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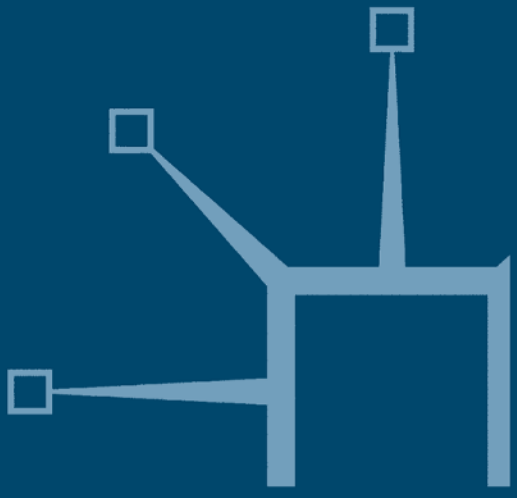
New Waves in Philosophy of Law

Edited by

Maksymilian Del Mar



New Waves in Philosophy

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New Waves in Philosophy of Law

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Series Editors' Preface

The New Waves in Philosophy Series

The aim of this series is to gather the young and up-and-coming scholars in philosophy to give their view of the subject now and in the years to come, and to serve a documentary purpose, that is, 'this is what they said then, and this is what happened'. It will also provide a snapshot of cutting-edge research that will be of vital interested to researchers and students working in all subject areas of philosophy.

The goal of the series is to have a *New Waves* volume in every one of the main areas of philosophy. We would like to thank Palgrave Macmillan for taking on the entire *New Waves in Philosophy* series.

Vincent F. Hendricks and Duncan Pritchard

Notes on the Contributors

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Introduction

Maksymilian Del Mar

I.1 Preface

Anglo-American philosophy of law is at a turning point in its short history.[1] A peculiar tradition, dominated – like, arguably no other realm of philosophy on the contemporary scene – not only by one philosopher (H. L. A. Hart), but by one book (*The Concept of Law*, 1961; 2nd edition in 1994), it is one that, for the last fifty years, has been responding, sometimes passionately in favour, and sometimes passionately against, Hart's surprising[2] *magnum opus*.[3]

A Hart-inspired map of the discipline has those close to the core engaging directly with Hartian problematics, and thus participating in such popular contemporary debates as the quarrel between soft and hard positivism, the plausibility of the right answer thesis, the conventionality of the Rule of Recognition, and the explanatory scope of the concept of a legal system as the union of primary and secondary rules. Those on the penumbra, from this perspective, include those with less obvious a stake on how to interpret Hart, including the institutionalists and neo-institutionalists,[4] the discourse theorists,[5] the autopoieisis theorists,[6] the American and Scandinavian legal realists, and the various kinds of non- or post- formalists and legal naturalists.[7] This is not yet to mention all who would find a hard time fitting onto this map altogether, including those engaged in anthropology and sociology of law, law and literature, law and the humanities, law and policy, feminist legal theory, and increasingly, law and psychology, and law and neuroscience.[8]

Fifty years have passed since the publication of *The Concept of Law*, and there are stirrings in the academy.[9] For example, as a result of the push for new research paradigms, such as New Legal Realism[10] or

Cognitive Legal Studies,[11] cracks in the above Hartian-inspired map are certainly beginning to appear. These stirrings and cracks raise the following questions: Can the discipline organise itself in a different way? Is there a new orthodoxy emerging, or can we perhaps do without one? Can the next generation of philosophers of law continue to learn from lessons of the recent past, but begin from a different starting point (or, better, from different starting *points*), and call upon a wider variety of methods and resources?

The eleven chapters of this book answer a resounding 'Yes' to these questions. Some are more forthright in their rebellion against the contemporary orthodoxies of legal philosophy; others construct advances in more incremental steps – all, however, offer promising new horizons for our discipline.

The collection is divided into five parts, each containing two papers (with the exception of the opening part, which has three). The five parts are as follows:

I. Methodology and Metatheory;
II. Reasoning and Evaluating;
III. Values and the Moral Life;
IV. Institutions and the Social Life;
V. The International and Global Dimension.

In what follows, each contribution in each part is described and placed in some context of the relevant debates. The conclusion considers some of the themes that emerge from the collection as a whole.

I.2 Part I Methodology and Metatheory

It is fitting, given what has just been said above, that this collection should open with Sundram Soosay's 'Rediscovering Fuller and Llewellyn: Law as Custom and Process' (Chapter 1). Any editor would be pleased to open with such a piece: provocative, but carefully and thoughtfully so, and one with potentially lasting implications for the future shape of the discipline. Soosay tackles head-on the dominance of Hart and Hartians, and the effects this has had on how law has been understood (or more accurately, in his view, misunderstood). Could it be, Soosay asks, not the alleged philosophical maladroitness of Fuller and Llewellyn that has contributed to their having been largely dismissed and sidelined, but rather contemporary legal theory's 'new professionalism', which has had the effect that 'legal theorists today simply lack the resources needed to appreciate, indeed even comprehend, the writing of their predecessors'?

Soosay's question should make us all consider just what exactly has been the legacy – what exactly has been learnt from – the legal realists. Some have argued that the legacy of the American legal realists in America has been the rise of law and economics (after all, the realists argued for the need to utilise the social sciences, and economics is a social science), law and policy and various branches of empirical legal studies (including its application to legal theory).[12] Although Soosay's piece welcomes, and indeed calls for, 'systematic and comprehensive reading', and thus the drawing of resources from a great range of sources (including social science), the heart of what he finds most attractive about the realists is their commitment to and their mature fascination with 'the lawyer's craft'.[13] As Soosay says, in Fuller and Llewellyn's hands, 'Jurisprudence was ... the love and pursuit of a sort of lawyer's wisdom'. After all, just as much 'professionalism', 'specialisation', 'theoretical rigour', and 'technical sophistication' (to use Soosay's critical terms) characterise much of contemporary social science and even, to some extent, the humanities. What, then, is this 'lawyer's wisdom', this 'lawyer's craft', that has something to teach us about the nature of law that contemporary legal theory is missing?

In answering this question, Soosay looks in detail at the famous debate between Hart and Fuller, which was ostensibly about the relationship between law and morality, but, 'viewed pragmatically', says Soosay, was about the shape that legal theory was to take post-war. According to Soosay, what made all the difference in Hart and Fuller's treatment of the topic were their different points of view: Hart as the outsider approaching the subject-matter in a 'wholly abstract, theoretical manner' and Fuller as the 'insider, a member of the community responsible for its development'. Fuller was not attacking the details of positivism, but rather its premise: that we need a precise definition of law, and one which differentiates it, and as a result also isolates it, from moral and social life. Hart, so eager on a clear, settled object, purified it so much that it was bereft of cultural and historical contingency, but, ironically, perhaps precisely because of his efforts at the crystallisation of the concept of law, attracted the greater following from the next generation of theorists. To argue about the nature of law, Hart made us think, all we need are some basic tools: primary and secondary rules, the internal point of view, etc. – it is a description of these that we need to get right. Anything else – say, a deep knowledge of the different shapes and roles that law has taken on in different times and places – is at best a distraction. As a result of Hart's purification, and its subsequent popularity, legal theorists have, or so argues Soosay, lost sight of 'the actual life of the law'.

The dire effects of excessive enthusiasm for universalisation are also the topic of Chapter 2, Michael Giudice's 'Analytical Jurisprudence and Contingency'. Soosay, in his contribution, argued for a radical change: let contemporary legal theory finally get over Hart; let us return to thinking about the law not as imposed from above, but as 'instead "natural", an organic expression of a particular society's desire for orderliness' – to law as custom and process.[14] For Giudice, this would be going too far: although there are problems with Hart's framework, there is still much that we can retain from it. What does need to be done, according to Giudice, is finding room within that framework for contingency (indeed, part of the enterprise for Giudice is a proper understanding of Hart's account – in other words, we misunderstand *The Concept of Law* if we burden it with an excessively universalistic temperament).

Giudice argues forcefully against a view of jurisprudence that takes it to be by nature unconnected to, and thus justified in ignoring, descriptions of the nature of law offered by normative or political philosophy, and sociology or anthropology of law. The key to distancing oneself from such a view is noticing that the explanation of a concept – any concept, including also the concept of law – ought not to be restricted to setting out its necessary and essential features, but ought to include contingent features and relations. As Giudice succinctly puts it, 'A lack of emphasis on contingent features and relations both misrepresents some paradigm work in analytical jurisprudence, and, worse, threatens to entrench what are already unhelpful divisions between analytical jurisprudence and other theoretical approaches to understanding law'.

Following an exemplary account of the nature and purpose of conceptual analysis (and one which demonstrates that 'Determination of categories and subject-matter can proceed relationally, situating law's place in social life by explaining both its necessary and contingent relations to other phenomena'), Giudice goes on to point to five places where we can, and ought to, make room for contingency in analytical jurisprudence: (1) in law's relations to related social phenomena (such as morality, coercion and social rules); (2) in the reasons for which officials accept and follow secondary rules, especially the Rule of Recognition; (3) in the interests or puzzles chosen to be addressed by the theorist; (4) in the choice of concepts used to explain some range of phenomena; and (5) in the range of phenomena chosen to explain.

Giudice's sensitivity not only to the contingent features and relations of the concept of law, but also to the very practice of legal theory, points to a richer reflexivity than one focused merely on methodology; it calls, as well, for insight into the historical and social situatedness

of the practice of jurisprudence,[15] as well as for awareness of what he calls 'meta-theoretical virtues'. One of his examples of such a virtue is seeking continuity between empirical and conceptual approaches to the study of a phenomenon.[16] Another is 'responsiveness to reasons for re-drawing … features and borders in light of new experiences and new problems'. Giudice's remarks concerning the meta-theoretical virtues of legal philosophy of law are important: reflexive sensitivity to the limits of our theories, especially the historical contingencies of our methods of carving out the object of study, will help us to further enhance our responsiveness to the phenomena. The future of legal philosophy would do well to pay heed to his discussion of meta-theoretical virtues.

Whereas Soosay and Giudice both call for, on methodological and meta-theoretical grounds, greater engagement with disciplines traditionally sidelined by mainstream analytical jurisprudence, the third chapter – 'Jurisprudence and Psychology', by Dan Priel – performs that very task, though with a particular focus, as the title suggests, on the relevance and potential uses to be made of the methods and results of psychological research. It is one of the virtues of Priel's account that it is not a survey of recent and present efforts in bringing jurisprudence and psychology together.[17] Instead, Priel's approach is to take a series of traditional jurisprudential questions and to show how such questions can be profitably informed by psychology. If the spell of anti-empirical sentiment is to be broken in the ranks of analytical jurisprudence, it is precisely such work that will need to be undertaken.

Among the applications of psychology which Priel discusses is its relevance for tackling the issue of the normativity of law. Hart, as Priel notes, was dismissive of the potential for psychology to shed light on the internal point of view (that being his 'answer' to the problem of law's normativity), preferring instead to place his bets on a social theory of practices. To be fair to Hart, however, psychology in the 1950s was, says Priel, 'still under the behaviourist spell', a situation that has changed dramatically since then. Relying on the findings of social psychologist Tom Tyler,[18] Priel argues that, translated into language that jurisprudes can understand, there is much to learn from such data. Tyler's data points to 'two factors that seem to matter to people in their thinking about law: the fairness of the procedures associated with the promulgation and use of these laws, and their perceived substantive justice'. The effect of this data on the problem of law's normativity is manifold: for example, it indicates that 'the question of the normativity of law cannot be fully answered in the abstract, but only through the examination of the specific arrangements adopted by particular legal systems'. This suggests

that a more complete and enlightening answer to the problem will be one that combines research on people's beliefs with normative analysis: the former can help the latter identify associations (e.g., of legitimacy in general with the legitimacy of particular institutions) that matter to people on the ground, while the latter can help establish what the former should survey (the two, as it were, spur each other on).

