quoting James Boyd White, of the ‘habit of mind...that our most important uses of language are fundamentally propositional in character, indeed that any meaningful piece of discourse asserts (or denies) that such and such is the case.’<sup>893</sup> Rather, what we need, again following White, is a way of ‘imagining language not as a set of propositions, but as a repertoire of forms of action and of life.’<sup>894</sup> Importantly, this is a conception that operates in time, and thus in the face, according to Sally Engel Merry, of uncertainty and contingency.<sup>895</sup> Language use is not studied retrospectively, where an ‘analysis might make it seem as if a certain interpretation and concomitant result was inevitable’, but rather, ‘from the perspective of a person in the process of an ongoing linguistic exchange, [where] all manner of meanings could potentially result from their choices in speaking.’<sup>896</sup> Mertz argues that such a framework of socially grounded linguistic creativity in the face of contingency and uncertainty ‘provides a compelling reason for paying attention to the language of law’, doing so in a way that

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<sup>890</sup> *Ibid.*, 422.

<sup>891</sup> *Id.*

<sup>892</sup> *Id.*

<sup>893</sup> White quoted in *Id.*

<sup>894</sup> White quoted in *Id.*

<sup>895</sup> Mertz is reviewing Merry 1990.

<sup>896</sup> Mertz 1992, 422-3, ff16.

conveys how ‘language is structured in crucial ways by its social context, and social power is implication at every level of contextual influence on language (sometimes all the more powerfully at the subtle levels of pragmatic structuring that are not easily accessible to conscious awareness).’<sup>897</sup> What is interesting for present purposes is the way that Mertz oscillates between the importance of discourse – she endorses, for example, White’s point that ‘our purposes, like our observations, have no prelingual reality, but are constituted in language’<sup>898</sup> – and the importance of tradition, i.e., all those no doubt infinite constructions of the pragmatic context under the scrutiny of which language itself seems to disappear.

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<sup>897</sup> *Ibid.*, 423.

<sup>898</sup> *Ibid.*, 422.

## IC2. ANALYTICAL JURISPRUDENCE AND DESCRIPTIVE SOCIOLOGY

Nicola Lacey eases us into her call for the analysis of the institutional conditions of the existence of legal rules by revealing what she takes to be the limitations of the work of Hart. In her earlier biography of Hart,<sup>899</sup> Lacey had mentioned – and gave some personal reasons for understanding – Hart’s much-discussed claim, in *The Concept of Law*, that the book was an exercise in descriptive sociology.<sup>900</sup> In a subsequent paper, entitled ‘Analytical Jurisprudence and Descriptive Sociology Revisited’, Lacey tackles the question more philosophically, and shows why and how she thinks that Hart does not fulfil his promise.<sup>901</sup> Lacey presents the following as the paradox for those, like Hart, who adopted the ordinary language school of philosophical analysis: ‘if language speaks for itself,’ she notes, ‘it is not clear that philosophical analysis is either necessary or capable of being applied to linguistic usage without doing violence to its meaning. For philosophical analysis is itself a distinctive form of usage. How, then, can linguistic usage criticise the incoherence of the linguistic practice that it takes as its material?’<sup>902</sup> Lacey’s question is poignant, for it is indeed a neat move of the ordinary language philosophers to argue that in studying allegedly ordinary language use they are really describing the reality of some social phenomenon. By providing a meaning – as it is allegedly available on a perusal of the way it is used in ordinary, everyday life – of the word courtesy, we can, it is said, understand the social phenomenon of courtesy. However, as Lacey asks, ‘when

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<sup>899</sup> Lacey 2004.

<sup>900</sup> Hart 1961, v.

<sup>901</sup> Lacey 2006. Lacey’s view is not necessarily endorsed here. As noted above in section IA1e, Hart’s claim needs to be read against Kelsen’s more metaphysical model of legal theory.

<sup>902</sup> *Ibid.*, 965.

we claim that our account is an account of a concept or phenomenon that has a real social existence, what, precisely, are the criteria of accountability involved?’<sup>903</sup>

Lacey looks specifically at Hart’s writings on responsibility,<sup>904</sup> and on his work, with Tony Honoré, on causation.<sup>905</sup> In the case of the latter, as Lacey puts it, ‘Hart and Honoré simply inundate us with a huge amount of actual linguistic data. This data is almost exclusively drawn from appellate case law.’<sup>906</sup> In doing so, Lacey laments, Hart and Honoré do not provide the reader with ‘a systematic analysis of the institutional, practical, professional, or social context in which that legal language was used.’<sup>907</sup> They offer no ‘exploration of the social practices or forms of life within which the causal language game is embedded.’<sup>908</sup> They reduce, she continues, ‘linguistic usage to a body of doctrine rather than seeing it as a social practice that takes place within a context, the specific nature of which requires investigation because it inflects the relevant concepts.’<sup>909</sup> In both the case of causation, and in the case of his writings on responsibility, Hart, says Lacey, ‘never looked at the relationship between language and behaviour; between linguistic usage and context.’<sup>910</sup> In that respect, she argues, Hart ought not to be seen as ‘having had an institutional or social theory of law.’<sup>911</sup> He analyses law ‘as a body of doctrine rather than as a social practice, and “usage” is understood as the language that makes up the doctrines.’<sup>912</sup>

Lacey proposes the following alternative – an alternative, she argues, more inspired by Ludwig Wittgenstein’s approach to language, in opposition to that of J.L.

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<sup>903</sup> *Id.*

<sup>904</sup> See, Hart 1968.

<sup>905</sup> See, Hart and Honoré 1959.

<sup>906</sup> Lacey 2006, 967.

<sup>907</sup> *Id.*

<sup>908</sup> *Id.*

<sup>909</sup> *Ibid.*, 969.

<sup>910</sup> *Ibid.*, 968.

<sup>911</sup> *Id.*

<sup>912</sup> *Id.*

Austin's: it is an approach that would explore, for example, '1) the institutional factors that restrict the extent to which judges will appeal to pragmatic or policy arguments, 2) their sensitivity to the need to legitimate their decisions, 3) their system-specific understanding of their constitutional role.'<sup>913</sup> 'The illumination of legal practices', Lacey argues, 'lies not merely within an analysis of doctrinal language; it lies equally with an attempt to locate the analysis within some general account of the history and social role of the institutions and the power relations within which that usage takes place.'<sup>914</sup> Lacey extends her general view to that of an analysis of the institutional factors shaping the legal concept of responsibility.<sup>915</sup> Finally, Lacey argues that her way of integrating analytical jurisprudence with descriptive sociology has implications for a jurisprudence that engages, as she argues the best kind does, in a normative and not merely descriptive analysis:

If conceptual ideas have institutional and other conditions of existence—if, for example, a notion of capacity responsibility can only be realised in criminal law on the basis of certain institutional developments and in the context of a cluster of social and cultural conditions—this has clear implications for the pursuit of our normative project. To the extent that the ambition of special jurisprudence is to affirm, and not merely to delineate, certain key legal concepts, we must surely be interested in the conditions that facilitate—or hamper—their institutional realisation.<sup>916</sup>

Lacey, then, seeks to provide us with a method via which we can resist the 'radical separation between the analytical and the contextual', and thus protect us against the occlusion of our understanding of law that, she argues, is a direct result of such a separation.<sup>917</sup> Like Mertz, though in a different way, Lacey falls somewhere between the discourse and tradition explanatory paradigms: there are such things as legal ideas

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<sup>913</sup> *Id.*

<sup>914</sup> *Ibid.*, 969.

<sup>915</sup> *Ibid.*, 969-75.

<sup>916</sup> *Ibid.*, 975.

<sup>917</sup> *Ibid.*, 979.

and legal institutional practices, but both depend on each other in maintaining their existence.



## IC2c. SOCIOLOGY OF LEGAL IDEAS

In his *Ethics and the Limits of Philosophy*, Bernard Williams concludes his criticism of the linguistic turn in moral philosophy in a manner instructive for our understanding of both Lacey's and Roger Cotterrell's integration of tradition- and discourse-friendly elements in legal theory:

It is an obvious enough idea that if we are going to understand how ethical concepts work, and how they change, we have to have some insight into the forms of social organisation within which they work. The linguistic approach does not, at some detached level, deny this, but it does not ask any questions that help us gain that insight or to do anything with it in philosophy if we have gained it. Its concentration on questions of logical analysis have helped to conceal the point, and so has its pure conception of philosophy itself, which indeed emphasises that language is a social activity but at the same time, oddly enough, rejects from philosophy any concrete interest in societies. But it is at least potentially closer to some understanding of the social and historical dimensions of ethical thought than some other approaches, which see it entirely in terms of an autonomous and unchanging subject matter. To draw attention to our ethical language can at least hold out the prospect of our coming to think about it, and about the ethical life expressed in it, as social practices can change. The linguistic turn could have helped us, even if it has not actually done so, to recognise that ethical understanding needs a dimension of social explanation.<sup>918</sup>

Though long, it is worth including this quote in full. Both Lacey's and Cotterrell's views can be seen as seeking to resist the criticism made by Williams, by locating the study of legal ideas within the forms of social organisation within which they work. Cotterrell is against explanations of law in terms of sociological terms alone: he argues that such explanations 'make law disappear.'<sup>919</sup> 'A sociological understanding of legal ideas', he says, 'does not reduce them to something other than law. It expresses their social meaning as law in its rich complexity.'<sup>920</sup> By 'law', then, Cotterrell clearly means to refer to a more or less coherent body of doctrine. Indeed, he places great emphasis on the importance of coherence: he argues, for example, that

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<sup>918</sup> Williams 2006a (1985), 131.

<sup>919</sup> Cotterrell 2006, 49.

<sup>920</sup> *Ibid.*, 54.

it is ‘essential that understanding of law should be systematic and general, theorised and organised.’<sup>921</sup> This is necessary, he says, ‘at the very least... to manage both legal doctrinal and social complexity.’<sup>922</sup>

But it is important to see that Cotterrell is not wholly comfortable within the law-as-discourse explanatory paradigm. ‘Undoubtedly,’ he acknowledges, ‘law is presented professionally as a more or less unified, specialised discourse’, but it ‘is an intellectually vulnerable, open discourse, liable to invasion by many kinds of ideas, including sociological ones.’<sup>923</sup> If there is such a thing as law’s truth, and the nature of that truth appears in the form of a unified, distinctive discourse, then we ought to recognise that that truth is ‘a contingent feature of particular social environments.’<sup>924</sup> ‘Ultimately,’ he suggests, law ‘is given discursive coherence and unity only because its intellectual insecurity, its permanent cognitive openness, is stabilised by political fiat.’<sup>925</sup>

However, we ought not to think that the sociological analysis of legal doctrine – an analysis also advocated by Durkheim, one of Cotterrell’s philosophical heroes – is all one way. We ought not to think, in other words, that sociology itself is not informed by the construction of social reality by law.<sup>926</sup> Law, he says, ‘defines social relations and influences the shape of the very phenomena sociology studies’;<sup>927</sup> it ‘constitutes important aspects of social life by shaping or reinforcing modes of understanding of social reality.’<sup>928</sup> In that sense, he argues, ‘theorising [legal] ideas is not a separate enterprise from theorising the nature of social life.’<sup>929</sup> ‘Sociological

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<sup>921</sup> *Ibid.*, 57.

<sup>922</sup> *Id.*

<sup>923</sup> *Ibid.*, 53.

<sup>924</sup> *Id.*

<sup>925</sup> *Id.*

<sup>926</sup> *Ibid.*, 49.

<sup>927</sup> *Ibid.*, 54.

<sup>928</sup> *Id.*

<sup>929</sup> *Ibid.*, 57.

analysis,' he says, needs 'to see legal ideas as forms of organisation of the social world.'<sup>930</sup> As a 'field of experience', he says, law 'is to be understood as an aspect of social relationships in general, as wholly concerned with the coexistence of individuals in social groups.'<sup>931</sup> It is because Cotterrell sees the function of legal discourse as concerned with social relationships and as constituting social reality, that he argues that the sociology of legal ideas is already the sociology of social life itself.

But that body of legal ideas, though clearly powerful, is not to be 'considered merely as disembodied doctrine.'<sup>932</sup> Rather, 'law appears as doctrine produced in, embodied in and legitimating institutional practices.'<sup>933</sup> Like other normative systems, law consists, according to Cotterrell, 'of rules, concepts, and principles and is distinguished from' those other normative systems 'in degree rather than in kind by the existence of an institutional structure for the development and organisation of doctrine.'<sup>934</sup> Law may appear as a discourse, but it is 'rooted in community life'; it is 'an ever-changing web of norms expressing and influencing the interactions of many different networks of community.'<sup>935</sup> It judges the particular norms that arise in the community within which it thrives 'in terms of its existing doctrine, and it represses, adopts, integrates, modifies or comprises with these norms.'<sup>936</sup> Cotterrell, perhaps even more so than Mertz and Lacey, moves back and forward, dialectically, between the discourse and tradition paradigms, using one family of ideas to prop up the other, finding the ceaseless oscillation between the two revealing. He does not seem to go as far as Tamanaha<sup>937</sup> or Schauer,<sup>938</sup> who argue for the social construction of the concept

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<sup>930</sup> *Ibid.*, 50.

<sup>931</sup> *Ibid.*, 55.

<sup>932</sup> Cotterrell 1983, 251.

<sup>933</sup> *Id.*

<sup>934</sup> *Id.*

<sup>935</sup> Cotterrell 2006, 107.

<sup>936</sup> *Id.*

<sup>937</sup> See, Tamanaha 2001.

<sup>938</sup> See, Schauer 2005.

of law – as Tamanaha puts it, ‘law is whatever people identify and treat through their social practices as “law.”’<sup>939</sup> He does not appear to be as concerned with what counts as law. A body of legal doctrine is already there for Cotterrell; he is more interested in how it operates. And, for him, it operates, or at least so it seems from Cotterrell’s language, relatively autonomously (as above, he says ‘*it* judges’, and ‘*it* constitutes social reality’, etc.). But, that operation itself would not be possible without a specific social environment, a community, a form of social organisation that both nurtures it and is itself created by it.

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<sup>939</sup> Tamanaha 2001, 194.

## IC4. INSTITUTIONS OF LAW

Neil MacCormick's latest book, his magnum opus, *Institutions of Law: an Essay in Legal Theory*,<sup>940</sup> is a work of incredible scope and ambition, covering vast areas of the law (including private, public, criminal, and constitutional law). The discussion below cannot hope to do it justice. Nevertheless, it will be instructive to consider parts of the first four chapters – the most generally philosophical, which set the tone for the book – from the perspective of the interaction of the tradition and discourse explanatory paradigms.

It is noteworthy to begin with MacCormick's invocation of the distinction between brute and institutional facts. It is noteworthy, in light of the aims of the present discussion, because the centrality of that distinction – of fundamental significance to MacCormick's earlier work (with Weinberger)<sup>941</sup> – is somewhat displaced by another distinction made in this work, i.e., that between norm-users and norm-givers. As we shall see, that latter distinction can be profitably understood under the rubric of the tradition and discourse explanatory paradigms. The distinction between brute and institutional facts is that brute facts are 'sheer physical facts',<sup>942</sup> while institutional facts are ones 'that depend on the interpretation of things, events, and pieces of behaviour by reference to some normative framework.'<sup>943</sup> The key move from seeing something as an institutional fact, rather than a brute one – as in the move from seeing a piece of colourful plastic and recognising it is a credit card – is enabled, indeed presupposes, a 'body of legal or other rules',<sup>944</sup> including, for example, those concerning consumer credit. Without these rules, MacCormick says, 'the physical object would lack or lose its current *meaning*. Interpretation of the things

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<sup>940</sup> MacCormick 2007.

<sup>941</sup> MacCormick and Weinberger 1986.

<sup>942</sup> MacCormick 2007, 11.

<sup>943</sup> *Id.*

<sup>944</sup> *Id.*

and their use in the light of the relevant rules is what makes such physical objects have the meaning they have.’<sup>945</sup> Recognising institutional facts, then, is a method for revealing the ontology of law, and thus also, though no doubt somewhat imperfectly, the ‘omnipresent and inherent elements of social reality.’<sup>946</sup>

It is interesting to pause here and consider a recent debate between Searle – the most well-known proponent of the idea of institutional facts – and Dreyfus. Searle, as is well known, finds classical theories of social reality – such as those offered by Max Weber, Georg Simmel, Emile Durkheim, and Alfred Schutz – deficient for ‘taking language for granted.’<sup>947</sup> They ‘presuppose’, says Searle, ‘the existence of language and then, given language, ask about the nature of society.’<sup>948</sup> But this move, argues Searle, has ‘things back to front.’<sup>949</sup> Consider the following passage:

You cannot begin to understand what is special about human society, how it differs from primate societies and other animal societies, unless you first understand some special features of human language. Language is the presupposition of the existence of other social institutions in a way that they are not the presupposition of language. This point can be stated precisely. Institutions such as money, property, government and marriage cannot exist without language, but language can exist without them.<sup>950</sup>

Even those sociological theorists who have taken language seriously – such as Pierre Bourdieu, Jürgen Habermas, and the linguistic anthropologists (such as Mertz, as above) – have, according to Searle, neglected to recognise the ‘constitutive role of language.’<sup>951</sup> Recognising that constitutive role, in turn, allows us to see, Searle says, that ‘human societies have a *logical structure*, because human attitudes are

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<sup>945</sup> *Ibid.*, 11-12.

<sup>946</sup> *Ibid.*, 12.

<sup>947</sup> Searle undated (recently published in Searle 2008), 3

<sup>948</sup> *Id.*

<sup>949</sup> *Ibid.*, 4.

<sup>950</sup> *Id.*

<sup>951</sup> *Id.* As we have seen, however, this criticism is not valid in the case of Mertz, nor, in the case, for example, of Cotterrell.

constitutive of the social reality in question and those attitudes have propositional contents with logical relations.<sup>952</sup> The challenge, as Searle sees it, for any theory of social reality, is ‘to expose those relations.’<sup>953</sup> Institutional facts, such as money, a football game, a piece of private property, a marriage or a government, exist only insofar as they are represented as existing; and they are only represented as so existing when thoughts represent them; those thoughts, in turn, for Searle – taking us back to our earlier discussion of the language of thought hypothesis – are dependent on language. The flame of the explanatory paradigm of discourse could not burn brighter.

It is instructive to consider Dreyfus’ critique of Searle’s approach to social reality. Dreyfus does so in a paper entitled ‘The Primacy of Phenomenology over Logical Analysis.’<sup>954</sup> Dreyfus takes issue with Searle’s location of the determination of action within an intentionally formed propositional attitude. He replaces it, by drawing on the work Maurice Merleau-Ponty and Martin Heidegger, with what he calls the phenomenology of everyday absorbed coping. Within such absorbed coping, a person need not be aware, nor be striving for, success: rather, the person, having acquired a certain degree of the relevant skill in question, feels what is appropriate in the situation at hand. Intention may still be an important part of the explanation of the behaviour – but it is more like an occasion, a trigger, rather than an accompanying element all the way through the action. The key point is that we learn, over more or less long periods of time, to sense the appropriateness of certain ways of doing, coping, in particular environments – as we might recall, these are all central features of a tradition-friendly epistemology.

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<sup>952</sup> *Ibid.*, 5.

<sup>953</sup> *Id.*

<sup>954</sup> Dreyfus undated.

What, according to Dreyfus, follows for an account of social reality? For Dreyfus, adopting the perspective of everyday absorbed coping, allows us to see that ‘social norms need not be *constituted* the way institutional facts are; all that is needed to *produce* a social norm is collective agreement in judgments in the Wittgensteinian sense, i.e., the coordination of the tensions and tension-resolutions people socialised into a certain culture feel in specific social situations.’<sup>955</sup> Dreyfus provides the following example – one that will be useful for bringing out MacCormick’s notion of norm-users:

To see how this works, we can return to the phenomenon of standing the appropriate distance from others. A child learns such a social norm from her parents without the parents even sensing they are inducting her into the practice. Simply, if the child stands too close or too far away, the parent feels a tension and corrects the impropriety by moving closer or backing away. The child then ends up feeling comfortable in each specific situation only when standing the culturally appropriate distance. Thus, from the phenomenological point of view, a certain type of physical distance doesn’t *count as* the appropriate distance for the person to stand; the person is just drawn to the comfortable and therefore appropriate place.<sup>956</sup>

To put it more generally, the ‘sense of appropriateness of certain comportments is produced by socialisation without there needing to be any type of brute fact and without there needing to be any linguistically describable status assigned to it.’<sup>957</sup> It is Searle, says Dreyfus, who has things back to front. It is ‘social skills that create and sustain norms underlie and make possible social institutions...the sense of what is appropriate sets up the power relations which in turn give institutions the powers codified as rights and obligations.’<sup>958</sup> Institutional facts ‘evolve out of social norms’;<sup>959</sup> ‘money grows out of and makes sense in terms of the practice of barter’;<sup>960</sup>

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<sup>955</sup> *Ibid.*, 23.

<sup>956</sup> *Id.*

<sup>957</sup> *Ibid.*, 24.

<sup>958</sup> *Ibid.*, 26.

<sup>959</sup> *Ibid.*, 27.