All three of the contributions included in this first part offer reasons for, and examples of, a more gregarious approach to the study of the nature of law, one that looks to our experience of the law, our beliefs about it – and all of that in specific historical periods and geographical locations. For all three, the resources used by analytical jurisprudes have been unfortunately thin; there is room, they say, for including within our grasp the methods and results of empirical work in the study of the mind and society.[19] In arguing as they do, Soosay, Giudice and Priel not only lay down the gauntlet for contemporary analytical jurisprudence; they also open new vistas for future work.

I.3 Part II Reasoning and Evaluating

Legal epistemology, both in the context of the everyday life of the citizenry as well as in the practices of legal officials, is an area calling out for more work. The two chapters included here – the first (Chapter 4), 'Pre-Reflective Law', by Jonathon Crowe; and the second (Chapter 5), 'Virtue and Reason in Law', by Amalia Amaya – both offer excellent and rich visions for how to take the topic forward.

Crowe's chapter unravels a long-standing dogma in the field, namely the idea that legal reasoning is a 'reflective process', in which 'legal actors consciously incorporate legal norms into their deliberation when deciding what to do'. He argues, on the contrary, that although legal norms do have influence over our decision-making processes, they do so 'primarily' at what he calls the 'pre-reflective level'. Further, our initial engagement with legal norms takes place within a broader context of 'pre-reflective values'. Calling on a broad range of conceptual and empirical resources – including contemporary moral psychology, the philosophy of the emotions and phenomenology – Crowe's chapter articulates, in detail and with many examples, the functioning of this pre-reflective level and the experience of this pre-reflective engagement with norms and values.

It is important to see that for Crowe the pre-reflective level ought not to be understood as irrational or non-rational; if, he says, we identify reasoning as 'the process of identifying and applying reasons', then this

opens up the possibility of characterising pre-reflective processes – as when, following Crowe's example, I choose to hit the specific keys I do when typing – as an exercise of reason, and thus one for which I can be responsible, and one which is capable of being mistaken. Further, Crowe makes short shrift of claims that just because pre-reflective processes can be influenced by emotions, so they, *ipso facto*, must be irrational; here, he says, we ought to keep in mind that emotions themselves sometimes provide reasons for action, and that they may be carriers of previously internalised reasons.

When we contrast the traditional view of reasoning (as reflective) with the pre-reflective kind, we can all too easily forget the details of how the latter works (i.e., we resign ourselves to thinking that the latter is mysterious or inexplicable). One of the virtues of Crowe's chapter is that he zooms in on a wide variety of cases of pre-reflective reasoning, and reveals their inner workings. Those inner workings include pattern recognition, or the way in which our practical choices are assisted by certain salience markers that guide our actions. They also include learned attitudes and skills, as when our motor-sensory system acquires its own kind of memory and familiarity with an environment. In sum, the kind of normative deliberation Crowe has in mind is 'a type of pattern recognition, where learned responses are applied to new situations by invoking pre-existing categories'.

There are many other important features, at the general level, of Crowe's account – of particular note are the distinctions he makes between types of dispositions – but the real cash value for this collection is how Crowe applies his general account to the legal context. Based on his general model, Crowe argues that 'legal reasoning always begins – and frequently ends – at a pre-reflective level'. Citizens make intuitive assessments based on legal inclinations, which place observed conduct into pre-existing categories and thus enable judgement. Of course, citizens may form such inclinations in less than reliable ways (e.g., by watching too much *Law & Order*), whereas legal officials are more likely to have developed inclinations based on standardised and common sources. The study of how legal officials form such inclinations, and how they are exercised – and further refined by various kinds of feedback loops – is precisely what Crowe's chapter facilitates and encourages.[20]

Like Crowe's, Amaya's chapter swims against the tide of orthodox and mainstream theories of legal reasoning. The chapter offers a basic outline (though still rich in detail) of a virtue theory of legal reasoning. Amaya puts it best and most succinctly when she describes, in her conclusion,

her theory as being committed to the following five claims: 'a) correct legal reasoning requires fitting one's judgement to the particulars of the case; b) perception is central to legal reasoning; c) emotions play a critical role in legal deliberation; d) the description (and re-description) of a case is a most important and hard part of legal reasoning; and e) legal reasoning involves reasoning about ends and, more specifically, the specification of indeterminate and conflicting values'.

There are many promising affinities between Crowe's and Amaya's contributions, perhaps especially the importance attributed to emotionally educated perception. More generally, both Crowe and Amaya encourage theorists to consider alternatives to the long-standing favouritism shown towards the 'cold' model of a solitary and isolated mind computing rules. The alternative, as is very evident in both contributions, does not do away with rules, but rather incorporates them in such a way that recognises both their benefits (e.g., their ability to guide perception, though only ever defeasibly) and their limitations, thereby avoiding imposing an impossibly demanding and overly rigid, 'stop-start' view of cognition-in-action.

Perhaps the most strikingly original aspect of Amaya's contribution is her articulation of the process of description and re-description. In effect, Amaya advocates a paradigm shift in studies of legal reasoning: away from a focus on interpretation and justification, and towards issues do with sensitivity to, responsiveness to, classification of, and generally engagement with, facts.[21] Amaya is aware that this process of engagement with the facts can be an intensely difficult one, and one, furthermore, that, when properly exercised, has complex emotional, perceptual and ethical dimensions. As she notes, 'It takes moral effort and hard work to direct reflection upon the facts of a case with the appropriate attitude, as well as to undertake the process of description in a way that is conducive to a picture that is fully responsive to the specificities of the case'. A wise judge, on Amaya's account, is one who is both willing and able to exercise a critical imagination – at once sensitive to the values previously held and the emotional intelligence acquired over time, while also prepared to question the ways in which (s)he has to date engaged with facts. What Amaya shows us is the need for an account of creative legal knowledge, or imaginative legal cognition, and one that is articulated with particular attention to its ethical implications.

The challenge for models of cognition in the last fifty years has been to learn from, while also seeing the limitations of, an account of the mind that neglects its emotional, multi-sensory, situated, enactive, and

extended dimensions. In the past, some of the alternatives offered were simply too mysterious – as has often been said of intuitionist models, which Amaya's most definitely is not. Other alternatives – such as various (perhaps especially Heidegerrian-inspired) models of expertise – presented the mind-in-action as overly fluent, where everything came easily and was always and already familiar and ready-to-hand (at the moral level this is also very problematic, for it suggests a kind of easy elitism). The great virtue of Amaya's account is that it is bereft of such mystery mongering and over-simplification; it delves into the details, emphasising the wide array of contingent variables at play in any one instance of legal decision making, highlighting the many dimensions of legal judgement and pointing out how they might be ideally balanced, and acknowledging the possibly unique mix of constraint and experimentation, of experience and change, that is exercised on a daily basis in courtrooms around the world. As if that was not enough, Amaya also provides a neat bridge between contemporary theorising about the mind and ancient (especially Aristotelian) resources – thereby reminding us that we neglect voices from the distant past at our peril.

I.4 Part III Values and the Moral Life

The above chapters have already provided us with occasions to discuss some of the issues that arise in the chapters in this third part of the collection – for example, the normativity of law. In the opening chapter of this part (Chapter 6), 'Making Law Bind: Legal Normativity as a Dynamic Concept', Sylvie Delacroix builds on her award-winning book, *Legal Norms and Normativity*,[22] and in doing so extends her original and striking mixture of history, meta-ethics, and legal theory. Recent years have seen a rise of new work on the normativity of law, many of them developed in the more general context of a theory of practical reason,[23] and Delacroix also falls within this tradition. Where she comes into her own, however, is where she argues, as she does in this chapter, that capturing the normative dimension of law is not a static matter of identifying whether certain conditions obtain, but rather a dynamic matter of bringing about law's normativity on a daily basis.

Part of the task of articulating this dynamic concept of law's normativity is telling a history, ideally not only of the understanding of the phenomenon (as Delacroix performs here), but also of 'all the various and contingent social processes that enable law ... to bind "us" on a daily basis' (a Herculean task that she leaves for another day). Delacroix moves fluently between Montaigne, Kant, Kelsen and Hart, showing

how all of these accounts leave something to be desired. These previous accounts fall short because they either search for something that cannot be found – that is, for some kind of absolute, ultimate, and safe foundation, and thus one separated from the contingencies of moral and political life – or (as in the case of Hart) they simply presuppose law's normativity, focusing on the 'surface phenomena flowing from the fact that law is normative' without grappling with 'what it takes for law to be normative in the first place'.

In offering her own account, in the second part of her chapter, Delacroix proceeds in two steps: first, ascertaining what makes law's normative dimension possible in the first place; and second, emphasising and celebrating what she calls 'responsibility as authorship'. The first step requires moving away from a 'pedigree approach' to the origins of a phenomenon, where a single, fixed point of origin is presumed or sought after, and towards a genealogical inquiry, which 'reveals a conjunction of diverse processes which cannot be brought back to a singular origin'. Delacroix argues that the focus needs to be on the 'mess of human affairs': that motley of social interaction, which 'brings law into being'. The second step, in turn, and really the crux of Delacroix's chapter, is to look more closely at social interaction, paying attention to the desires that are brought about in any community of interacting individuals, with a particular eye on the 'programmatic element meant to encapsulate what that particular society sees as a "better" way of living together'. In other words, law's normativity is brought about whenever, for instance, 'an individual is led to assess law's normative claims in the light of morality's demands', or 'each time a judge is led to re-articulate what we want law for'; in both cases, what is being contributed to is the 'shaping' of the 'socio-cultural fabric' that enables law's normativity.

The key to understanding Delacroix's approach is to see that for her this constant re-articulation – precisely because it is fragile and contingent, and thus to some extent fraught with vertigo (for there is no safe place to stand on) – is exactly what law's normativity requires; precisely what keeps it 'alive', as she puts it. Hence the reference to 'responsibility as authorship': a pro-active, plastic and creative kind of responsibility, and one that is distinctively our own, warts and all.

Understanding how law may be infused with the morality at stake in our daily interactions is also, at the most general level, what animates the second contribution to this third part of the collection, namely Lorenzo Zucca's 'Tolerance or Toleration? How to Deal with Religious Conflicts in Europe' (Chapter 7). As his title indicates, Zucca's focus is on one particular dimension of social interaction – indeed, social

conflict – that emerges from the clash of religious beliefs and practices. The challenge is a long-standing one, and no less pressing now than it has been in the past (Zucca points to such worrying recent occurrences as the ban on minarets in Switzerland, and the French veil saga). The key question is: How can we live peacefully together, all the while maintaining rather than destroying heterogeneity?

Zucca's strategy is to make room for a distinction between tolerance and toleration. He traces the emergence of toleration back to the seventeenth century, and notes that it was regarded as 'a key political virtue, which the state imposed as a legal obligation'. Toleration, Zucca says, is a moralising attitude: it looks down on the viewpoints of others from an ideal moral standpoint, and conditionally accepts the morally wrong beliefs held by others. This traditional liberal idea – which we can witness in public documents, such as the Act of Toleration 1689, as well as theoretical tracts, such as in Locke – continues to be drawn on, by some theorists (though now often under the guise of respect), as a promising answer for dealing with contemporary religious conflicts. For Zucca, this continuing commitment to toleration is not helpful.

The limits of toleration are clearly visible when one contrasts toleration with what Zucca calls 'tolerance'. Unlike toleration, tolerance is a non-moralising attitude: it does not depend on prioritising any one moral viewpoint. Instead, tolerance is best understood as a 'biological, physiological and psychological matter' of every individual having 'a disposition to cope with a certain amount of diversity'. Echoing the naturalistic sympathies we have seen expressed in chapters referred to above, Zucca argues that understanding tolerance is less a matter of normative assumptions than it is a question of responsiveness to empirical data, 'including psychological insights as to the human ability to deal with difference'.