<sup>960</sup> *Id.*



social norms are ‘already involved in using something as a medium of exchange’;<sup>961</sup> ‘even in cases of highly codified institutions’, says Dreyfus, ‘such as property, the institution must draw on the social norms out of which it evolved if it is to make sense to people and so be accepted and perpetuated. Our sense of the appropriate ways of using things and letting others use them or excluding others from using them underlies our practices for dealing with property, and, in the end, underlies the laws spelling out property relations in terms of rights and duties. Indeed,’ says Dreyfus, ‘it is this underlying practical sense of the “spirit” of our institutions that allows judges to extend the laws codifying our practices to new cases.’<sup>962</sup>

The oscillation here between discourse (emphasised by Searle) and tradition (emphasised by Dreyfus) plays itself out in MacCormick’s definition of law as ‘institutional normative order’ – a definition that is, at its base, rooted in the notion of norm-users. MacCormick uses the example of forming a queue, or the practice of queuing, to extrapolate his notion. The practice of forming a queue, he says, ‘occurs very frequently in the everyday experience of contemporary human beings.’<sup>963</sup> It is ‘a matter of common experience.’<sup>964</sup> ‘To the extent that people “take their turn” in a queue or line, there is an orderly movement through the checkout, or on to a tramcar or bus.’<sup>965</sup> Of course, queuing need not work perfectly: either because ‘there may always be somebody with brass neck enough to jump the queue’ or because ‘it is sometimes all right to go to the head of the line without waiting your turn’ (e.g., in cases of medical emergency).<sup>966</sup> Nevertheless, even if it may not work perfectly,

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<sup>961</sup> *Ibid.*, 28.

<sup>962</sup> *Id.*

<sup>963</sup> MacCormick 2007, 14.

<sup>964</sup> *Id.*

<sup>965</sup> *Id.*

<sup>966</sup> *Id.*

‘there is some minimum threshold of compliance below which the practice would be unsustainable’.<sup>967</sup>

It would be literally impossible to be the only person that ‘takes her turn’ because ‘turns’ require a mutually co-ordinated practice of two or more. When a substantial majority of potential competitors for a certain opportunity fails to acknowledge turn-taking, it amounts to pointless self-abnegation if one or a few act as though most others were ready to take their turn.<sup>968</sup>

From this it follows, says MacCormick, that ‘turn-taking or queuing is...normative’.<sup>969</sup>

For where there is a queue for something you want, you ought to take your turn in it, and people who do take their turn do so because in their opinion that is what one ought to do—that is, ought to do in the given context. Such action-guiding ‘ought’ alerts us to the presence of some kind of norms, and to the normative character of the opinions that people hold in such a setting.<sup>970</sup>

The practice of queuing, then, is normative, but it is also a kind of normative *order*. ‘People’s positioning in a queue,’ says MacCormick, ‘is ordered, not random.’<sup>971</sup> But this is not an order that can be studied “externally” and reported statistically; it is a “normative order” because, or to the extent that, one can account for it by reference to the fact that actors are guiding what they do by reference to an opinion concerning what they and others ought to do.<sup>972</sup> The ‘result’, says MacCormick, ‘is a kind of common action by mutually aware participants.’<sup>973</sup>

Importantly, MacCormick, unlike Searle, does not rely on language to develop his account of norm-users in normative orders. ‘There can be normative order’, he says, ‘without explicitly formulated norms.’<sup>974</sup> Perhaps partly due to his self-imposed requirement of mutual awareness – on some level of self-consciousness, rather than,

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<sup>967</sup> *Id.*

<sup>968</sup> *Id.*

<sup>969</sup> *Ibid.*, 15.

<sup>970</sup> *Id.*

<sup>971</sup> *Ibid.*, 16.

<sup>972</sup> *Id.*

<sup>973</sup> *Id.*

<sup>974</sup> *Ibid.*, 18.

as Dreyfus would have it, an everyday absorbed coping, which may, at best, involve the exercise of motor-intentionality – MacCormick continues to explain normative order via implicit norms. ‘People know how to queue,’ he says ‘and can tell cases of queue-jumping, and protest about them, even if they have never articulated exactly what their governing norm is.’<sup>975</sup> What explains this phenomenon is that ‘implicit norms are in fact largely observed and respected, without any other element of supervision, direction or enforcement than that constituted by a pressure of common (not necessarily either universal or identically expressed) normative opinion among those who interact with each other.’<sup>976</sup>

Interestingly, then, though he posits the possibility of a stratum of social behaviour that need not rely on pre-articulated norms, MacCormick nevertheless feels tempted to explain the order as one governed by mutual awareness of an implicit norm. Providing such an explanation, allows for an easier transition to the articulation of rules of conduct for the behaviour in question. It is an easier transition because those rules can now be seen not as imposed from above, but as, in some sense, emerging from the practice of a normative order – those rules are an attempt, no doubt imperfect, and no doubt appearing in a formulation that not everyone might agree with, to make explicit the implicit norm or norms that norm-users had been following all along – without feeling the need for articulation. The transition doesn’t always occur – as MacCormick points out, ‘normative order can exist in some cultural and social settings on the basis simply of mutual belief and inexplicit norms with overlapping mutual understanding and interpretation.’<sup>977</sup> But sometimes it does become necessary to avoid ‘problems of a kind apparently endemic in informal

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<sup>975</sup> *Ibid.*, 15.

<sup>976</sup> *Ibid.*, 18.

<sup>977</sup> *Ibid.*, 19.

orders'<sup>978</sup> 'by resorting to the issuance of expressly articulated norms, making explicit what is to be done or decided in expressly foreseen circumstances.'<sup>979</sup>

MacCormick's elaboration, then, of normative orders, remains wedded to the attraction of the explanatory power of discourse. Normativity is still best explained, he seems to think, by rule-following, though the element that he adds is that those rules need not be explicit, they need not be pre-articulated. In introducing, at the foundation of his theory, the primacy of norm-users – human beings are, by their nature, he suggests, norm-users, and they are so before they are norm-givers – MacCormick does edge closer to the explanatory value of tradition. But the notion of tradition is subordinated to that of order, and to that of normative order, which, in MacCormick's view, require some element of relatively conscious rule-following: discourse, then, is still there, operating to explain behaviour; to restrict, if you prefer, the explanation of behaviour to that of mutually aware persons interacting with each other. But that discourse is, self-consciously in MacCormick, a kind of fiction – it is implicit, unarticulated. It is as if MacCormick does everything he can to resist conceptualising tradition without discourse – for, he seems to believe, the only explanation on offer by the paradigm of tradition is a normatively reductive one, i.e., it would reduce the explanation of behaviour to a matter of externally observing regularities, to reporting on behaviour statistically. To be rescued, the very concept of normativity for MacCormick must be action-guiding, operating *ex ante*, capable of explaining micro-actions – all the hallmarks of an explanation of social behaviour based on the discourse paradigm. However, at the same time, the move to make norm-users primary recognises the explanatory limitations of discourse – at least in its

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<sup>978</sup> *Ibid.*, 24.

<sup>979</sup> *Ibid.*, 14.

articulated form – for how else to explain the phenomenon of queuing, when there are no express rules that can be said to govern it?

The same kind of problems – and a similar kind of oscillation between tradition and discourse – appears in chapter four, which deals with rules and habits. In light of some recent work by Soosay (who was discussed above), MacCormick opens his chapter with an acknowledgement that ‘there is a case for the re-evaluation of “habits” in life and in law.’<sup>980</sup> His principal strategy is to incorporate the role of habits in his theory of law as institutional normative order by arguing that ‘institutionalised legal orders depend on habits about rules, that is, on habitual references in some contexts to special sorts of text like those in the statute book and those in law reports.’<sup>981</sup> MacCormick elaborates on this as follows:

This involves the maintenance of a standing practical attitude towards institutionally established rule-texts...when these are cited and brought to attention as relevant to some context.... The habit or practical disposition of personnel engaged in legal work must include a disposition to give respect to and seek respect for any relevant provisions found in the texts of valid statutes and binding precedents, read in the light of the principles and values to which they give expression.<sup>982</sup>

Having acknowledged such a role for habits, MacCormick goes on to recognise that there are two kinds of gap between habits and law (conceived of as institutionalised normative order). The first is that knowledge of the law on the books does not capture the knowledge and, equally, respect of the law in practice: thus, the success of lawyers in practice ‘derives from a great deal more practical knowledge, know-how, and wisdom than could be gleaned from however voluminous a grasp of the whole body of statute law, whether or not supplemented with voracious reading of cases and precedents.’<sup>983</sup> We have already seen this observation being made in the context of a

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<sup>980</sup> *Ibid.*, 67.

<sup>981</sup> *Ibid.*, 69.

<sup>982</sup> *Id.*

<sup>983</sup> *Ibid.*, 71.

tradition-friendly picture of legal work. The second gap is the efficacy gap, namely, that:

However legal professionals and legal officials negotiate their way around the law, it is very much an open question how much of the official law is any part of the working consciousness of laypersons. It is also questionable to what extent their sense of what is right and proper depends on, and how far it diverges from, what the official law enjoins either in the sense of abstract texts or in the mediated form filtered through professional and official practice.<sup>984</sup>

We have observed this gap too – doing so, for example, above by reference to Giudice’s distinction between norm-subjects and norm-subjected (in section IA1d). MacCormick addresses the difficulties arising from these gaps by pointing out that they are not always as large as may think. ‘There is,’ he insists, ‘a large conceptual framework [provided by law] which is available to people to appeal to, and to which they do frequently appeal.’<sup>985</sup> People generally know they have rights, he says, and they know there are things that are crimes, and they can generally discern their own belongings from those of others.<sup>986</sup> Further, states increasingly acknowledge ‘international standards of acceptable conduct’, and corporations ‘acknowledge legal conditions for recognition of corporate activity wherever they engage in trade.’<sup>987</sup> Finally, says MacCormick, there is such a thing as a ‘civil society’ – such that ‘civility can obtain among persons who are relative [or complete] strangers to each other.’<sup>988</sup> All these elements encourage us to ‘consider whether [our] lived experience is not the best evidence [we] could have that law is at work to some reasonable extent in the state [we] live in.’<sup>989</sup>

The same move, then, is made in conceiving of the relationship between habits and rules, as is made at the level of institutionalised normative order and normative

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<sup>984</sup> *Id.*

<sup>985</sup> *Id.*

<sup>986</sup> *Ibid.*, 71-2.

<sup>987</sup> *Ibid.*, 72.

<sup>988</sup> *Id.*

<sup>989</sup> *Ibid.*, 74.

order *simpliciter*. Habits are certainly there, but their explanatory role is limited, at least in legal theory, for providing an account of our capacity to follow rules. We are norm-users, and the concept of a norm for MacCormick is, at bottom, a rule, even if it is not articulated.