One of the highlights of Zucca's chapter is his application of the distinction between toleration and tolerance to a case recently under consideration by the European Court of Human Rights (ECHR), *Lautsi v Italy*.[24] The issue before the EHCR concerns the presence of crucifixes in Italian school classrooms. From the perspective of toleration (or respect), the analysis of the issue becomes either too individualistic (and thus misses out on the society's interests in, and the state's power in imposing, symbols of cultural and political allegiance), or too pluralistic (e.g., per certain versions of multiculturalism) where diversity is paid lip service but there is no attempt made at dialogue and encounter. From the perspective of tolerance, however, the issue becomes an opportunity for knowledge and imagination. For a start, the crucifix helps one to

remember and seek to better understand the role played by Christianity in Italy (which in itself is important, and of course more complicated and contested than can all too easily be assumed), but the key point is that it marks the beginning, and not the end, of a creative debate: for example, students may be asked to complement the symbol or, if they have taken it for granted, to review their opinion and offer their own explanation. In the context of tolerance-as-a-natural-disposition, all this offers teachers and students – and one might also add public officials – a platform upon which to engage in 'an empathetic process that leads people to know their mutual starting points so that negative emotions and passions can be ruled out from the outset'.

Both chapters in this part of the collection wrestle with an extremely difficult, but also timely, challenge: What picture ought we to have, informed by what theoretical and empirical resources, of the moral life in the twenty-first century, and what effect should that picture have on the law and its institutions? In a sense, both contributions are grappling with the consequences of the secularisation of the public sphere (at least in many Western states). Whether one's focus is law's normativity for citizens and officials alike, or instances of religious conflict, some of the roots of the problem may lie in where one places the emphasis of what is at stake in social interaction: Is it adherence to a certain system of norms or values, or is it something more nebulous, more fragile, but perhaps also more tenacious, more promising in the long-term? Examples of the more nebulous and fragile include commitments: to mutual dialogue and encounter; to the constant renewal of one's own capacity to evaluate; and to a ceaseless confrontation with the limits of what one finds important and valuable. The chapters in this part help us grope our way to future debate on these matters.

I.5 Part IV Institutions and the Social Life

Shifting focus somewhat – though, as we shall see, retaining an interest in the moral elements of the issues discussed – are the two chapters in this fourth and penultimate part of the collection. The emphasis in both is on social life and institutions: in the first, 'The Social Epistemology of Public Institutions' by Mathilde Cohen (Chapter 8), the challenge is to understand how institutions (as collective bodies) can 'have reasons' and, more broadly, why imposing reason-giving duties on institutions is important; and in the second, 'Two Perspectives on the Requirements of a Practice' by Stefan Sciaraffa (Chapter 9), the task is how understanding social life in terms of social roles can and ought to inform, *inter alia*,

difficult choices faced by legal officials (especially adjudicators reviewing legislation).

Problems created by collectivities are not new to the law; indeed, the law itself is one of the great sources of the creation and management of irreducibly social entities (e.g., corporations). Epistemology, though, especially insofar as it analyses knowledge in terms of having and giving reasons, tends to be an individual-focused affair. Can we, then, retain a holistic, rich social ontology and still speak of reasons in the context of public institutions? Cohen argues that we can, and her chapter offers a framework for that task.

First, however, it is necessary to clarify the ambit of the inquiry: (1) What reasons? and (2) What institutions? Talk of reasons can sometimes equivocate on different roles that reasons play. Cohen avoids this pitfall by clarifying at the outset that her interest is in the reasons institutions have or give as *justifications* for (rather than, say, as explanations of) actions or decisions. In terms of 'institutions', Cohen is more wide-ranging, but still keeps within certain limits: the focus is on 'formal organisations' that are 'by nature created and governed by rules', including courts, hospitals or administrative agencies, or less durable entities such as juries or temporary committees of various kinds; in short, the emphasis is on 'bodies that operate in the name of the state' and 'usually enjoy a certain coercive authority over the citizens'.

The preliminaries in place, Cohen then considers whether the various proposals made in contemporary epistemology and ethics as to what it means for a person to have and give a reason apply equally well to institutions. Here, Cohen expresses scepticism, and the originality of her contribution lies in how she amends existing proposals in epistemology and ethics to the institutional practices she is interested in.

At the heart of the tussle in the literature Cohen addresses is a question of priority: is it that one needs to have reasons in order to give them, or is it that in giving reasons one has them (or acquires them)? For Cohen, however, the question is misleading, especially insofar as it forces us to see the two answers as mutually exclusive. In fact, she argues, in the context of public institutions, 'neither having a reason nor giving a reason for a decision takes precedence over the other'. The thrust of her argument, then, is an articulation and defence of the 'no-priority thesis, according to which either stage, whether it is having a reason or giving a reason for a decision, may be more fundamental than the other, depending on context'.

It may be possible to see Cohen's chapter as a contribution to the institutional theory of law,[25] which one could see as traditionally high

on ontology and low on epistemology. It is an important contribution because it seeks to combine the latest developments in analytical epistemology and ethics with respect for the unique features of institutions. Thus, Cohen notices that it is significant that, unlike individuals, collective decisionmakers 'typically need to satisfy demands for collegiality and majority-building', for they are duty-bound to reach an agreement (even in the face of disagreement among individual members). As Cohen notes, this unique feature is particularly marked in civil law jurisdictions where 'judges must decide as a single unit, since separate opinions are usually prohibited'. If we take these, and other, features seriously, as Cohen does, we soon realise that our epistemology needs to adapt to them; for example, we might want to say, at least in the first instance, that given that decisions must be reached for reasons that individuals do not have to share prior to giving them, it follows that the giving of reasons, in institutional contexts, is sometimes how institutions come to have (or acquire) reasons (the stress has to be on the 'sometimes' because, in keeping with her 'no-priority thesis', it is also the case that sometimes institutions have reasons before they give them).

Finally, with respect to Cohen's chapter, it is important to observe that her account may have implications for our understanding of the principles of institutional design – this being a rapidly developing area of concern for legal philosophy.[26] Here, we would do well to take seriously Cohen's plea for an account of the having and giving of reasons that captures the need, in institutional contexts, for a reciprocal relationship 'wherein the state of having reasons for a decision gives rise to that of giving those reasons and vice versa' – a conclusion that may have implications not only for the design of any one institution, but also for the design of dialogue between institutions (including between institutions across traditionally conceived state systems – a topic of Nicole Roughan's chapter in this collection).

Sciaraffa's chapter also contains potential lessons for institutional design, but the journey of his chapter passes through a considerably different terrain. As Sciaraffa explains, it is common among analytical legal theorists to believe that a Hartian theory of a legal system implies commitment to a positivist theory of legal content. Based on an analogy with an account of social roles, Sciaraffa resists this implication, and therefore argues that a defence of a Hartian theory of a legal system is compatible with a non-positivist theory of legal content.

Sciaraffa's construction of an analogy between an account of social roles and a theory of legal content is original and instructive. In this

respect, Sciaraffa's first task is to argue that the requirements of any social role are not determined by the standards that the role's participants convergently accept (as a practice positivist would hold), but rather by evaluative considerations. Having established such an understanding of the requirements of social roles, the second task is to help us see the similarities between the system's secondary rules and social roles. In the result, we have the view that the requirements of secondary rules are 'fundamentally determined by evaluative considerations and, hence, the laws that such secondary rules determine are also fundamentally determined by evaluative considerations'.

In the context of his account of social roles, Sciaraffa asks a simple question: '[W]ith respect to social role S and duty D, what makes it the case that D is a duty of S?' Here, we have two opposing views: first, the natural role view; and second, the practice positivism view. According to the latter, 'the duties of a doctor, mother, lawyer, and so on, just are those standards that we convergently hold to be binding on those who occupy these respective roles'. By contrast, the natural role view – or, better, the non-positivist view – 'puts front and centre the underlying values of a role'.

The distinction is illustrated well in the context of same-sex marriage. A positivist understanding of the 'application conditions of the role of a married person' would look to the practice, and thus ask: 'As a matter of fact, do the members of the relevant society convergently treat such persons as married?' If they do not, then the matter is settled; a homosexual couple would not be entitled to marry. On a practice non-positivist position, however, the focus is on the 'underlying valuable points' of any convergent practice, with the important difference that 'the application conditions of the role are determined by the role's underlying values; that is, the features of the role that make pursuing and supporting it normatively compelling' (this also means that where the values do not meet the 'threshold fit' of the convergent practice, a new role may be created). In this case, such underlying valuable points may be either progressive ('the underlying values of marriage include a kind of special relationship that produces a psychological safe harbour for the marriage partners', where differences in sex are irrelevant) or conservative (where 'the valuable point of the role is a unique form of relationship that is only possible between a man and a woman'). The point is that on the practice non-positivist view we make the further step of delving into these underlying valuable points; from there, once articulated, we need to make a judgement as to which articulation is the 'most normatively compelling account of the underlying values of the role'.

Although it may feel as if we have ventured quite far already into practice non-positivism, one of the key features is yet to come, namely an account of the rational role-participant. Importantly, this is an agent that does not simply accept, by default, the requirements attached by convergence to a role; instead, this is an agent that 'maintains allegiance to the applications conditions ... that are justified by the role's underlying valuable points' (which, of course, may be, but need not be, those that are convergently followed). The point is that the agent – the 'rational role-participant' – does not offer her allegiance to requirements just because they are what everyone else does, but because she believes that those requirements can be justified by the underlying values of the practised role.

With a practice non-positivist account of social roles (and their requirements) in place, Sciaraffa then applies it to the legal system, understood to be composed of secondary norms that determine the content of primary norms: insofar as they are rational role-participants, 'legal officials should accept those standards that are justified by the underlying valuable points of the practised rule of recognition as the criterion for legal validity'. In the context of the example of same-sex marriage, Sciaraffa's procedure is as follows. If the issue of the validity of some legislation banning same-sex marriage were to come before the courts, the legal officials (the judges) would, on the practice non-positivist account, have to consider the underlying valuable points of the system's practised secondary rules. The relevant secondary rule is that of 'treating the enactments of a democratic legislature as law' and one promising candidate for the underlying value is 'democratic rule'. Assume, for argument's sake, that the most normatively compelling understanding of this value (i.e., of democratic rule) is one that states that 'at the heart of democracy is the public and equal advancement of the interests of the democratic citizenry'. Now you are in a position, as a judge, to consider whether, as a rational role-participant, you can pledge allegiance to a law banning same-sex marriage when that law is one that is clearly at odds with the underlying valuable point of the relevant secondary rule: after all, the law clearly fails to 'advance the interests of each equally'.[27]

It is an impressively constructed argument, and one that will demand further attention. In its details, it is certainly unique; but in its spirit, it is compatible with other contributions in this collection. Consider, for instance, Delacroix's argument for 'responsibility as authorship', that ceaseless pro-active bringing-about of law's normativity, and compare it to the picture of agency that Sciaraffa's rational role-participant

promotes: the resemblance is striking. The general lesson, which one finds in both Delacroix and Sciaraffa, is that as we struggle – still, after so many decades – to grapple with the secularisation of the public sphere, and thus in times when we turn to conventionalism (though mixed in with individualism, that modernist malaise), it is vital that we do not do so at the cost of our critical faculty, our ability to commit to be guided only by that which we endorse as worthwhile.[28] One of the crucial points in Sciaraffa's chapter is that the procedure involved in coming to so commit ought to be a mixture of paying attention to practice (therefore not slipping into solipsism, avoiding becoming a monad blind to one's social surroundings) and reflective first-person endorsement. The result: a mindful, and mindfully social, critical endorsement of what ought to guide me and, to some extent (especially if I am, as a judge say, obliged to say so), ought to guide us.

I.6 Part V The International and Global Dimension

The fifth and final part of the collection contains two chapters: first, 'Legitimacy and Multi-Level Governance' by Bas van der Vossen (Chapter 10); and second, 'The Relative Authority of Law – A Contribution to "Pluralist Jurisprudence"' by Nicole Roughan (Chapter 11). Both take very seriously the emergence, in recent decades, of forms of governance that have crossed traditionally conceived boundaries of state sovereignty. Whatever title we give it – whether pluralist, multi-level, post-sovereign, transnational, or global jurisprudence (which is not to say that there are not distinctions between these) – it has become clear in recent times that legal philosophy can no longer afford to ignore those forms. Of course, there have been prominent legal theorists who have, for some time now, been pointing out to us of how these forms challenge traditional assumptions of (perhaps especially) analytical legal theory (prominent examples include William Twining,[29] Roger Cotterrell and Patrick Glenn),[30] but it really is only in the last few years that we have seen a new wave of interest in the topic among the next generation of philosophers of law.[31] The next decade will no doubt witness a lot more philosophical work being published on the global,[32] as well as the international,[33] dimension of law. The two chapters included here – covering mutually complementary ground – offer original and powerful contributions to a burgeoning field.