## IC5. LEGAL TRADITIONS OF THE WORLD

Finally, this section considers Patrick Glenn's *Legal Traditions of the World*.<sup>990</sup> Glenn's book is just as, if not more, magisterial in its scope as MacCormick's. Once again, given that scope, the focus is limited to the first few theoretical chapters. There is no discussion, therefore, of Glenn's application of the concept of a legal tradition to specific legal traditions. Rather, the focus is on how Glenn defines and explains the concept of legal tradition itself.

It will be useful to do so, even if only because, as Glenn notes in his response to a symposium on the book in the *Journal of Comparative Law*,<sup>991</sup> 'the criticism most frequently encountered in the symposium...is that the concept of legal tradition is not adequately defined, such that one cannot ascertain whether one is before the legal, or not.'<sup>992</sup> Glenn confesses to finding this criticism 'surprising, given the range of experience of the commentators, since each,' he says, 'appears to me, is reverting to a uniquely Western insistence on separation, here of law from all else.'<sup>993</sup> The insistence on such a separation, he continues, 'is found nowhere else in the world, or more precisely nowhere outside of the Western legal tradition, such that the absence of a clear separation between legal and other traditions may be seen not as a problem but as a virtue, a necessary reflection of interdependence.'<sup>994</sup> In responding to the criticism, then, Glenn finds himself resorting to a metaphilosophical analysis of jurisprudential inquiries. He argues that the criticism emerges from the tendency, dominant in Western legal theory in the last two hundred years, to formulate 'the concept of a legal system,' which insists 'on clear, or purportedly clear, identification

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<sup>990</sup> Glenn 2007a.

<sup>991</sup> Glenn 2007b; the symposium is edited by Nicholas Foster – see Foster 2006.

<sup>992</sup> Glenn 2007b, 70.

<sup>993</sup> *Ibid.*, 71.

<sup>994</sup> *Id.*



of law.<sup>995</sup> The notion of a system – and, to some extent also, he suggests, the notion of a culture – has operated, ‘since the so-called Enlightenment,’ with ‘a certain bias against the idea of tradition.’<sup>996</sup> Glenn expressed dissatisfaction with those notions of tradition that have sought to explain it by reference to habit or ‘the process of transmission of information from generation to generation.’<sup>997</sup> These formulations, he suggests, represent ‘ongoing bias against the idea [of tradition], equating it with unreflective behaviour or a current process.’<sup>998</sup> Indeed, we have already witnessed this to some extent in MacCormick’s work, whose account of normative order is dependent on mutual awareness of implicit or explicit rules, and one that, equally, reduces the explanatory paradigm of tradition to the external observance of regularities, reported statistically.

Glenn presents his concept of tradition as not falling prey to this trap, to this ongoing bias. Tradition, he says, is ‘best thought of as normative information, the object of transmission rather than the process itself, or unreflective reaction to it.’<sup>999</sup> He argues that this conception allows us to better appreciate ‘the tradition itself, the process of its transmission, and contemporary reaction to it.’<sup>1000</sup> Such a concept, he says, is to be contrasted with that of a legal system, which ‘allows us to understand nothing but contemporary momentary (Western-style) systems, whose origins are entirely obscured, or presumed.’<sup>1001</sup> In doing so, it also allows us, he suggests, to ‘contextualise the Western concept of legal system’ itself, ‘explaining it no longer as an ultimate and autonomous form of legal development, but as simply a tradition

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<sup>995</sup> *Id.*

<sup>996</sup> *Id.*

<sup>997</sup> *Id.*

<sup>998</sup> *Id.*

<sup>999</sup> *Id.*

<sup>1000</sup> *Id.*

<sup>1001</sup> *Ibid.*, 72.

amongst others, which must both justify itself to its adherents and explain itself to other traditions.<sup>1002</sup>

How is, as MacCormick would be tempted to ask, such a conception of tradition normative? Where is the normativity in Glenn's concept of tradition? Glenn answers in the following way:

Tradition is unquestionably normative. It tells us how we should act. Its normativity derives from the collective judgement, exercised over time, that the content of the tradition is of value and should be of contemporary application. Tradition as a general concept makes no further claim, however, of binding... It is simply available, as normative information. Nor does it claim to be complete in terms of dictating specific conduct.<sup>1003</sup>

It is indicative of Glenn's approach – as it is of others who have taken seriously the explanatory value of the paradigm of tradition – that he resists the sense in which any realm of normative information determines our actions, or is autonomous to such a level that it does all the work for us when we behave. Rather, as Glenn wishes to say, normative information is best seen as simply being there, as available, and as, generally, thought to be valuable.

It is no small part of the very availability of this move for Glenn that he rejects any straightforward or exhaustive relationship between law and language. Legal traditions, he says, answering Andrew Halpin's charge that he restricts the concept of tradition to a language game,<sup>1004</sup> is 'best thought of as a repository of normative or substantive thought, and not simply the language of its expression.'<sup>1005</sup> It is precisely Glenn's ability to resist the language of thought hypothesis, which also allows him to resist the exclusive location of normativity within the formal and abstract values of a system. He says, in his chapter on the civil law tradition, 'there is ongoing challenge, notably in cognitive science affirming the primacy of human thought (we always still

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<sup>1002</sup> *Id.*

<sup>1003</sup> *Ibid.*, 73.

<sup>1004</sup> See, Halpin 2006.

<sup>1005</sup> Glenn 2007b, 75.

have to decide what to do, in a way uncontrolled by language) and in the idea that the civil law is the result of a process of collective, and learned, deliberation.<sup>1006</sup> It is no coincidence that Glenn cites Christian Atias' *Epistemologie juridique*<sup>1007</sup> – a central reference, also, for Samuel's *Epistemology and Method in Law*,<sup>1008</sup> which was discussed above under the legal-work-as-tradition picture (in section IB2b). Under this kind of picture, legislation and its interpretation 'are simply means of continuing the discussion, and not in any way means of bringing to an end or limiting its breadth.'<sup>1009</sup>

It is also no coincidence that Glenn places emphasis on learning to value a tradition, and on doing so, furthermore, in epistemic communities. Adopting a perspective in which we learn to value a tradition, allows Glenn to introduce a cleavage between the representation of a tradition as authoritative, and it actually being so. The latter, under this conception, dissolves. As Glenn notes, 'the information of traditions thus represents authority, but it is not necessarily authoritative. Absent instruments of authority, or of dominance or of repression, the authority of tradition is persuasive only. It does not bind, in the sense of somehow automatically ensuring adherence.'<sup>1010</sup> There is, moreover, a critical ethical message in leaving such room for contingency – as Scott Veitch points out in a recent book, there is an inherent danger in a theory of law that merges the enforcement capacity of legal orders with their claim to correctness.<sup>1011</sup> Adopting such a perspective, encourages blindness as to the capacity for law to legitimate suffering, to subsume our ethical awareness to adherence with the rules. Once, under this conception, some

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<sup>1006</sup> Glenn 2007a, 154-5.

<sup>1007</sup> See, Atias 1985.

<sup>1008</sup> See, Samuel 2003.

<sup>1009</sup> Glenn 2007a, 155.

<sup>1010</sup> *Ibid.*, 40.

<sup>1011</sup> Veitch 2007. This aspect of the argument cannot be discussed here, but is discussed elsewhere: Del Mar 2008.

behaviour can be categorised as having adhered to the formal requirements of a legal rule, it cannot be judged unfavourably: the merging of law's power with its claim to correctness leaves no room for judgement outside the law. In this way, dwelling within the law, we can disavow our responsibilities. However, once we see, as Glenn does, that the representation of authority does not automatically translate into authoritativeness, we leave room for judgement – a judgement that may be informed by the availability of normative information, but not exhausted by it.

Glenn's ability to leave room for contingency – where what we ought to do is not exhausted by that which is generally represented as authoritative – is also a legacy of his engagement with the philosophy of time. Glenn resists any notion of static or linear time. He argues that this concept of time has been adopted by the western world because it allows us – in a typically self-aggrandising manner – to see human rationality as 'effecting change, making a difference.'<sup>1012</sup> We ought to see, he says, the very idea of the primacy of the present as a certain kind of tradition.<sup>1013</sup> Once we adopt the alternative view, of a non-linear, encompassing view of time, we are enabled to see tradition 'as transmitted information, an ongoing bran-tub churned by new generations, with no inherent elites or hierarchy', and we are able to see how 'the linking of tradition with stability becomes less obvious and less defensible. Tradition' then 'becomes rather a resource from which reasons for change may derived, a legitimating agency for ideas which, by themselves, would have no social resonance.'<sup>1014</sup>

And yet, in all of this, Glenn does not retain some elements of the explanatory paradigm of discourse. 'That which is brought', he says, 'from the past to the present,

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<sup>1012</sup> Glenn 2007a, 26.

<sup>1013</sup> *Id.*

<sup>1014</sup> *Ibid.*, 23.

in a particular social context, is information.<sup>1015</sup> Tradition is not in the doing, but in the way of doing. ‘Acts or decisions, once they take place’, he notes, ‘disappear forever if they are not translated into communicable information.’<sup>1016</sup> Of course, we ought not to forget the essential element that we are not thereby forced to act upon that information (to neglect to remember this would be to neglect to remember how Glenn leaves room for contingency, as above), but it remains the case that, for Glenn, without the existence of that communicable information ‘there can be no concept of tradition, only a grim reality of human entropy.’<sup>1017</sup>

What is the content of that information? That depends, says Glenn, on the particular tradition. It need not be rules or instructions, or indeed facts – it all depends on the specific tradition. Indeed, it is ‘the choice of the information to be captured by a tradition’ that is thus fundamental to the tradition itself.<sup>1018</sup> Is that choice determined by tradition itself? No – definitely not, says Glenn: the ‘pool of information captured by the adherents of a particular tradition...cannot be entirely controlled by the tradition itself.’<sup>1019</sup> Rather:

Different levels of understanding, different means of interpretation of existing sources, different opinions, will all contribute to a variety of statements of current elements of a tradition, in one or other of the means of capture. The variety of information captured will increase as the tradition increases in size, each generation capturing its own understanding of, and adherence to, the tradition. The reporting of current cases, in law, is an example of this large, reflective, looping characteristic of a living tradition. Very large, ancient traditions will thus constitute vast repositories of information. A given tradition emerges as a loose conglomeration of data, organised around a basic theme or themes, and variously described as a ‘bundle’, a ‘tool-box’, a ‘language’, a ‘seedbed’, a ‘rag-bag’ or ‘bran-tub’. In the language of modern information theory, a tradition will always include a great deal of noise, not essential for understanding the primary message of the tradition.<sup>1020</sup>

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<sup>1015</sup> *Ibid.*, 13.

<sup>1016</sup> *Id.*

<sup>1017</sup> *Id.*

<sup>1018</sup> *Ibid.*, 14.

<sup>1019</sup> *Id.*

<sup>1020</sup> *Ibid.*, 15.