Focusing on multi-level governance – defined loosely as comprising 'the exercise of political power by institutions that do not conform to a simple model of territorial sovereignty' – van der Vossen's chapter

explores the legitimacy of such forms of governance as the networks governing the global financial economy, those combating international terrorism, and those attempting to address various environmental issues. As van der Vossen notes, there is considerable variety here, including everything from judicial bodies claiming extraterritorial jurisdiction[34] to more amorphous global networks. Still, despite this diversity, there are discernible general features of any debate concerning the legitimacy of these forms.

Understanding legitimacy as indicating that an institution has passed the 'moral right to rule' test, van der Vossen's chapter patiently argues against various versions of the claim that only existing states can be legitimate. The chapter thus does not seek to either articulate or defend the legitimacy of forms of multi-level governance; rather, it seeks to put to rest preliminary worries about the very *possibility* of the legitimacy of those forms – worries based on claims about the unique right to rule (i.e., being the sole authority in a territory) or the exclusive right to rule (i.e., being the sole authority carrying out certain particular governing activities) of existing states. In effect, van der Vossen loosens, if not cuts, the ties that theorists have traditionally presupposed between legitimacy and sovereignty.

To assist him in his critique, van der Vossen enlists a distinction between backward-looking and forward-looking (my terms) versions of allegedly unique or exclusive sovereign rights: the former, which he calls 'incurred political obligation' accounts, claim that the basis of the state's right to rule rests on 'some fact or feature in the shared history of the state and its subjects' (e.g., the subjects' consent to be governed); the latter, dubbed 'teleological' accounts, argue that 'a state can have the right to rule if it achieves the right sorts of results'. As already indicated, van der Vossen argues that in both versions, claims to the uniqueness or exclusiveness of a state's right to rule fall short, with the consequence in this context being that they are potentially compatible with the legitimacy of forms of multi-level governance. Special attention – though with the same conclusion – is paid to an extra claim, namely that forms of multi-level governance can only be legitimate if they come about in a certain way, typically via the consent of states (though here van der Vossen does appear to leave some room, given certain factual assumptions, for an argument against interference without consent based on teleological justifications of the legitimacy of states).

One of the many virtues of van der Vossen's chapter is that he connects the worries bound to animate philosophers of law wishing to contribute to the above-mentioned burgeoning field of transnational

jurisprudence with long-standing and recent debates in political philosophy and international relations theory. Further, insofar as van der Vossen argues, in his conclusion, that 'An important task of legal and political theory is to investigate what really works' – in this case, what 'institutional forms actually serve human purposes best' – he highlights the need for empirical research (e.g., research in economics and demographics), as well as real-world innovation and learning, particularly encouraging 'locally informed and fine-tuned solutions, instead of blunt top-down attempts'. Future work in this respect would do well to heed van der Vossen's recommendations (the importance of which may be particularly pronounced in the context of theories and practices of governance in developing countries, where forms of multi-level governance – e.g., in the context of access to public goods – still often inadequately connect with local communities).[35]

The question animating Roughan's chapter – ultimately, part of a larger project that 'explains what law is like by addressing the facts and features of overlapping and interactive legal systems', that is, a pluralist theory of law – is 'the question of whether, and if so under what conditions, all these levels of law can have legitimate authority'. The question is important, because without an account of what Roughan calls 'relative authority' – in which 'legitimate authority … can be conditioned by interaction between multiple and sometimes conflicting authorities' – the prospects for a pluralist theory of law look dim. Thankfully, with Roughan's chapter in hand, those prospects look very bright indeed.

There are two steps in Roughan's account, though the focus – given the material already covered in van der Vossen's chapter – is on the second. The first step 'is a conception of authority as non-exclusive and non-supreme', which Roughan demonstrates by 'showing the possibility of interacting and overlapping, yet still authoritative, legal systems'. The second offers 'a theory of legitimate authority in circumstances of multiplicity', outlining what Roughan calls 'a relativity condition', namely a condition under which an authority is justified on the basis of the 'relationship between the overlapping or interacting authorities'.

Roughan's account not only plugs a gap in contemporary jurisprudence (which, as she notes, struggles to explain how the dispersal and fragmentation of jurisdictions and legality is consistent with law's authority) but also pushes and stretches contemporary understandings of the very concept of authority. Changes to the concept of authority are necessary if theorists are to be responsive to the phenomena Roughan has identified, that is, once gain, 'multiplicity and interactivity between

legal orders that are not integrated or regulated by overarching rules or rulers'. For instance, as Roughan notes, the Razian normal justification conception of authority – under which authority is legitimate when it can better help subjects conform to the reasons that apply to them – does not help settle matters in these contexts, for what one soon notices is that 'more than one authority can meet the normal justification for the same subjects'; instead, what is vital is the quality of the interaction – or better, the quality of the relationship between – the relevant authorities. The quality of these inter-authority relationships can be evaluated by considering the extent to which the authorities: (1) cooperate with each other; (2) coordinate their responses; and (3) tolerate conflicts between obligations imposed by them (of course, up to a point, beyond which cooperation or coordination may be more appropriate).

It is clear that a pluralist theory of law – in this case, as seen through the eyes of Roughan's account of relative authority – lays down the gauntlet for many assumptions dear to analytical jurisprudence. Roughan considers a number of such challenges in her chapter – e.g., the challenge to law's alleged claim to supremacy, including supremacy over other systems of law – that show, if her arguments are to be accepted, that many features we previously thought necessary or essential to the nature of law are anything but.

Collectively, the two chapters included in this fifth and final part of the collection make a very strong case for considering new and emerging forms of multi-level governance, or circumstances in which relative authority (and perhaps also something like 'relative legitimacy'?) obtains, as a test-bed for long-held assumptions about the nature of law.

Perhaps philosophical progress – if such a thing can be spoken of at all – ought not be measured by how much we think we have discovered that which is necessary and essential, but, on the contrary, by how much we are able to see what is contingent. The more responsive we become to the phenomena – especially to globalised legality, but also, more generally, by utilising comparative and historical methods of inquiry – so the more we discover how many different (perhaps endless) kinds of garments the Emperor of the Law has in his closet. It might very well turn out that the universal emperor is the one who is invisible, and none the happier for it.

I.7 Conclusion

If these eleven papers are any indication of the future of legal philosophy, then that future is a bright one. It should also be added

that special emphasis was placed in this collection on inviting young scholars, many of them only recently tenured, and none (yet!) in full professorial posts. It really is, then, the views of the future generation of scholars that we are witnessing here. Of course, given space limitations, only a very small selection of excellent young scholars working today could be made. Much to my regret, there is not enough representation of many new waves, including wonderful new work in languages other than English, often developing fascinating accounts of non-Western local jurisprudence, with profound lessons for the Anglo-American tradition. But one cannot achieve everything with one collection, and, in any event, there is more than enough to chew on in these chapters.

Looking back over these excellent chapters, the following themes appear to me as particularly important for the future of legal philosophy.

First, one is struck not only by the diversity of issues and problems, but also by the diversity of disciplines that are being brought into the mix: both to inform pre-existing, traditional issues and problems, but also as a way of creating new puzzles and challenges.

Second, and partly as a result of the first theme, there is less eagerness, perhaps even readiness, to identify with and defend a particular school of jurisprudential thought, or to contribute to the same old debates that characterise the literature of the preceding generation. This is not to say that the literature of the past is being discarded – not at all – but it is to say that the conditions of those debates, and the circumstances that led to the demarcation of those schools along those lines, are being examined and their relevance is being challenged.

Third, all this activity demands new terms, and we see this with concepts such as 'legal naturalism', 'pre-reflective law', 'transnational legal theory' (though sometimes the terms are not new, but rather forgotten or neglected, such as 'law-as-craft'). The change in nomenclature, as any self-respecting student of history will tell you, is no trivial matter.

Fourth, the new generation of legal philosophers is responding to powerful changes in how we live and how we get along with each other in the twenty-first century: we are, after all, more anxious than ever before about the environment and future generations; we are feeling the effects of the splitting of the economic and political spheres (allowing, arguably, too much freedom in the global corporate sector), and now realising that much greater duties on governments and companies have to be put in place (especially in order to protect the individual); we are discovering that many of our dispositions and character traits owe much (if never everything) to certain genetic and developmental accidents (e.g., as present in our brains); and we are still coping with the challenges

posed by the secularisation of the public sphere in many countries. All these, and other, contemporary challenges are equally pressing for legal philosophers as they are for all scholars in all disciplines.

Fifth, and finally, it is important to remember that these and other pressures on the future of legal philosophy are being felt in specific institutional contexts where legal philosophy is practised. There may be new waves in philosophy of law, but what are the tides facing departments of philosophy or schools of law, and then what about the role of the humanities in contemporary universities, or contemporary universities *tout court*? And how are these tides affecting the way that philosophy of law is being done? Certainly, there are similarities here – e.g., the interest in experimental philosophy is concomitant with the rise of legal empirical research – but then there are also differences: philosophers in philosophy departments will be concerned about the challenge posed to the method of introspection, and scholars in law schools will wonder, for example, what this means in terms of legal procedure (e.g., are we to expect more from expert witnesses?). Or, differently again, think about the buzz surrounding neuroscience: the kinds of lessons that legal philosophers working in philosophy departments will take from these findings are likely to be different to those working in law schools (e.g., whereas those in law schools may be concerned with how neuroscientific evidence affects long-standing principles, such as the presumption of innocence, those in philosophy departments may look at that same scientific research through the history of debates surrounding free will and moral responsibility). Methods (including favourite examples) and problematics have their own history and spirit, peculiar not only to the discipline but also often to the institution. Of course, we need not over-state differences in order to be respectful of distinct tangents and pressures.

That having been said, let us stow away the crystal ball and get down to the detailed task of philosophising about law. Without further ado, then, I offer and recommend the chapters in this collection, which – I hope readers will agree – create many new waves, enough for many a surf.

Notes

The cover image for this volume recalls – as jurisprudes will immediately notice – the famous example of the rule against vehicles in the park, discussed originally by Hart and Fuller, and since then by many legal theorists. Given its reference to 'foreign vehicles', it also raises other issues of relevance to the

philosophy of law, including who counts as a subject of law, and whether law ought to be seen in universal or local terms, or as lying somewhere in between.

1. Too little attention, in contemporary Anglo-American philosophy of law, is paid to the history of the discipline. This is not only the case for the common law context of the tradition, for which there are a number of excellent sources (see, e.g., Lobban 2007; Duxbury 1995; and Postema 2011), but also more broadly (see, e.g., Kelley 1992) – though, in this respect, it is a great pity that there is not more available on histories of legal theory outside the Western canon. It should be added that any history of the philosophy of law will itself be informed by what any historian understands to be the problems of philosophy of law: thus, there is no one definitive or authoritative history of the discipline to be told.
2. I say 'surprising' because *The Concept of Law* was designed to serve as an introductory primer, and Hart never expected it to become, nor perhaps did he ever completely recover from how it became, so popular and influential. For biographical background in this respect, see Lacey (2004).
3. This is so both in terms of the scholarship and the teaching of the philosophy of law. A classic example of passionate resistance to Hart, especially in terms of his exclusively analytic method, is Stone (1950; there has been some much-needed revival of interest in Stone of late: see Irving, Mowbray and Walton 2010); a more recent example is Hutchinson (2009; Hutchinson pleads for more focus on the local and particular, and less on the universal and general). In a recent paper, Andrew Halpin (2011) argues that the methodological dilemmas faced by legal theory – especially the issue concerning the exclusivity of analytical methods for the jurisprudential study of law – can be traced back to John Austin's influence. In terms of teaching in the United Kingdom, see the surveys conducted by Barnett (1995) and Barnett and Yach (1985); for a historical overview of contemporary developments on the teaching of legal theory and the role of legal theory in the common law curriculum, see the Introduction to Del Mar, Twining and Giudice (2010).
4. A useful historical overview is provided by La Torre (2009).
5. Most prominently, Robert Alexy and Jürgen Habermas. Two recent collections on Alexy are Pavlakos (2007) and Klatt (2010).
6. Most prominently, Niklas Luhmann and Gunther Teubner. Richard Nobles and David Schiff (2006) have applied Luhmann to offer a sociology of jurisprudence.
7. There are current important debates here about how to characterise these positions (e.g., were there ever any genuinely hard-nosed formalists?); see, e.g., the debate inaugurated by Tamanaha (2009), especially Leiter (2010). See also Leiter (2007).
8. Readers may be surprised to see law and economics not included in this list. Arguably, law and economics scholarship holds its own special position in the legal academy. Indeed, it might even be true to say that law and economics, especially in the United States, is becoming orthodoxy in legal scholarship much like Hart became orthodoxy for the philosophy of law (i.e., it is that central, dominating position to which one either contributes or which one criticises). As in the case of the philosophy of law, so for legal scholarship this may not be an entirely healthy state of affairs.