The difficulties involved in understanding Glenn's concept of legal tradition arise from his willingness to leave room for contingency, and from his desire to escape the problems of adopting either one of the two extremes: either of a necessarily authoritative discourse, or of a supposedly chaotic or entropic realm of activity. The first is too rational, painting too determinative a picture of our behaviour, i.e., of behaviour as reliant solely on our adherence to rules. The second, on the other hand, is too much of a black-box about which, it seems, we can say nothing at all. This view does, however, it must be said, come perilously close to that of MacCormick's. Glenn is perhaps more careful to leave room for a determination of what we ought to do that is not already determined by the formal properties of a discourse. But, like MacCormick, he focuses his attention, at least in part, on the moment or moments of choice – of that which is captured as normative information by tradition. Glenn holds on to a realm of being – the realm of information, itself relatively autonomous, stretching over time, beyond generations – though he subjects it and surrounds it with innumerable qualifications. Even though traditions are undefinable, incomplete,<sup>1021</sup> they are subject to a process of selection<sup>1022</sup> – a process that Glenn refers to as that of 'massaging' a tradition. We engage in such a process of massaging a tradition, says Glenn, 'in order to decide on personal conduct. We must each decide on the constraint which traditionally eventually lays upon us.'<sup>1023</sup> Such a process may not be evident to any one individual engaging in it, says Glenn, 'but it is forever present.'<sup>1024</sup> Some of us will be more readily disposed to the constraints of the tradition; others will find themselves amongst the 'not vigorous opponents to it'; the 'massage,' it seems,

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<sup>1021</sup> *Ibid.*, 15.

<sup>1022</sup> *Ibid.*, 17.

<sup>1023</sup> *Ibid.*, 20.

<sup>1024</sup> *Id.*

‘occurs between both groups.’<sup>1025</sup> A tradition may never reach definitive form, but, nevertheless there is a sense in which it ‘is...in the present, a series of interactive statements of information.’<sup>1026</sup> The ‘totality of information in the tradition is constantly undergoing a process of review, appreciation and ongoing communication.’<sup>1027</sup> That ‘totality’ is by no means one capable of being subjected to some formal coherence or consistency, but nevertheless, it remains the case that we can speak of that totality as existing at any one moment.

Glenn here walks a fine line, a line finer, perhaps, than that walked by Mertz, Lacey, Cotterrell or MacCormick, but a line nonetheless. As soon as he finds himself on the side of discourse – of a totality of information, of a sense of presence – he reminds us we must not subject that totality or presence to any logical system or stability. Equally, as soon as he find himself edging closer to entropy, he introduces elements of order, of the disposition of certain groups or social contexts to respond to tradition in a certain way, of a process of selection, of choice, of determination (for example, by reference to the above-cited means of interpretation, opinions, or other methods of capture). To make this point is not, unlike the members of the symposium on the book, to criticise the coherence of Glenn’s notion of a legal tradition. Rather, it is to use the devices introduced above – namely, that of tradition and discourse – to reveal the explanatory tensions inherent in the concept as Glenn uses it. Glenn is careful, as are Mertz, Lacey, Cotterrell and MacCormick, to avoid the problems of going too far down either the discourse- or the tradition-friendly line of conceiving of law and legal work. But in avoiding those problems he does present a moving target. It may be that that is the reason for the symposium participants’ expression of frustration with what they saw as the lack of utility of the tool for comparative legal

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<sup>1025</sup> *Id.*

<sup>1026</sup> *Id.*

<sup>1027</sup> *Ibid.*, 22.

scholarship, or its alleged conceptual imperialism; that, rather than what Glenn sees as the Western legal theoretical tradition of seeking to separate law from everything else – for identifying what counts as law and what does not.



## **II. TOWARDS THE INCOMPLETENESS OF THEORETICAL PICTURES**

One ever-present feature of the above discussion has been the formation of a theorist's own view on the back of an avoidance of what the theorist characterises as two extremes in the history of the relevant inquiry. In other words, what we have seen throughout, is that the process of coming to understand the history of the relevant inquiry in a certain way is also a process during which one's own predilections for certain problems, methods, and insights is formed. This does not need to be stated as a hypothesis to be proven: it is sufficient to point to a tendency, or perhaps a usual occurrence, in the advanced education of a theorist.

Given that observation, if it is possible to show that any understanding of the history of a relevant inquiry is itself incomplete – that it is one out of many possible ways of understanding that history – then it would appear to follow that any one picture that emerges from that understanding will be incomplete.

There is one obvious way to show that any understanding of the history of a relevant inquiry is itself incomplete. It has already been observed above that the theorists discussed in the above history themselves used other concepts to characterise that very same history. Unless there is a way to show those theorists were mistaken, the matter appears to stand proven: the above understanding of the history of jurisprudential inquiry is incomplete, in the same way that any of the other theorists' divisions that were mentioned are incomplete.

Although this seems, at first blush, like a good argument, the problem is that a stubborn theorist could reply: 'your history may be incomplete, but mine is not; mine is a truthful, accurate, adequate history, and it is the only one that can claim such a status.' What are we to say to such a claim?

Another obvious way to bring out the incompleteness of the first part of the thesis, would be to say that it is itself discursive, namely, that as a history, it is incomplete because it uses as its basic data other texts, and not, say, the socio-historical contexts in which the inquiries were produced, or the biographical contexts of the authors, and so on. Once again, however, a stubborn theorist might say: 'but that only shows that your history is incomplete, not that all such histories, or indeed all theoretical inquiries, are incomplete.' Once more, then, what are we to say to such a claim?

There are at least three responses to the stubborn theorist, each of which shall be examined below. The first response is to try to show that truth can be the aim, perhaps a necessary aim, of an inquiry – not only one's own, but anyone's – but that this is not incompatible with the adoption of an attitude to the results of one's own theory as incomplete. The second response is to show that the results of one's inquiry are never complete not for the prosaic reason that more can always be added, more references included, sentences refined, but for the more fundamental reason that an inquiry only ever appears complete to one when (and only when) one does not problematise its central terms – often the terms employed in the articulation of the insights reached by the inquiry. The third response is even more metatheoretical, and also somewhat more tendentious. This response appeals to the limitations of the mode one is in when one theorises. The theoretical life is an intensively self-reflective form of life. The suggestion made is that that mode itself tends to influence theorists to look for and attempt to locate the presence and importance of self-reflexivity. The three responses are divided below into three sections, respectively.

There is a point to be made about the second and third responses. These responses do not set out to prove that all theoretical pictures are incomplete. If that

were possible, the responses would be undermining the central argument, suggesting that they have managed to offer a complete inquiry for the incompleteness of all inquiries. The aim of the second and third responses is more modest: whereas it is the aim of the first to show that a theorist can adopt such an attitude (that the results of one's inquiry are incomplete), the second and third responses are designed to show the theorists some good reasons for adopting that attitude. To repeat, this is not a case where proof is possible; it is, at best, a matter of persuasion.

## **IIA. TRUTH AND INQUIRY**

The central organising aim of part one of this thesis was to show that all theoretical pictures of law and legal work are oriented in such a way that they place explanatory primacy on ideas that fall either under the explanatory paradigm of discourse or the explanatory paradigm of tradition. Some individual works, it was argued, may contain elements of both, but they do not transcend those paradigms. Now, if this was the central organising aim, and if one accepts the argument of the above discussion, then one may conclude that it has already been shown that any one picture of law and legal work will be incomplete. What such an argument misses, however, is the very premise from which it begins. The premise is that the results of the above inquiry are an adequate, truthful and accurate account of the history of jurisprudential inquiries. In other words, to make the argument canvassed in this paragraph would be self-defeating.

There is a way to reconcile this seemingly intractable dilemma. It is to say that it may very well be unavoidable, in the pursuit of a certain inquiry – such as to set out the history of the traditions of accounts of law and legal work – to be oriented by the aim of producing a truthful, adequate and accurate account. There is nothing to stop

one from having such an aim, and indeed, it may very well be one without which the inquiry itself would not get going. However, and critically, there is also nothing that can stop one, once one has reached the ‘completion’ of one’s inquiry (the matter of ‘completion’ is returned to in the second section below), to say that what one has produced is incomplete. This is exactly the thought that the second part of this thesis seeks to encourage.

In their lively debate, published as *What’s the Use of Truth?*,<sup>1028</sup> Pascal Engel and Richard Rorty provide a window onto the long-standing debate in contemporary philosophy over the role of truth in inquiry. Engel’s contribution first characterises Rorty’s position and then responds to it. According to Engel, Rorty argues there is no distinction that can usefully be made between truth and justification – ‘truth’ is a way of speaking that functions as ‘a rhetorical pat on the back’ or ‘a compliment.’<sup>1029</sup> In this respect, says Engel, Rorty not only disagrees with philosophers who claim that truth is secured by some criteria of correspondence or correctness, but also disagrees with those who, like C.S. Peirce, Hilary Putnam, and Crispin Wright, see truth as ‘rational acceptability at the limit of inquiry’ or those, like Habermas, who conceive of truth as ‘ideal convergence within a communicational community.’<sup>1030</sup> Thus, summarising Rorty’s views, Engel suggests that for him truth is ‘neither a norm nor an ultimate goal. It cannot be a norm in the sense of that which regulates inquiry because it is unknowable. And it cannot be an ultimate goal in the sense of being an intrinsic value (although it can have an instrumental value).’<sup>1031</sup>

According to Engel, then, Rorty takes it that because truth cannot be a property of a set of propositions (say), so truth has only, and at best, an instrumental

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<sup>1028</sup> Rorty and Engel 2007.

<sup>1029</sup> *Ibid.*, 8.

<sup>1030</sup> *Ibid.*, 9.

<sup>1031</sup> *Ibid.*, 10.

value (e.g., the pursuit of democracy or solidarity, improving the quality of our conversations, etc.), and that, therefore, there is no sense in which we can say, or ought we to say, that truth is either the norm of inquiry or its aim. Engel's strategy, in reply to Rorty, is to hold on to the distinctions between truth as a property, truth as a norm, and truth as an aim. In essence, Engel defends the idea that truth is best thought of as a norm (of assertions and beliefs) – he says, for example, that truth is a norm of belief 'in the sense in which, for any belief whatsoever, it is an objection against this belief to say that it is false and that it is normal (in the sense that it is the rule) to try to revise it'<sup>1032</sup> – and although he recognises that it does not follow from this that truth either has 'an intrinsic value and must be respected and sought under all circumstances' or that it is 'the goal of inquiry, the supreme epistemic value',<sup>1033</sup> he nevertheless finds it difficult to repress the worry that without truth as an intrinsic value and supreme epistemic value, not only would our striving for democracy and solidarity (say) suffer, so would the virtues of sincerity and accuracy in the practice of inquiry.