9. Much depends here on what one understands by 'the academy': as is noted also at the conclusion to this Introduction, the philosophy of law looks quite different depending on the institutional context one analyses it in; e.g., the law school, the department of philosophy, or the university as a whole. For an overview of the relationship between legal theory and legal scholarship (including comparative law), see the Introduction to Del Mar, Twining and Giudice (2010). One relationship that demands further study here is that between the practice of legal theory and legal history.
10. See, e.g., Suchman and Mertz (2010).
11. See, e.g., Winter (2003).
12. For a brief overview of 'post-realism', see Duxbury (2010); for a helpful discussion of the relationship between empirical research and legal theory, see Galligan (2010).
13. For a recent attempt to resuscitate the notion of 'law as craft', see Scharffs (2001); more generally, on the bias against craft, and an argument for its virtues, see Sennett (2008).
14. For an interesting, recent take on 'law as process', see MacLean (2011).
15. A classic text in this respect is Cotterrell (1992). See also the references mentioned in Note 1, above.
16. For more details on precisely this issue, see Giudice (2005).
17. As Priel notes, there have been quite a few recent attempts at mapping out the possibilities for 'law and neuroscience' and 'law and evolutionary psychology'; for a taster of the former, see Pardo and Patterson (forthcoming A, and forthcoming B).
18. See Tyler (2006).
19. For another attempt at mapping the possible interactions between legal theory and social science, see the Introduction to Del Mar and Giudice (2010).
20. There are fascinating possibilities here for the cross-pollination of Crowe's account with the realist-inspired law-as-craft approach. One source interested readers may wish to consult is Rietveld (2008), which offers an account of our ability to act appropriately but unreflectively. The latter also draws on Wittgenstein's famous discussion of the master tailor; the point is that there may be more in common between the tailor and the judge than we have been prone to see in the past.
21. In doing so, Amaya reminds us of the calls for serious theorising on engagement with facts, as advocated and illustrated in the works of, e.g., William Twining (2006) and Geoffrey Samuel (2003). Further work here will do well to combine insights from general reflections on legal epistemology/legal cognition/legal reasoning with research in the philosophy and psychology of the law and practice of evidence. To this mix can – and should – be added an ethical dimension (see, e.g., Ho 2008).
22. See Delacroix (2006), which won the Peter Birks second prize for outstanding legal scholarship 2008.
23. For a recent collection of essays, see Pavlakos (2010); see also Marmor (2009) and Bertea (2009).
24. *Case of Lautsi v. Italy* (application no 30814/06).
25. Greatly reinvigorated by MacCormick and Weinberger (1986).

26. See, e.g., the work of Adrian Vermuele (2007). One of the heroes of this line of work may be Lon Fuller, whose revival in this respect is a most appropriate one; see Witteveen and van der Burg (1999). Fuller has recently received much-needed attention from an emerging scholar: Rundle (2011).
27. It may be that some of the issues discussed here are also tackled well by considering the quality of the relationship between courts and legislatures, and how this quality (e.g., the quality of the dialogue) may be further improved; on this, see the work of another emerging scholar, Conrado Hübner Mendes (2009a and 2009b).
28. The influence, especially on Delacroix, exercised by Christine Korsgaard's (1996) emphasis on first-person self-critical endorsement as a source of normativity is readily apparent.
29. See, most recently, Twining (2009). Roughan, in her chapter, explicitly states that her 'own work takes up Twining's challenge'.
30. See Cotterrell (2008), drawing on the concept of 'community'; and Glenn (2008–9) appealing to the concept of 'tradition'.
31. Examples include Culver and Giudice (2010) and von Daniels (2010) – to mention but two. New journals covering this topic are also emerging, e.g., *Transnational Legal Theory* (published by Hart).
32. See, e.g., the essays collected in Halpin and Roeben (2009).
33. See the recent collection of essays edited by Besson and Tasioulas (2010).
34. For a recent emerging scholar's treatment of the 'philosophical foundations of extraterritorial punishment', see Chehtman (2010).
35. In this context, I am familiar with the work of one fellow young scholar: Oche Onazi. His recently defended PhD thesis at the University of Edinburgh is currently being prepared as a book manuscript (the working title is *Reframing Public Goods: Community and Human Rights in the Third World*).

References

Barnett, H. (1995). 'The Province of Jurisprudence Determined – Again!', *Legal Studies*, 15, 88–127.

Barnett, H. and D. Yach (1985). 'The Teaching of Jurisprudence and Legal Theory in British Universities and Polytechnics', *Legal Studies*, 5, 151–72.

Bertea, S. (2009). *The Normative Claim of Law* (Oxford: Hart).

Besson, S. and J. Tasioulas (eds) (2010). *The Philosophy of International Law* (Oxford: Oxford University Press).

Cotterrell, R. (1992). *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Oxford: Oxford University Press).

Cotterrell, R. (2008). 'Transnational Communities and the Concept of Law', *Ratio Juris*, 21, 1–18.

Chehtman, A. (2010). *The Philosophical Foundations of Extraterritorial Punishment* (Oxford: Oxford University Press).

Culver, K. and M. Giudice (2010). *Legality's Borders: An Essay in General Jurisprudence* (Oxford: Oxford University Press).

Del Mar, M. and M. Giudice (eds) (2010). *Legal Theory and the Social Sciences* (Surrey: Ashgate).

Del Mar, M., W. Twining and M. Giudice (eds) (2010). *Legal Theory and the Legal Academy* (Surrey: Ashgate).
Delacroix, S. (2006). *Legal Norms and Normativity* (Oxford: Hart).
Duxbury, N. (1995). *Patterns of American Jurisprudence* (Oxford: Oxford University Press).
Duxbury, N. (2010). 'Postrealism and Legal Process', in D. Patterson (ed.). *A Companion to Philosophy of Law and Legal Theory*, 2nd edn (West Sussex: Wiley-Blackwell), 327–38.
Galligan, D. J. (2010). 'Legal Theory and Empirical Research', in P. Cane and H. Kritzer (eds). *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press), 976–1001.
Giudice, M. (2005). 'Ways of Understanding Diversity Among Theories of Law', *Law and Philosophy*, 24(5), 509–45.
Glenn, H. P. (2008–9). 'The Concept of Legal Tradition', *Queen's Law Journal*, 34, 427–46.
Halpin, A. (2011). 'Austin's Methodology? His Bequest to Jurisprudence', *Cambridge Law Journal*, 70(1), 175–202.
Halpin, A. and V. Roeben (eds) (2009). *Theorising the Global Legal Order* (Oxford: Hart).
Hart, H. L. A. (1961/1994). *The Concept of Law* (Oxford: Clarendon Press).
Ho, H. L. (2008). *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press).
Hübner Mendes, C. (2009a). 'Not the Last Word, but Dialogue: Deliberative Separation of Powers', *Legisprudence*, 3(1), 69–110.
Hübner Mendes, C. (2009b). 'Not the Last Word, but Dialogue: Deliberative Separation of Powers II', *Legisprudence*, 3(2), 191–246.
Hutchinson, A. (2009). *The Province of Jurisprudence Democratized* (Oxford: Oxford University Press).
Irving, H., J. Mowbray and K. Walton (eds) (2010). *Julius Stone: A Study in Influence* (Sydney: Federation Press).
Kelley, D. (1992). *A Short History of Western Legal Theory* (Oxford: Clarendon Press).
Klatt, M. (ed.) (2010). *Institutional Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press).
Korsgaard, C. (1996). *The Sources of Normativity* (Cambridge: Cambridge University Press).
La Torre, M. (2009). 'Institutional Theories and Institutions of Law: On Neil MacCormick's Savoury Blend of Legal Institutionalism', in M. Del Mar and Z. Bankowski (eds). *Law as Institutional Normative Order* (Surrey: Ashgate), 67–82.
Lacey, N. (2004). *A Life of H. L. A Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press).
Leiter, B. (2007). *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press).
Leiter, B. (2010). 'Legal Formalism and Legal Realism: What is the Issue?', *Legal Theory*, 16(2), 111–33.
Lobban, M. (2007). *History of the Philosophy of Law in the Common Law World, 1600–1900* (Dordrecht: Springer Verlag).
MacCormick, N. and O. Weinberger (1986). *An Institutional Theory of Law: New Approaches to Legal Positivism* (Dordrecht: D. Reidel).

MacLean, J. (2011). *Rethinking Law as Process: Creativity, Novelty, Change* (London: Routledge).
Marmor, A. (2009). *Social Conventions* (Princeton: Princeton University Press).
Nobles, R. and D. Schiff. (2006). *A Sociology of Jurisprudence* (Oxford: Hart).
Pardo, M. and D. Patterson (forthcoming A). 'Philosophical Foundations of Law and Neuroscience', *University of Illinois Law Review*.
Pardo, M. and D. Patterson. (forthcoming B). 'Minds, Brains and Norms', *Neuroethics*.
Pavlakos, G. (ed.) (2007). *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart).
Pavlakos, G. (ed.) (2010). *The Normative Dimension of Law* (Oxford: Hart).
Postema, G. (2011). *Legal Philosophy in the Twentieth Century: The Common Law World* (Dordrecht: Springer).
Rietveld, E. (2008). 'Situated Normativity: The Normative Aspect of Embodied Cognition in Unreflective Action', *Mind*, 117(468), 973–1001.
Rundle, K. (2011). *Forms Liberate: Reclaiming the Jurisprudence of Lon. L. Fuller* (Oxford: Hart).
Samuel, G. (2003). *Epistemology and Method in Law* (Aldershot: Ashgate).
Scharrfs, B. (2001). 'Law as Craft', *Vanderbilt Law Review*, 54, 2245–347.
Sennett, R. (2008). *The Craftsman* (New Haven: Yale University Press).
Suchman, M. C. and E. Mertz (2010). 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism', *Annual Review of Law and Social Science*, 6, 555–79.
Stone, J. (1950). *The Province and Function of Law: Law as Logic, Justice and Social Control, A Study in Jurisprudence* (Cambridge, Mass.: Harvard University Press).
Tamanaha, B. (2009). *Beyond the Formalist–Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press).
Twining, W. (2006). *Rethinking Evidence: Exploratory Essays* (Cambridge: Cambridge University Press).
Twining, W. (2009). *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press).
Tyler, T. (2006). *Why People Obey the Law* (Princeton: Princeton University Press).
Vermuele, A. (2007). *Mechanisms of Democracy: Institutional Design Writ Small* (Oxford: Oxford University Press).
Von Daniels, D. (2010). *The Concept of Law from a Transnational Perspective* (Surrey: Ashgate).
Winter, S. L. (2003). *A Clearing in the Forest: Law, Life and Mind* (Chicago: Chicago University Press).
Witteveen, W. J. and W. van der Burg (eds) (1999). *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Chicago: Chicago University Press).