Engel's tripartite distinction between truth as a property, norm and aim is useful, but nevertheless skirts over two important distinctions. The first distinction is the difference between a first person and a third person account of the function of truth-as-a-norm. As above, Engel refers exclusively to the third person perspective in bringing out the notion of truth-as-norm. One can see this in the quotes above, but also in Engel's challenge to Rorty to 'deny that the notion of truth plays a central role in the overall system that allows us to express our beliefs through linguistic communication and to conceive of our beliefs as rational.'<sup>1034</sup> The judgement of another that our belief is false ought to make us revise our belief, and normally does

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<sup>1032</sup> *Ibid.*, 21.

<sup>1033</sup> *Ibid.*, 26.

<sup>1034</sup> *Ibid.*, 16-17.

so. When it does not, we are either insincere or deluded.<sup>1035</sup> What this misses is the possibility of the first person perspective, i.e., of a norm as an attitude one adopts to oneself.

The importance of the second distinction comes out in Engel's criticism of Rorty's argument that it follows from the proposition that truth is not a property of any one set of propositions, assertions, beliefs or the results of certain inquiries that truth cannot be a norm, and that it should not be the aim, of inquiry. What this distinction skirts over is the *ex ante* and *post factum* distinction. Both norm and aim, as used by Engel, are essentially *ex ante*: truth-as-norm dictates that when someone tells us (in keeping with the third person perspective) that our belief (or assertion, etc.) is false (i.e., does not contain the property of truth) we revise that belief (i.e., we use that judgement to change what we will believe in the future) for that very reason (and no other reason); truth-as-aim, on the other hand, is *ex ante* by definition.

Put together, what these important distinctions, skirted over by Engel, yield, is another perspective on the debate of the role of truth in inquiry, namely, the first person *post factum* perspective. It is exactly this position that is emphasised in the second part of this thesis. What this perspective raises is the question of the attitude that I, myself, as a theorist, can and ought to take to the results of my inquiry. This question is quite separate from whether, either as a theorist (generally, or as someone engaged in a theoretical inquiry concerning the concept of truth), I can, must or should accept that truth is a norm that regulates inquiry, that truth is the aim of inquiry or that the results of the inquiries of others are capable of truth.

Although these are the major distinctions, there is a further distinction that ought to be mentioned. In some points in Engel's discussion, Engel presents the ideas

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<sup>1035</sup> *Ibid.*, 21.

of truth-as-aim-of-inquiry and truth-as-value (or epistemic value, or supreme epistemic value) as equivalent. This is liable to lead to confusion. The concept of an aim and a value are quite different concepts. The concept of an aim may be purely descriptive: the argument could be that a theorist cannot help but be oriented, in the process of inquiry (or perhaps, more generally, a person producing beliefs or making assertions), to truth, i.e., to the way things really are or what is the case. The concept of truth-as-a-value, however, can either suggest that it is worthwhile for us to have the aim of truth as the aim of inquiry (i.e., that the process would be invaluable without that aim), or that it is valuable that truth is a property of our inquiries either because our inquiries would not be valuable if they could not attain the property of truth, or that only those inquiries that do not attain the property of truth are valuable.

The position taken here, as amongst all these, insofar as this is relevant for the present discussion, is as follows. One does not have to come to a stance on the debate over whether or not truth is a property of the inquiries of others, including jurisprudential inquiries, in order to adopt an attitude, in accordance with the first person post factum perspective, thanks to which one can acknowledge that the results of one's own inquiries are incomplete.

It may very well be the case, though nothing discussed here rests on the viability of this argument, that we cannot help, as theorists in pursuit of an inquiry, but to pursue the truth, i.e., we cannot help but to try to describe the way things are or what is the case, or, if we are prescribing, we cannot but help assume certain things about the way things or what is the case. It does not follow from this belief, even if it were somehow possible to prove, that truth ought to be the standard of evaluation of inquiries or that we ought to think recourse to that standard accounts well for how communities of inquirers regulate themselves. This second part of the thesis does not

mean to impose any way of speaking about inquiries or to impose a standard thanks to which we can evaluate or justify them. The interest of this part is much more modest: it is to encourage the adoption of the attitude to our own inquiries in which we acknowledge the incompleteness of that which our own efforts produce.

The other half of the debate, mentioned in the above book, is the contribution made by Rorty. However, Rorty's own position is better expressed, at least for my purposes here, in an article entitled 'Philosophy as a Transitional Genre.'<sup>1036</sup> Most probably written after the debate, referred to above, between Engel and Rorty held in the Sorbonne in 2002, Rorty acknowledges Engel's argument, though not without some disparagement. He says, 'One of the principal achievements of recent analytical philosophy is to have shown that the ability to wield the concept of "true belief" is a necessary condition for being a user of language, and thus for being a rational agent.'<sup>1037</sup> That acknowledgement, however, does not change his view of 'Truth' and how we ought to treat it. On the contrary, he prefers to stick to the 'old Nietzschean story about how "Truth" took the place of "God" in a secular culture, and why we should get rid of this God-surrogate in order to become more self-reliant.'<sup>1038</sup> More clearly and more relevantly for my purposes here, Rorty argues that 'the question "Do you believe that truth exists" is shorthand for something like "Do you think that there is a natural terminus to inquiry, a way things really are, and that understanding what that way is will tell us what to do with ourselves?"'<sup>1039</sup> The view that answers 'yes' to this question is what he calls the search for 'redemptive truth.' The following passage will illustrate this nicely:

I shall use redemptive truth for a set of beliefs that would end, once and for all, the process of reflection on what to do with ourselves. Redemptive truth

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<sup>1036</sup> Rorty 2004.

<sup>1037</sup> *Ibid.*, 6.

<sup>1038</sup> *Ibid.*, 4.

<sup>1039</sup> *Ibid.*, 6.



would not consist in theories about how things interact causally, but instead would fulfil the need that religion and philosophy have attempted to satisfy. This is the need to fit everything – every thing, person, event, idea and poem – into a single context, a context that will somehow reveal itself as natural, destined, and unique. It would be the only context that would matter for purposes of shaping our lives, because it would be the only one in which those lives appear as they truly are. To believe in redemptive truth is to believe that there is something that stands to human life as elementary physical particles stand to the four elements – something that is the reality behind the appearance, the one true description of what is going on, the final secret.<sup>1040</sup>

Rorty's argument is partly historical – he says, for example, that 'Intellectuals of the West have, since the Renaissance, hoped for redemption first from God, then from philosophy, and now from literature',<sup>1041</sup> partly a thesis about philosophy – i.e., he argues that 'The premise of philosophy is that there is a way things really are – a way humanity and the rest of the universe are and always will be, independent of any merely contingent human needs and interests';<sup>1042</sup> and partly a warning and a prescription:

To give up the idea that there is an intrinsic nature of reality to be discovered either by the priests, or the philosophers, or the scientists, is to disjoin the need for redemption from the search for universal agreement. It is to give up the search for an accurate account of human nature, and thus for a recipe for leading the good life for man.<sup>1043</sup>

The above quotes serve as good source material for the clarification of the view presented here. It could be claimed, on the back of the argument for incompleteness and in a way that may seem to echo Rorty's thinking, that insofar as theorists hope to make a contribution to questions concerning how we ought to lead our lives and govern each other, they ought to give up the idea of there being an accurate, genuine, sincere, and true picture of human nature, one that needs no revision, and thus one that one can use confidently, and continuing using confidently, in pronouncing public policy. However, the resemblance with Rorty's view here is mistaken. Rorty argues

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<sup>1040</sup> *Ibid.*, 7.

<sup>1041</sup> *Ibid.*, 8.

<sup>1042</sup> *Ibid.*, 11.

<sup>1043</sup> *Ibid.*, 24.

that we both ought to give up the possibility of an accurate picture that needs no revision and that we ought to give up the search for such a picture. As has already been suggested with respect to Engel's views, however, neither argument needs to be accepted in order to support the argument being conveyed here, namely, that we can and ought to take such an attitude to the results of our own inquiries that acknowledges their incompleteness. Similarly, adopting such an attitude does not force us to accept Rorty's arguments that there is no such thing as truth, or that we ought to give up the search for it.

The above does not pretend to be making a contribution to the complex and long treatment of the concept of truth in philosophy of the sciences or social sciences, or in metaphilosophy. Such treatments have often been waged at the level of whether or not inquiries in science and social sciences can produce truths, or whether they can produce objective truths, and whether any of the truths or objective truths it produces are endangered by the 'involvement' of the theorist – and of course, ceaseless debate about how we should characterise that 'involvement' and the implications of characterising it in such-and-such a manner. What one could state, though this is not defended here, is that debates over the status of the insights produced by scientific and social scientific inquiry are, at bottom, debates about what attitudes we ought to adopt to the examined life and its yield. Views, such as Karl Popper's, for example in *Conjectures and Refutations*,<sup>1044</sup> that 'there are all kinds of sources of our knowledge; but *none has authority*',<sup>1045</sup> and that '*the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability*',<sup>1046</sup> but that, nevertheless, '*science is capable of real discoveries*',<sup>1047</sup> are consumed with the difficulties and nuances with

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<sup>1044</sup> Popper 2002.

<sup>1045</sup> *Ibid.*, 32.

<sup>1046</sup> *Ibid.*, 48.

<sup>1047</sup> *Ibid.*, 157; original emphasis.

just how much we can expect from scientific and social scientific inquiry and how should we approach doing it, using it and reflecting upon it. What the present discussion hopes to achieve is to suggest that one can (and perhaps one inevitably does) pursue an inquiry with the belief that one can (and thereby also be motivated in accordance with the belief that one can) produce a ‘real discovery’, but that this is compatible with a post factum attitude one can take to one’s efforts that acknowledges the product of those efforts being incomplete.

We have come to the point of the discussion where it is necessary to show a good argument for adopting the attitude that the results of one’s own inquiry are incomplete. Before going on to do so, however, one further point needs to be made. This thesis does not engage with the arguments made as part of the contemporary debate concerning the methodology of jurisprudence. This is not, however, an oversight. Although it is reasonable to believe – and this belief has indeed been expressed in the first part of this thesis – that any one theoretical picture of law and legal work is not capable of locating, for all times and all places, the necessary and sufficient conditions for the existence of, or an adequate explanation of, or even a paradigmatic or central case of, law or legal work – because, on the basis of the first part, all such pictures place explanatory emphasis in different places, and are oriented to give priority to certain problems, methods or modes of explanation – the basic thesis defended here does not depend on the success of that argument.