Part I
Methodology and Metatheory

1

Rediscovering Fuller and Llewellyn: Law as Custom and Process

Sundram Soosay

1.1 Introduction

> [W]e have in my opinion a duty, an inescapable duty, to do our best to awaken in every student without exception some appreciation of the law as a whole in its relation to society … The relation of a man's life-work to his society and to himself is a duty-job for himself to wrestle with, and a duty-job for us to see that he wrestles with it.[1]

> We need a philosophic awakening that will put law in its proper place in the human struggle to achieve order and justice ... a part of the eternal quest for those principles that will enable us to live and work together in harmony. This philosophic quest should, I believe, dominate the law school curriculum from the beginning to the end.[2]

Reading the efforts of Lon Fuller and Karl Llewellyn today, one cannot help but be struck by how different jurisprudence looked in their hands. What is striking, particularly, is how much more the subject, as they understood it, actually resembles what we might expect to find in a law school course, one naturally taught in a law school, to law students, as an essential part of their legal training. A fascination with the lawyer's craft is everywhere in their work. Prominent, too, and explored with as much sincerity, is a complementary effort to find meaning in that work. All of this they sought to share with their students, and a course in jurisprudence was the place to do it. They said as much, and often.

For both of them, law school philosophy was, in essence, an effort to illuminate the lawyer's craft and its meaning for students, to offer insight into both the mechanics and the ultimate significance of the work. Llewellyn set out his vision for the subject with his characteristic lyricism in essays like 'A Required Course in Jurisprudence'[3] and 'The Study of Law as a Liberal Art'.[4] Fuller, typically a more sober character than Llewellyn, nevertheless had his moments, as the passage above attests. Interestingly enough, this made their understanding of the subject not only more legal in appearance, but also more philosophical, at least if we understand philosophy in its original classical sense. For in their writing, Fuller and Llewellyn often come across as older, wiser lawyers who, in all their efforts, seek to transmit a deeper, more profound understanding of the enterprise of law to their students. Jurisprudence was, in their hands, the love and pursuit of a sort of lawyer's wisdom, we might say; its subject was law, yes, but more, it was law in a high sense.[5]

As attractive as this approach to law school philosophy might seem to us, the efforts of Fuller and Llewellyn have long since fallen out of favour with their present-day counterparts. Their work is not unknown, of course, and Fuller's writing in particular retains some prominence in contemporary scholarship and teaching. But jurisprudence – or legal theory as it is now more commonly known – is today a very different undertaking. For the past fifty years the subject has been pursued as a professional and specialised discipline, having been recast in the middle of the twentieth century as a technical and rigorous branch of philosophy. In this new light, the likes of Fuller and Llewellyn have fared rather badly.

Indeed, so complete has been the transformation that contemporary legal theorists sometimes struggle to see the efforts of their pre-war counterparts as even remotely meaningful or valuable. Leslie Green and Brian Leiter, two contemporary legal theorists, are representative in this respect, if a little extreme. In a letter to the *Times Literary Supplement*, they describe the subject as it was pursued in the first half of the twentieth century as a 'dilettantish pastime for law teachers and retired judges, an undisciplined jumble of history, speculative sociology, legal doctrine and party politics'.[6] Fuller in particular they dismiss as 'famously muddled'.[7] Frederick Schauer, in a book review that is largely sympathetic towards Fuller and other similar pre-war figures, nevertheless describes Fuller and others variously as presenting insights 'without philosophical sophistication'; as 'lacking knowledge of, talent in, or sympathy for philosophy'; as defending a position that is 'elusive and

unsystematically presented'; and as offering arguments that are 'philosophically unsophisticated and decidedly nonrigorous'.[8]

Matthew Kramer, another prominent contemporary legal theorist, is decidedly less charitable in his assessment:

> Fuller's impressive strengths were accompanied by a number of glaring weaknesses. For example, his skills as a narrator coexisted with his ineptitude in philosophical argumentation. Though in some respects a systematic thinker, Fuller was incapable of presenting any sustainedly rigorous lines of reasoning. Anecdotes, rather than deductions, were his forte. More irritating than any of his other failings, however, were his arrant misunderstanding of legal positivism and his associated insistence on the inherently moral character of his precepts of legality. Fuller's anti-positivist strictures were doomed not just by his own philosophical maladroitness but also by the untenability of his position.[9]

This extraordinarily harsh criticism of Fuller – muddled, inept, philosophically maladroit, lacking knowledge of, talent in, or sympathy for philosophy – communicates very well the way in which contemporary legal theorists have come to understand the requirements of their subject. The criticism levelled makes clear, too, precisely where figures like Fuller and Llewellyn now stand given this transformed understanding of the enterprise. According to this view, the immediate post-war period saw a dramatic and relatively sudden transition to maturity for the subject. Legal theory, having transcended its quaint, rather homely pre-history, is now a professional undertaking, and as such, is subject to high standards of practice, with emphasis placed particularly on theoretical rigour and the sort of technical sophistication Fuller himself was thought so woefully to lack. The efforts of the likes of Fuller and Llewellyn are therefore to be understood as belonging to the subject's pre-history, we might say, rather than its history proper; as muddled and wrong-headed astrology, superseded now by contemporary legal theory's astronomy.

This is, of course, to accept a rather happy picture of the subject's development over these past fifty years. And, predictably enough, contemporary figures like Green, Leiter, Schauer and Kramer are generally quick to congratulate themselves and their peers for all that they believe has been achieved by the new, professional legal theorists. The impression given is of a subject in rude health. Indeed, it is sometimes even possible to discern in such assessments intimations of something

like a golden age for the subject – if not in absolute terms, then at least relative to its earlier 'dilettantish' life.[10] For myself, however, I am not so sure. Many of the older figures were truly giants; that their efforts should be dismissed in so cursory a manner should not sit so easily with us.[11] Moreover, for all the ready contempt shown by the post-war professionals, there is often little evidence of real engagement with the older writing. Legal theorists today are in this respect not unlike academics more generally. For the most part, they believe that their time and energy is best expended engaging in 'professional activities' like writing and reviewing journal articles, or attending and organising conferences. Systematic and comprehensive reading is not, sadly, one such activity.[12]

When thinkers like Fuller are dismissed as 'muddled' or 'inept', then, there is good reason for us to suspect that this tells us more about the post-war professionals themselves than it does the competence or otherwise of their predecessors. Could it be that the poor reputation thinkers like Fuller and Llewellyn suffer today is due not to their own 'maladroitness' or 'lack of philosophical sophistication' but rather some failing on the part of new professionalism itself? Could it be that legal theorists today simply lack the resources needed to appreciate – indeed, even comprehend – the writing of their predecessors?[13]

This is, of course, to raise troubling questions about the new professionalism. At its worst, it suggests that the post-war transformation heralded not a golden age, but a collapse. In this essay, I will explore this thesis. To do so, I will take a closer look at Fuller's debate with Herbert Hart. Hart's debate with Fuller is particularly appropriate for my purposes here, as is Hart's subsequent exchange with the judge Patrick Devlin, though in this essay I will concentrate on the former rather than the latter. Ostensibly, the debates took as their subject the relationship between law and morality. Viewed pragmatically, however, both debates were about the post-war transformation itself. Hart was more than a legal theorist, after all. He was, rather, a 'portent',[14] embodying the rise of a new, 'modern' outlook, which at that moment in time was beginning to take hold across both the wider culture and in the academy, and finding expression in efforts at law reform. Fuller and Devlin were both motivated to speak out against the way the world was changing around them. They were in this respect both conservative figures, as they are sometimes characterised, but theirs was not conservatism of the simple type often attributed to them. What they spoke and wrote in defence of was a view of law that was more mature and sophisticated than the one they saw crystallising around them. What they opposed, then, was not the liberal impulse that informed the

rising climate of opinion, but the simplistic and immature understanding of law they felt rested at its heart.[15] In this essay, I will try to do justice to their efforts.

1.2 The debate

Given the high reputation that Hart has enjoyed for much of these past fifty years, it takes no small act of imagination on our part to appreciate today just how little he represented, at the time of his debate with Fuller, the discipline he later came to dominate. That Hart set himself so much against the prevailing opinion of the time is clear enough from his Holmes Lecture. Early on, Hart notes that the separation of law and morality so central to positivism was at the time thought, both in England and the United States, to be 'superficial and wrong'[16]. Positivism itself, he continued, had come to stand for a 'baffling multitude of different sins', its status at the time so diminished that he likened the decline in its fortunes to a 'reversal of the wheel'[18]. Hart set off from this unpromising starting point to present a determined defence of positivism quite in the teeth of the disciplinary consensus as it then stood.

The rest, as they say, is history. As Nicola Lacey notes in the Introduction to her excellent biography, by the time of his retirement from the Oxford Chair of jurisprudence in 1968, Hart was credited with having more or less reinvented the philosophy of law, transforming it, along the way, into a credible professional enterprise[19]. Indeed, in this respect, Hart's efforts proved so successful that we now have only a murky understanding – if that – of the approach to, and the achievements of, the jurisprudence of the late nineteenth and early twentieth century. For our purposes here, it is this last point that is most significant. For while Fuller's response is, to my knowledge, nowhere portrayed in this manner, it is, I submit, best understood as a defence of the modest consensus that Hart was so determinedly flouting. Exercised by Hart's cursory dismissal of that consensus, Fuller set out to explain to him and their shared audience just why positivism had fallen into such a state of disrepute.[20]

As readers will know, the debate itself, for all its fame and influence, was a curiously unsuccessful one, with the disputants arguing past each other. The exchange between the two men had as its subject the case against positivism, with both Hart and Fuller offering their respective assessments of the body of criticism that had attached to positivism over the preceding decades. While both men set out to examine this same body of criticism, however, each perceived that body of criticism quite differently. Where Hart approached the body of criticism in a

wholly abstract, theoretical manner, Fuller attempted to convey to Hart and their shared audience an account of that same body of criticism, but here presented from the point of view of an insider, a member of the community responsible for its development. This subtle difference in their respective points of view made all the difference. Hart sought to debate the theory of positivism, approaching the matter as if the theory had yet to be tested. In doing so, he took for granted the premise of positivism, the larger vision of law the theory seeks to instantiate. In offering his response, Fuller sought to elucidate the same body of criticism. For him, however, this body of criticism offered, cumulatively, a challenge to the very premise of positivism, and it was this he sought to get across to his audience.[21]

Early on in his response to Hart's lecture, Fuller makes clear that his target is positivism's premise rather than its detail. Positivism's insistence on the separation of law and morality is motivated, he says, not by the merits of the separation itself, but rather by a desire to preserve the integrity of a particular understanding or concept of law that is itself the priority:

> It is characteristic of those sharing the point of view of Professor Hart that their primary concern is to preserve the integrity of the concept of law. Accordingly, they have generally sought a precise definition of law, but have not been at pains to state just what it is they mean to exclude by their definitions. They are like men building a wall for the defence of a village, who must know what it is they wish to protect, but who need not, and indeed cannot, know what invading forces those walls may have to turn back.[22]

By the time of the debate, Fuller had long been making this argument. Indeed, almost twenty years earlier, in his book *Law in Quest For Itself*,[23] Fuller put the point succinctly. What positivism represented, he felt, was 'law's quest for some exclusive hegemony of its own ... free from the complications of ethics and philosophy'.[24] The separation of law and morality is of fundamental importance, then, for what is really at stake is the viability of the particular way positivists think about the law. The concept of law in question is intuitive enough. Positivists equate law exclusively with its visible, formal, institutional aspect. This, then, is the premise of positivism: only positive law is truly law, 'law strictly and so-called'.

On the face of it, this view of the law does not seem so controversial. The background to positivism is, of course, the rise of the modern,

administrative state. As the modern state crystallised, thinkers like Bentham and Austin recognised the changing character of law and sought to play their part in its development. The past, exemplified by the common law, was now behind them. In the brave new world of the modern nation state, law was to be reborn as the means by which the very fabric of the modern society – populous, urban, heterogeneous, commercial and industrial – was to be constituted. Modern societies were artificial societies, merely collections of individuals who happened to live together. Modern legal and political institutions existed to bind together and regulate these populations through artificial, bureaucratic means.

While this artificial, bureaucratic conception of modern law has immediate appeal, it is, much to the frustration of positivists, curiously out of keeping with what we find in the actual life of the law. Here we find a great many other forms and devices beyond regulatory legislation. There is mediation, contract and, not least of all, common law adjudication, none of which can easily be reduced to system in the manner sought by positivists. All involve, to a greater or lesser degree, active problem solving by judges, lawyers and government officials. Even more problematic, however, is the way in which these problem-solving efforts often seem to require the individuals involved to look beyond the letter of the law, to sources positivists vehemently dismiss as extra-legal.

Positivism has built into it, therefore, a certain antagonism towards both the actual reality of the legal process and, by extension, those members of the legal profession who seek to speak for the reality of its practice. This tension between theory and reality has been resolved in different ways by different positivist thinkers, but the range of strategies all reduce, ultimately, to either denial or distortion. Early on in the life of the movement, for instance, Bentham dealt with the problem simply by dismissing much of what he found in the law of his day. The common law, Bentham argued, was a legacy of feudalism, a backward and corrupt practice to be repudiated in favour of the 'pure body of statutory law'[25] he would himself fashion. Law as it is was neither here nor there, he argued repeatedly; it was what law ought to be that mattered. Adopting a now-familiar strategy, Austin was a little more accommodating of the common law, addressing the problem it presented for his command theory not by denying it outright, but rather by absorbing it into his own positive account. The legal rules which emerge from customs are, he said, 'tacit commands of the sovereign legislature'. In making his accommodation, however, he articulated no greater love or understanding of the form than Bentham did. The implicit, customary

aspect of the common law was as much an embarrassment to him as it was to Bentham.[26]

While this aspiration for a 'pure body of statutory law' might have held some plausibility in Bentham and Austin's time, by the middle of the twentieth century it had long been accepted within jurisprudence[27] that modern law presented a problem altogether more challenging and subtle than the positivists of the late eighteenth and early nineteenth centuries had appreciated. Legal thinkers eventually gave up trying to fashion ideal bureaucratic legal and political arrangements, and increasingly looked instead to fashion an altogether more sophisticated understanding of the process. These later thinkers chose not to deny the relationship between law and the underlying way of life, but instead embraced it, directing their energies towards teasing out and illuminating the many and various implications the relationship held for the design and administration of the law.

This move away from positivism found expression in the historical, sociological and realistic approaches to jurisprudence that came to characterise the period between Austin and Hart, the movement sometimes described as the 'revolt against formalism'.[28] The low reputation positivism had come to suffer by the time of Hart's intervention must be seen, therefore, as the product of a process of maturation. The theoretical and speculative understanding of modern governance that Bentham had offered early in the life of the modern nation state had slowly but surely given way to a mature, practically informed attitude to the enterprise that arose, understandably enough, from the maturing of the modern nation state itself. What had seemed plausible when theorists could only speculate as to the nature of modern legal and political arrangements gave way quite naturally to more realistic conceptions as practical experience accumulated.

By the time Hart entered the picture, then, the separation of law and morality was indeed thought to be superficial and wrong, a curious artefact of a distant past, evocative of an early, immature phase in the development of modern law. This is not, however, to suggest that inquiry and disputation ended there. I referred above to the consensus Fuller sought to speak for. It is important to see this consensus as no more than a modest or partial one for, beyond the collective rejection of positivism, disagreement was widespread and often profound. This was to be expected. In moving decisively from formalism to anti-formalism, legal thinkers of the period had reversed the currents of thought in which they moved. Where those currents under positivism were centripetal, now they were centrifugal. Positivism sought comforting clarity

and definition, but did so by shearing away anything and everything that brought unwelcome complexity, contingency and variety to their accounts. To appropriate an analogy offered by Fuller: there was order, yes, but it was the order of the morgue.[29] The anti-formalism that arose in response revelled in just those features, actively embracing 'life, experience, process, growth, context, function'.[30] But there was, in this reversal, a price to pay. Where formalism was sterile and imaginary, anti-formalism threatened chaos. At its worst, it offered aimless, iconoclastic anarchy.

There was a tension within the movement, therefore. There was explosion and expansion outwards, exemplified by the early attacks on formalism, by Holmes writing in the 1880s, for instance, or Jerome Frank's flamboyant *Law and the Modern Mind*.[31] Later on, however, greater emphasis came to be placed on the consolidation of what had been learnt, an effort to gather together and unify into a coherent vision the many and various elements thinkers of the period had assembled. Fuller was himself associated particularly with this latter movement, setting his stall out early as a seeker of unity and coherence. Earlier in his career, this had placed him somewhat at odds with other American legal thinkers of his time. He found greater kinship with the movement later on, however, as it moved into its mature consolidating phase.[32]

It is at this point that Hart makes his dramatic entry, emerging from nowhere and boldly setting out his confident challenge to the decades-long effort of the anti-formalists to move beyond positivism. Needless to say, Hart's own characterisation of the case against positivism reflected almost no real understanding of its significance. Indeed, as we have seen, he barely understood it. But no matter. With all the care for history and moment of a man attacking a newspaper crossword on his morning commute to work, Hart set about for his solution. Surveying the body of criticism that had accumulated over the preceding decades, but grasping none of its significance, Hart wondered: What clever turn of theory might serve to rescue Bentham and Austin's vision of bureaucratic governance? He found his answer, as we all know, in rules. What had brought positivism low, he felt, was Austin's poor choice of central instrument, the command. This had left Austin's model poorly equipped to address what Hart referred to as the 'borderline cases' found in the life of the law.[33] By substituting commands with rules, an altogether more flexible instrument, all of these borderline cases could be absorbed into the positivist model and the hermetically sealed bureaucratic conception revived.

It was, for the most part, this failure on Hart's part to truly appreciate the case against positivism that gave the debate its curious disconnected

character. In proceeding in the way that he did, Hart was effectively hitting a reset button, disregarding an extraordinary body of scholarship, the labour of decades, produced by some of the most impressive thinkers of the modern age. But Fuller, too, must take some of the blame for the breakdown in communication. While Fuller is today best known for his part in the debate with Hart, in fact the arguments contained in both his answer to Hart and in his subsequent writing – *The Morality of Law*[34] in particular – make most sense if we see them addressed to the legal thinkers of his own pre-war period. We must imagine them addressed to Holmes and Pollock, or to Pound and Llewellyn, in other words, rather than to Hart and Dworkin. The ideas that have so confounded the post-war professional legal theorists – the internal morality of law, interactionism, the moralities of aspiration and duty – all represent the culmination of Fuller's own career preoccupations, most notably his attempt to finally pull together and set in coherent form the chaos unleashed by anti-formalism. None of these concerns were remotely of interest to Hart.

1.3 Law as custom and process

What, then, was Fuller's vision of law? What unity did he find in the chaos of anti-formalism? As noted above, Fuller took issue not with the detail of Hart's argument, but with the larger premise involved, the very idea of law that lay beneath that detail. What is so misguided about the positivist project, Fuller argued, is the way in which human societies are understood to be ordered artificially, from the top down, through exclusively bureaucratic means. This is the effect of equating all law with its visible, institutional form, and with legislation in particular. Equating law with its letter rather than its spirit in this way produces a form of ordering which, while true of military organisation and totalitarianism, is not at all the form of order we associate with liberal, democratic states. With this in mind, Fuller describes the positivist understanding of law variously as 'managerial direction';[35] a 'one-way projection of authority, emanating from an authorised source and imposing itself on the citizen';[36] a 'datum projecting itself into human experience and not ... an object of human striving'.[37] He notes, too, that the object of managerial direction is 'order *simpliciter*' rather than 'good order'[38] with this same distinction in mind.

Under positivism, then, all law is thought to function in an administrative or regulatory spirit. Fuller rejects this view and offers an alternative. Law, he insists, is not artificially imposed from above, but is

instead 'natural', an organic expression of a particular society's desire for orderliness. This organic connection with an underlying way of life is, we might say, the hallmark of true legality, with a legal system understood to be genuine or authentic only to the degree to which it reflects a reciprocal relationship, subtle and pervasive, between the governed and those who govern. Of course, readers may well find this talk of order that is natural and organic singularly unhelpful. Such statements are everywhere in Fuller's work, and, as we have seen, many have struggled to make sense of his ideas. We will, therefore, need to state the matter more simply and more concretely. As it happens, this is not so difficult. One useful way we might characterise the shift from utilitarianism and positivism in the late eighteenth and early nineteenth centuries to the anti-formalism of the late nineteenth and early twentieth centuries, is to present it in terms of a shift in the hold the statutory and common law forms of law held on the imagination of legal thinkers. In the earlier part of this period, the rise of Parliament and the bureaucratic state more generally led thinkers like Bentham to see legislation as the definitive legal form of modern nation states. All modern law was to be conceived in these terms and the common law, as we have seen, was to be done away with entirely or absorbed into the statutory model. By the later part of this period, however, the emphasis had shifted back.

As we have noted, common law adjudication has, from the very start, been a thorn in the side of positivist theorists. Where the likes of Bentham, Austin and Hart chose simply to brush aside this aspect of legal life, the anti-formalist thinkers working in the period between Austin and Hart took common law adjudication seriously, making a sincere attempt to illuminate the process as an aspect of law distinct from legislation. But these thinkers looked to do more than merely give the process its due alongside legislation. Rather, they sought to find the spirit of law itself in common law adjudication, with legislation viewed as an extension of this more basic form. Fuller was very much a part of this tradition. And while he is today known for advocating a natural law conception of law many find nebulous and incoherent, his work can best be understood, I submit, if we see it as a form of common law jurisprudence. For Fuller, then, the challenge offered by modern law was not to be answered by burying the common law and denying its existence. Rather, he sought to proceed by understanding the common law form itself, better grasping its logic or spirit, before going on to work out how this form needed to be expanded and adapted to meet the demands of modern life. Crucially, legislation here would be seen merely as part of this process of expansion and adaptation rather than as superseding the common law form entirely.

What, then, is the spirit or logic of the common law? Perhaps the best statement was provided early on, by the common law theorists of the seventeenth and eighteenth centuries, Edward Coke, Matthew Hale and William Blackstone most prominently among them.[39] Facing the rise of Parliament and the increasing hold legislation was coming to have on the imagination of legal thinkers, thinkers like Coke felt the need to offer a defence of the common law. This was not least because the common law form is in many ways the very antithesis of legislation. Where legislation encourages us to think of the law as possessing a tangible existence – commands, rules, a form of words found in a statute – the common law conception eschews any such tangible existence. There is no 'law qua law', then, no 'law, strictly and so-called'. Instead, there is merely custom and process. In the place of a distinct body of rules, under the common law conception the raw material of law is found in the habits or customs of a people. To this is added legal process, the work of lawyers and judges, which takes the form of an active effort at clarifying, rationalising and extending that body of habit or custom.