In other words, this thesis does not need to make an argument as to whether it is possible to identify necessarily true features of law or adequate explanations of its nature,<sup>1048</sup> or whether we ought to use the standard of truth to evaluate the results of

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<sup>1048</sup> For a useful overview of this literature, see Priel 2007.

jurisprudential inquiries.<sup>1049</sup> All that is needed is to show is that it is possible and reasonable for one to adopt an attitude to the results of one's inquiry as being incomplete. Similarly, the argument of this thesis does not depend on the success of the idea that there is irreducible plurality or diversity among theories of law and legal work. At the same, this thesis is not in any way a challenge to the different ways in which various other theorists have characterised the pluralism of jurisprudential inquiries.<sup>1050</sup> The point, in short, in all of this, is that the second part of this thesis suggests that it matters what attitude one adopts to the results of one's own inquiry. If anything, the acknowledgement that the results of one's inquiry are incomplete is an attitude that can and ought to lead one to be more careful, more circumspect, about evaluating the results of the inquiries of others.

## **IIB. MEANING IN USE**

What good reasons might one have for adopting an attitude that acknowledges the incompleteness of the results of one's own inquiries? This section and the next attempt to offer two sketchy responses to that question. The argument made in this section is as follows. The terms and phrases one uses in one's inquiry acquire their meaning *in use*, i.e., they are meaningful insofar as one does not problematise them. When such terms and phrases are meaningful they are capable of producing the illusion, for one, that the results of one's inquiry are complete. However, when one begins to problematise the terms and phrases one uses – particularly the ones used in one's conclusions or in one's central insights – then one sees that the terms and phrases themselves require potentially endless demands for further explanation. The argument of meaning-in-use, then, suggests that the only way in which one's

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<sup>1049</sup> See, Dickson 2001.

<sup>1050</sup> See, Priel 2008 and Giudice 2005.

theoretical picture – the results of one’s own inquiry – can seem complete to one, is when one does not problematise the terms and phrases one uses, and therefore does not subject one’s theoretical picture to explanatory regress. Given that explanatory regress is always possible – if one problematises one’s terms and phrases, and then problematises the explanations that are designed to face the first round of problematisation, etc. – then it follows that one has good reason to think that the results of one’s theoretical inquiries are incomplete.

The above argument, may, at first blush, resemble Ludwig Wittgenstein’s argument in *The Philosophical Investigations*,<sup>1051</sup> supported by the so-called sceptical reading offered by Saul Kripke,<sup>1052</sup> namely, ‘that there was an end to justifications, that at various points we run into the fact that “this is the way we go on”.’<sup>1053</sup> Williams has the point that ‘it makes a great difference who “we” are supposed to be, and it may mean different groups in different philosophical connections.’<sup>1054</sup> The point, with respect, is a bit clumsy. What matters is not who the ‘we’ are supposed to be, but rather, by whom to whom and when is the ‘running into how to go on’ realisation made. Indeed, to call it a ‘realisation’ is already to miss the point. Although the discussion here shall not attempt here to enter into Wittgenstenian exegetics, the point in making the argument is to say that, with respect to inquiries conducted in language – with the use of language as a tool of expression (rather than, say, diagrams or images) – one goes on as one does insofar, and only insofar, as, and thanks to, the non-problematization of certain terms and phrases. The meaning of these terms and phrases is not, as some interpretations of Wittgenstein assert, fixed or determined *by use*, for to assert that is to think that we can provide sufficiently robust

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<sup>1051</sup> Wittgenstein 2001 (1953).

<sup>1052</sup> Kripke 1982.

<sup>1053</sup> Williams 2006b, 196.

<sup>1054</sup> *Id.*

and complex criteria of use (what is today called ‘pragmatics’) that can help us identify the meaning of terms and phrases. Rather, the meaning of terms and phrases is constituted in use to such an extent that when the dynamics disappear, and we begin to attempt to make sense of the individual term or phrases, to isolate it and question it, to analyse it into its alleged components, and so on, the bottom of the terms and phrases (so to speak) falls out, their meaning dissolves before our very eyes.

The above argument will now be illustrated by reference to a reading of G.E.M. Anscombe’s famous paper, ‘On Brute Facts.’<sup>1055</sup> After performing such a reading, this general argument will be briefly applied to show how I can give myself a good reason to adopt an attitude thanks to which I can acknowledge the incompleteness of the results of my inquiry in the first part of this thesis.

Anscombe begins her paper by revealing the normative indeterminacy of the invocation of fact descriptions: it does not follow from the description of any facts (e.g., that the grocer supplied me with potatoes) that I am obliged to do something (i.e., following the example, that I should pay the grocer his bill). For it may always be the case that the description does not describe all the facts that it would be relevant to know: e.g., it may be the case that the grocer supplied me with potatoes as part of an amateur film production.<sup>1056</sup> Further, it does not help to say that the supply in question occurred within a certain institutional context – e.g., one in which the supplying of potatoes and the rendering of bills is made possible – because ‘the fact that something is done in a society with certain institutions, in the context of which it ordinarily amounts to such-and-such a transaction, is not absolute proof that such-and-

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<sup>1055</sup> Anscombe 1958. This reading of Anscombe is not necessarily the most popular reading of this paper, which has been used, for example, by Searle (e.g., Searle 1995) to help establish his account of social ontology.

<sup>1056</sup> *Ibid.*, 69.

such a transaction has taken place.’<sup>1057</sup> There is, in other words, no set of descriptions about the facts of any one specific instantiation of that description that would provide us with an absolute proof that the consequences that may be ordinarily said to follow from that instantiation should follow in this instance. The always-existing potential for some ‘special context’<sup>1058</sup> can always displace the finding that ‘what ordinarily amounts to such-and-such a transaction is such-and-such a transaction.’<sup>1059</sup> And the set of descriptions in which some normative consequence ordinarily follows does not of itself provide us with the resources to know when such a ‘special context’ exists, even if it may provide some guidance as to what makes it ‘special.’ It is not, then, ‘theoretically possible to make provision in advance for the exception of extraordinary cases; for one can theoretically always suppose a further special context for each special context, which puts *it* in a new light.’<sup>1060</sup>

Having established the theoretical possibility and significance of special contexts, Anscombe takes up the question of the nature and structure of descriptions. She asks whether her owing the grocer upon the supply of potatoes to her by him is simply a matter of the facts (in the set of descriptions) holding in the ordinary case, or whether ‘to say I owe the grocer adds something non-factual to the statement that some such facts hold.’<sup>1061</sup> Very quickly, she arrives at the following difficulty:

The grocer supplies me with a quarter of potatoes: that is to say, he 1) brings that amount of potatoes to my house and 2) leaves them there. But not any action of taking a lot of potatoes to my house and leaving them there would be *supplying* me with them. If for example, by the grocer’s own arrangement, someone else, who had nothing to do with me, came and took them away soon afterwards, the grocer could not be said to have supplied me.<sup>1062</sup>

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<sup>1057</sup> *Ibid.*, 70.

<sup>1058</sup> *Id.*

<sup>1059</sup> *Id.*

<sup>1060</sup> *Id.*; original emphasis.

<sup>1061</sup> *Id.*

<sup>1062</sup> *Ibid.*, 70-1; original emphasis.

Anscombe concludes that ‘There can be no such thing as an exhaustive description of all the circumstances which theoretically could impair the description of an action of leaving a quarter of potatoes in my house “as supplying me with a quarter of potatoes”.’<sup>1063</sup> Thus, not only is it the case that the theoretical possibility of special contexts means that we can never be sure that the set of descriptions really obtains, but it is also the case that we cannot describe all the circumstances in which some sequence of actions would indicate that the set of descriptions does not really hold.

‘Every description,’ then, ‘presupposes a context of normal procedure, but that context is not even implicitly described by the description.’<sup>1064</sup> It is that set of descriptions that constitute the ‘normal procedure’ that Anscombe refers to as ‘brute facts.’ In other words, in order to make a finding that some description – e.g., the supplying of potatoes – obtains (that the specific case before one is an instantiation of that description), some further set of descriptions must be functioning as ‘brute facts’:

As compared with supplying me with a quarter of potatoes we might call carting a quarter of potatoes to my house and leaving them there a ‘brute fact.’ But as compared with the fact that I owe the grocer such-and-such a sum of money, that he supplied me with a quarter of potatoes is itself a brute fact. In relation to many descriptions or states of affairs which are asserted to hold, we can ask what the ‘brute facts’ were; and this will mean the facts which held, and in virtue of which, in a proper context, such-and-such a description is true or false, and which are more ‘brute’ than the alleged fact answering to the description.<sup>1065</sup>

Of course, this account of how findings of descriptions holding are dependent on the functioning of some further set of descriptions as brute facts (which account for the proper context in which that initial finding, leading to a normative consequence, is ordinarily valid) does not mean that the theoretical possibility of special contexts is defeated. What Anscombe offers us is a theory of descriptions: there are relations between descriptions, and those relations can be explained by virtue of the functions

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<sup>1063</sup> *Ibid.*, 71.

<sup>1064</sup> *Id.*

<sup>1065</sup> *Id.*



they play as between each other. Further, there are no set of descriptions, however elaborate, that can guarantee that some normative consequence should follow: descriptions are not the sort of thing that can give us that guarantee. Finally, Anscombe should not be taken to be arguing for the reality of brute facts – instead, some descriptions, in a family of descriptions, function as descriptions of brute facts, thus also enabling other kinds of descriptions to function in different ways.

To paraphrase Anscombe's own conclusions:<sup>1066</sup> some set of descriptions *xyz*, functioning as descriptions of brute facts, can indicate – but only roughly, and never by way of a guarantee – the 'normal circumstances' in which some description, *A*, (e.g., the supply of potatoes) obtains. Those 'normal circumstances' also presuppose the existence of certain institutional contexts, though the set of institutional contexts presupposed by *A* need not be the same as that presupposed by *xyz*: e.g., 'the institution of buying and selling is presupposed to the description "sending a bill," as it is to "being owed for foods received," but not to the description "supplying potatoes".'<sup>1067</sup> Sometimes, the finding that *A* obtains entails that some further description, say *B*, also obtains. Thus, ordinarily, the description of supplying me with potatoes (*A*) entails the description that potatoes come into my possession (*B*), but the description that someone carted the potatoes to my house and left them there (say, *G*), does not entail that the potatoes came into my possession (*B*), for description *G* is not of the kind that can entail description *B*. But, one cannot mention all the things that cannot be the case such that the ordinary circumstances (or proper context, absence of special context) for the entailment from *A* to *B* is guaranteed.

Anscombe's argument, at least in the above interpretation, is useful for present purposes. It is possible to generalise it to the terms and phrases used in theoretical

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<sup>1066</sup> *Ibid.*, 72.  
<sup>1067</sup> *Id.*

inquiries in the following way. In each theoretical picture there will be terms and phrases that function as brute facts – their meaning depends on the presupposition of and reliance on ‘normal contexts.’ Those ‘normal contexts’ can never themselves be exhaustively described. They cannot, for example, be exhaustively identified by setting out to describe all the ‘special contexts’ in which those terms and phrases would not obtain. They cannot because any further description of the ‘normal contexts’ or the ‘special contexts’ would themselves use terms and phrases, which presuppose and rely on other ‘normal contexts.’ An explanation of the meaning of terms and phrases used in a theoretical inquiry would only have itself be explanatory to the extent that the terms used in that explanation are not themselves problematised. The moment they are, they require an explanation, and so on, potentially *ad infinitum*.

But, of course, we do not proceed *ad infinitum*. Even if at a rate often less than we would wish, or that our departments would wish, we do nevertheless produce theoretical pictures. If we consider carefully what stops us from finishing a particular inquiry, we may find lots of quite banal causes (though these are, in fact, far from banal), such as the norm that articles in journals be no longer than a certain amount of words and the requirement of contemporary scholarship that demands we publish at least one or two such articles a year. Even where we could go on with a paper, we ‘round it off’ in order to have it published.

What the above argument attempts to explain is how that ‘rounding off’ works – how that illusion of completion is produced – at least at the level of the meaning of terms and phrases. In other words, the above offers a theorist a good reason to think that the only reason why his or her own inquiry might seem complete to him or her is because he or she has not gone on to problematise certain terms and phrases,

especially important terms and phrases often used in conclusions or in articulating central insights.

Consider, as an example, the above inquiry, ‘completed’ in part one of this thesis, as to the orientation of theoretical pictures of law and legal work to either discourse or tradition explanatory paradigms. There is one glaring presupposition made and relied on in constructing the history above, namely, the assumption that the distinction between ‘law’ and ‘legal work’ makes sense, that we really can divide explanations into either ontological or epistemological levels. As we saw, the discussion sometimes found itself suggesting that under certain orientations, e.g., the tradition one, the ontological ambition disappears into the epistemological one (or vice versa in the case of the discourse orientation). This was already a sign that the entire history was being shaken at its foundations.

Further, each of the four chapters of the first part (i.e., law-as-discourse, legal-work-as-discourse, law-as-tradition, and legal-work-as-tradition) endeavoured to ‘identify’ or ‘reveal’ ‘central’ features or ideas of each of the four explanatory orientations. It was argued, for example, that in the case of the law-as-discourse orientation, it was common to answer the problem of law’s normativity by prioritising normative requirements to explain human conduct, thereby allowing a theorist to focus on evaluating the reasonableness of legal rules (i.e., the problem of the normativity of law was another way of phrasing the question as to when law’s reasons should be authoritative). In other words, the prioritisation of that form of explanation of human conduct (as rule-following, as acting for reasons), allowed theorists to provide criteria under which laws ought to function as reasons for action. There are, however, numerous ways of picking at this ‘central feature or idea’, that does not involve challenging the logic of the argument, but that problematises certain and

terms and phrases presumed in it. Thus, the very notions of a ‘reason for action’ or ‘a reason’ function here as brute facts. They are presumed to be unproblematic. They allow the explanation to proceed only insofar as they are not problematised. Of course, they may very well be problematic for another reader – e.g., that reader may have just finished reading Kieran Setiya’s *Reasons Without Rationalism*<sup>1068</sup> – and then the explanation will appear not only incomplete to that reader, but possibly also mistaken, or at best, simply not insightful for lack of ‘accuracy.’ What this shows is just how easy it is for one to become blind to the limitations of one’s own theoretical picture. In other words, the very fact that one finds certain explanations persuasive (accurate, adequate etc.) is also what secures its incompleteness.

Other examples could be offered here, but the general point is made. Of course, this does not prove the incompleteness of theoretical pictures. After all, the above is an argument made in language, and it no doubt uses terms and phrases that themselves can be problematised, possibly to the extent that the argument would dissolve (e.g., what ‘really’ is a ‘brute fact’, what ‘really’ is meant by a ‘presupposition’?). Once again, all that is suggested here is one reason, hopefully a persuasive one, for a theorist to adopt an attitude thanks to which he or she acknowledges the incompleteness of the results of his or her inquiry.

## **II.C. PHILOSOPHY AND THE EXAMINED LIFE**

The above two responses to the question asked at the outset by the ‘stubborn theorist’ – the one who resists taking up the attitude being encouraged here – are the principal responses, though out of those, it is the first (the discussion on truth) that is presented here as more important. Nevertheless, a third response was promised. It will not be

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<sup>1068</sup> Setiyah 2007; for an alternative, see Baker 2008.

dwelt on at length here. Rather, it is offered as just one modest further reason for adoption of the attitude.

No matter how creative an approach one takes to the history of philosophy, one is loathe to doubt the importance of the Greeks. Socrates' question, as Williams put it in his *Ethics and the Limits of Philosophy*, is not a trivial one: 'what we are talking about is how one should live.'<sup>1069</sup> Plato, like Socrates, 'hoped that one could direct one's life, if necessary redirect it, through an understanding that was distinctively philosophical – that is to say, general and abstract, rationally reflective, and concerned with what can be known through different kinds of inquiry.'<sup>1070</sup> In short, 'Plato thought that philosophy could answer the question.'<sup>1071</sup>

Nevertheless, despite the fact that Greeks thought that the examined life, the philosophical life was the best form of inquiry designed to answer the question put by Socrates, they were, according to Williams, 'less determined' than 'modern philosophy' to 'impose rationality through reductive theory.'<sup>1072</sup> Williams argues that modern philosophy – he means in particular modern moral philosophy – with its alleged obsession with the 'administrative ideas of rationality',<sup>1073</sup> is not well prepared, and most certainly of limited capacity to provide guidance for, the problems of the modern world. It is, he says, 'too far removed, as Hegel first said it was, from social and historical reality and from any concrete sense of a particular ethical life.'<sup>1074</sup>

What is of interest here, for present purposes, is the manner in which Williams characterises the examined life, the philosophical life. The life of a philosopher, he

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<sup>1069</sup> Williams 2006a (1985), 1.

<sup>1070</sup> *Id.*

<sup>1071</sup> *Id.*

<sup>1072</sup> *Ibid.*, 197.

<sup>1073</sup> *Id.*

<sup>1074</sup> *Id.*

asserts, ever since the Greeks, has been one of intense self-reflection. ‘Know thyself!’ is the war-cry heard within the walls of the Academy.

Interestingly, Williams also says ‘I must deliberate from what I am.’<sup>1075</sup> The ‘must’ here operates as a prescription, following on from a warning that ‘We must reject any model of personal practical thought according to which all my projects, purposes, and needs should be made, discursively and at once, considerations from me.’<sup>1076</sup> However, read either as a prescription or a description of the examined life, it is useful for present purposes.

For the great majority of the past few years I, like presumably many, if not most or even all, other theorists, have lived a more or less intensely self-reflective life. If I am to ‘deliberate from what I am’, whether as a description of what I cannot help but do since I am a theorist, or a prescription coming from a prominent philosopher (such as Williams), what I am likely to want to find is room for the kind of life I lead – for meaning in and significance of the kind of life I have led and am likely to go on leading.

Emerging from such a background is the tendency to place great emphasis on the location of self-reflective deliberation, on self-conscious intentionality, and, more generally, on human freedom, on the human being as intervener in the causal structure of the world, on the rational animal as self-mover, and, moreover, on the ethical import of such a life – consider, for example, Hannah Arendt’s argument that the problem with Eichmann was his ‘thoughtlessness.’<sup>1077</sup> The history of philosophy – of all kinds, though more clearly moral, political, legal (in short, practical) philosophy – could be profitably be written from this perspective.

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<sup>1075</sup> *Ibid.*, 200.

<sup>1076</sup> *Id.*

<sup>1077</sup> See, Arendt 1964.

Notice how easily this applies to the present thesis. By virtue of being an investigation into the history of a discipline that identified the kind of theorist I was seeking to become (a legal theorist), the first part of the thesis is a clear demonstration of intense self-reflection. What emerges from the discussion is a prescription – the thesis of this thesis – that one ought to adopt the attitude that the results of one’s inquiry are incomplete. Deliberating from who I am (in my image of who I am), I come to stress the importance of self-reflectivity – to find meaning in exactly the sort of life I am leading or at least take myself to be leading. The snake bites its own tail, and, so I hope, what emerges is a good reason to adopt the attitude of acknowledgement of the incompleteness of the results of one’s own theoretical endeavours. Perhaps, as a theorist, leading a theoretical life, I speak mainly, if not only, to myself, speaking of matters I am not (because my pictures of myself are incomplete), but thereby also revealing who I am (or have become).

## CONCLUSION

The aim of this thesis has been to offer an alternative history of theoretical pictures of law and legal work, and to suggest that the notion of explanatory paradigms, as well as some other phenomena explored in the second part (i.e., explanatory regress and the intensely self-reflective mode of the examined life), can encourage the adoption of an attitude that the results of one's inquiries are incomplete.

Such historical philosophising, both in itself and in combination with the related acknowledgement of the incompleteness of theoretical pictures, may have some value for the robustness of a discipline and the wellbeing of a community of scholars. If we learn to walk the line between the canonisation of the history of a discipline and the ignorance of past works, we also open up the fertility of the past. In doing so, arguably, we enable ourselves to learn more from those works, but not such as to stifle our own creativity, or, indeed, our own responsibility as theorists to confront the current and potential problems of the world we live in.

Further, if we learn from this process of creatively engaging with the past, and, as has been suggested in the second part of this thesis, come to acknowledge the incompleteness of the results of our own inquiry, it is possible that we will avoid the dangers of ascribing too much importance to the results of any one inquiry. All of us, both in our theoretical as in our everyday life, can come to dwell in the grips of a particular picture. We can all too easily come to be persuaded by the existence, truth, adequacy and accuracy of a particular pattern. We can also find great pleasure in recognising and repeating that pattern. Finally, and most disastrously, we can respond with great violence to that which we perceive as a threat to that way of seeing and doing, i.e., to that which we have come to take for granted or that which we have come to find familiar. Being locked into the grip of a picture places in jeopardy the



openness to others that we need in order to live peacefully and respectfully in a world composed of different ways of seeing and doing.

Ascribing too much importance to the results of any one inquiry may also have implications for the value of theoretical pictures in the public sphere. The domination of any one theoretical picture might mean that some policies, which depend on a combination of insights from different theoretical pictures, will be thwarted. It also might mean that where a certain form of justice (distributive, corrective or otherwise) is based on any one theoretical picture, it may lead us to be complacent about those forms of vulnerability and suffering it conceals or marginalises. In doing so, it may blind us to the injustices that such a policy perpetuates. Unfortunately, we do not need to look far into our common history to see how certain views as to what amounts to human nature (e.g., views that have suggested that human beings are, paradigmatically or typically, white, male, heterosexual, landowning and rational) have played in their part in creating and perpetuating the misery and death of so many human beings.

Much more, however, would need to be said to make the above claims persuasive and viable. Although it is outside the scope of this thesis to do so, it is hoped that the first and second parts of this thesis have at least contributed to the prospects of such future work.

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