It would be difficult to overstate the challenge this understanding of law presents to modern sensibilities, particularly academically inclined ones. Where positivists sought to develop law as a single, monolithic structure, something tangible to which the word 'law' could apply, the anti-formalist approach led to a diffuse, somewhat woolly vision, one that, on the face of it, was insubstantial and chaotic. The apparent vacuum at the heart of the vision incensed Bentham, who famously dismissed it as 'Dog's Law'.[40] Austin, similarly, dismissed talk of the customary basis of law as a form of needless obfuscation, with the admirers of customary law, he said, tricking out their 'idol' with 'mysterious and imposing attributes'.[41] Yet, for all the difficulty the material presents us, the anti-formalist accounts do in fact resolve around two distinct focal points: custom and process. It is a preoccupation with these two aspects of legal life that best characterises their work.[42]

In the first of these, the anti-formalists collectively rejected the positivist attempt to dispense altogether with any consideration of the relationship between law and society. Positivist theorists do not do this explicitly, of course. Rather, theoretical decisions are taken early on which helpfully render any such concern unnecessary. Bentham, for instance, begins his efforts by insisting that there is no such thing as society. Modern societies are in fact nothing more than collections of individuals. There is, he says, no organic whole greater than the sum of its parts. Having directed his attention exclusively to individuals in this way, he goes on then to similarly do away with any need to genuinely

consider what individual law-abiding behaviour might involve. He does this by taking the individual to be a completely rational agent, one whose actions are undertaken deliberately and self-consciously. Once again, this has the helpful effect of clearing away any of the complexity and difficulty that might emerge from a realistic cognitive and behavioural account.[43]

In the anti-formalist response, however, this radical and rather dishonest simplification of the matter is explicitly rejected. Rather than working with an artificial and self-serving understanding of both individual and society, these thinkers acknowledged that human life is complex and must be understood in its own right if sense is to be made of the law. With this in mind, legal thinkers like Savigny, Maine, Holmes, Ehrlich, Pound, Llewellyn and Fuller all looked to history, sociology, anthropology, economics and psychology to better understand the complex human picture found beneath the more visible legal processes. In doing so, these thinkers all came, in their various ways, to see the formal, institutional aspect of legal life merely as the most visible part of a much larger picture, merely the tip of an iceberg, as it is sometimes put.[44] To study law, they came to see, we must study the deeper processes responsible for social ordering. To seek to make sense of the visible part of the picture in isolation, as positivists insist on doing, is to distort that part of the picture. And, crucially, it is to give the law an authoritarian cast that is not actually true of law as we find it in liberal democracies. For under the common law conception, sovereignty remains with the way of life, where it belongs. Fuller's talk of reciprocity between lawgiver and citizen, so mysterious to many of the post-war professionals, in fact is nothing more than this long-standing defence of law in the face of the rise of the modern, administrative state, itself a tradition that can be traced back to the common law theorists of the seventeenth and eighteenth centuries, and to Edmund Burke and his defence of the British Constitution. In the middle of the twentieth century, this was an argument Fuller made alongside other defenders of natural or spontaneous order, figures like Friedrich Hayek[45] and Michael Polanyi.[46]

Along with custom, the other defining characteristic of the common law conception of law is the distinctive view taken of legal process itself. We might think that the positivist strategy of dispensing with any real engagement with the social origin and setting of law would have been undertaken specifically to allow greater attention to be given to the legal process itself. Sadly, no. Once again, the most prominent characteristic of the positivist account is the dramatic way in which legal process is simplified in the pursuit of a tidy theory. The picture is simplified in a

number of different ways. First of all, positivists reduce all law to legislation and bureaucratic organisation. All other legal forms and devices are simply ignored or are absorbed in some ingenious manner into legislation. Legislation is useful to the positivists because it holds out the possibility of a legal instrument that is not only tangible, but neatly enclosed. It becomes easy, then, to insist on the separation of law and morality; that is, the complete separation of the legal instrument from its social source and environment. This leads, thirdly, to the insistence that legislation operates mechanically for the most part, leaving little or no role for discretion and the exercise of judgement on the part of officials. In a few simple steps, then, everything that might introduce complexity and contingency into the account is dispensed with, and the way made clear for a purely theoretical treatment of law.

The anti-formalists, predictably enough, reversed each one of these positions. Put briefly, they presented a picture of law in which the forms and devices involved are many and diverse, all are open to and pervaded by the way of life, and none function mechanically, leaving the officials involved to exercise a considerable degree of discretion. The overall challenge they offered was exemplified in the care and attention they gave to common law adjudication, perhaps the defining characteristic of the anti-formalist work. As we have seen, common law adjudication is the very antithesis of legislation, frustrating at every turn the positivists' attempts to make law a fit and comfortable subject for the narrow, 'technical' attentions of the post-war professionals.

The first aspect of common law adjudication that presents difficulties for positivists is the way in which law here is clearly inseparable from the underlying way of life it exists to serve. While the concern for this relationship was perhaps explored more explicitly in the American sociologically oriented jurisprudence, it was as much a feature of the English common law jurisprudence of the same period. A good example of the way in which the issue was raised in England is provided by Arthur Goodhart's book *The English Law and the Moral Law*.[47] The title might suggest a tract on the influence of religious morality on the English common law. In fact it is nothing of the sort. Rather, 'morals' here stands for custom or an underlying way of life. The lectures collected in the book explore the subtle ways in which the various areas of law all are interpenetrated by custom. Goodhart's task was not to deny this relationship, but to explore the often very different extent to which custom plays a role in the various areas of law.[48] Interestingly enough, Patrick Devlin's collection of essays, *The Enforcement of Morals*,[49] adopts a similar structure, with the famous lecture on the criminal law followed,

in the collection, by companion lectures on tort, contract and marriage. In each of these, Devlin explores the extent and practical implications of the relationship for the area of law in question.[50]

The second way in which common law adjudication undermines the positivist project is perhaps the most obvious: the challenge it offers to the positivist insistence that only legislation is truly law. Of course, this aspect of the vision is undermined as soon as we acknowledge common law adjudication and take it seriously. But acknowledging common law adjudication is merely the start. For, as we have already noted, there are a great many such forms and devices employed in legal systems. It is not, then, simply that there are one or two definitive vehicles for law. It is rather that there are many. In the future we may see many more. The effect, in other words, is to shift our attention from this or that particular tool, encouraging us instead to pay much more attention to the work the craftsperson is there to do. When we acknowledge the many and various forms and devices, our attention moves to the ultimate work of law, which is social ordering. Again, this has the effect of reducing the prominence of the formal, institutional life of the law and placing greater emphasis on the ordering needs of the way of life.

For Fuller and Llewellyn, exploration of the diversity of legal forms and devices had a thoroughly practical motivation. The professional lives of both coincided with the dramatic expansion of the administrative state in America associated with Franklin D. Roosevelt's New Deal. With this expansion and diversification of government function, philosophical questions as to the nature of law became matters of thoroughly practical concern. Fuller and Llewellyn both challenged the impoverished understanding of law offered by the positivists, looking instead to offer a mature understanding of the various forms and devices available. This was pursued with a view to ensuring that means and ends were matched appropriately in the expanded legal system. Fuller's work is particularly notable in this respect. With articles like the celebrated 'Forms and Limits of Adjudication'[51] and 'Mediation – Its Forms and Functions'[52] he sought to tease out the strengths and weaknesses of the various processes with a view to ensuring that they were properly employed. He felt that the New Deal expansion often saw devices used inappropriately[53] and felt that this had behind it the decline of a certain sort of practical understanding of legal process.[54]

The third and final feature of common law adjudication we will explore here offers perhaps the most dramatic challenge to the positivist vision of law: the problem posed by the human element in legal life.[55] It is central to the efforts of the positivists that the role played by

officials in the life of the law be minimised. Common law adjudication is, of course, thoroughly human. Indeed, Coke's defence of the common law was to a large extent a defence of the legal class. Similarly, Bentham's antipathy towards the common law had a great deal to do with the considerable influence the form places in the hands of lawyers and judges.[56] Three hundred years after Coke, Fuller and Llewellyn were placing similar emphasis on the thoroughly human character of the enterprise. Indeed, Fuller's approach arguably turns the positivist vision inside out. Rather than identify the law exclusively with rules or commands, with these wielded mechanically by faceless officials, Fuller's account can be seen to take the very opposite view, with the enterprise of law understood to involve the coordination of largely independent action undertaken by individual officials. On the face of it, this might sound a strange view. But Fuller's account of law had a great deal in common with similar work produced around the same time by Thomas Kuhn, Michael Polanyi and Peter Drucker.[57] All of these thinkers sought to explore the challenge posed by modern, large-scale institutional approaches to science, business and law. In these enterprises, the task undertaken requires the coordination of a large number of participants, all of whom must be allowed a considerable degree of independence if their efforts are to be meaningful.[58]

This insistence on independence on the part of legal officials explains Fuller's repeated emphasis on purpose. Fuller was apparently much influenced by Michael Polanyi and, to a lesser extent, Thomas Kuhn.[59] According to Polanyi and Kuhn, scientists, though wholly independent, are nevertheless effectively coordinated by two influences. First of all, however independent the individual scientist, his or her efforts will be shaped to a large extent by the common physical reality investigated. In his book *The Logic of Liberty*,[60] Michael Polanyi argues that the spontaneous coordination of scientists succeeds because of the 'common rootedness of the scientists in the same spiritual reality'.[61] To this there is added what Kuhn refers to as the 'disciplinary matrix' the individual scientist operates within.[62] Fuller's account of law is similar, with two equivalent influences felt by the official. There is, first of all, the common spiritual reality these officials inhabit, here provided by the ordering needs of the way of life, what the likes of Goodhart and Devlin referred to as 'morals'.[63] To this is added the 'disciplinary matrix' the officials work within, principles of good practice Fuller sought to adumbrate with his famous allegory of Rex, the hapless lawmaker.[64]

Here, then, in summary, is the anti-formalist alternative. There is, first of all, the positioning of the way of life as primary while the formal,

institutional life of the law is relegated to a secondary position within the larger picture. The latter is merely the visible tip of the iceberg, the former its vast submerged body. Secondly, the formal, institutional life of law consists of a range of forms and devices, each of them slight and employed instrumentally. Law, under this view, is a craft. As such, the shape of its practice is determined by the work that is required of it. A certain flexibility must be entertained as to the means with which this work is to be done. The positivist tendency to fetishise legislation is therefore misguided. Finally, the forms and devices themselves do not operate mechanically, leaving considerable discretion in the hands of officials at every level. Rather than see this discretion as an embarrassment to be minimised, it is rather characteristic of the practice as a whole. This means that a realistic and mature understanding of both the purpose of law and its various forms and devices is crucial to the successful operation of the practice. Fuller and Llewellyn, with their emphasis on craft and meaning, sought to make this understanding a living reality within law schools and the legal profession more generally.[65]

A useful way of putting this alternative into perspective is to look at the parallel way in which we might think of the practice of medicine. The positivist understanding of law would find its equivalent in a view taking, say, surgery or pharmacology exclusively as what medicine amounts to, with health and well-being projected upon the individual patient by the process. This is, of course, an absurd way in which to think of the practice of medicine. The three aspects of the anti-formalist alternative set out above would clearly apply here. First of all, in medicine, the human body's inherent capacity for health and well-being stands as the primary consideration, with medical forms and devices understood to be secondary, as existing to tend to that inherent capacity. Similarly, no one form of device is thought of as exhausting medicine itself. There are potentially no end to such forms and devices. Finally, medical professionals are not faceless officials applying mechanical processes. Rather, each one must be thought of as a fully realised human being with a sophisticated understanding of the role he or she is there to play.[66]

1.4 Conclusion

Having briefly sketched out the pre-war alternative, dismissed with such contempt by their post-war professional counterparts, what are we to make of the developments of the last fifty years? Can we really judge the new professional legal theory to be an advance on the approach

taken by the likes of Fuller and Llewellyn? And what are the implications of the difficulty the material appears to present to contemporary readers? How much confidence can we have in the new, professional legal theory when its practitioners appear unable to understand their own history and inheritance?

The great difficulty the older material seems to present contemporary readers is the sheer complexity it embraces. Fuller and Llewellyn both seemed to possess an almost inexhaustible curiosity. Revelling in the fine detail the law presented them, they seemed determined to extend their inquiries out in every direction simultaneously. It is this, I think, that contemporary readers find so objectionable about their work, the almost gratuitous pursuit of ever finer detail, to the detriment of theory building. To Hart, what mattered above all else was clarity. As we have seen, however, he was happy to ignore or distort much of what was before him in the pursuit of this goal. I cannot be alone in finding it difficult to see the value of such an enterprise. What good can come from pursuing so artificial, so radically simplified an account of law? Unsurprisingly, the professional legal theorists of the post-war period have come to be a largely inward-looking group, to the bemusement and consternation of other legal academics and students. Professionalism has entailed a retreat from the wider community of students, scholars and practitioners. How are we to see this as an advance?

Philosophy does not have to take the form assumed by the post-war professionals. As we have noted, the pursuit of philosophy, properly understood, is the pursuit of wisdom. And the possession of wisdom does not necessarily translate into crisp theories that shine on the page. Indeed, this aspiration is corrosive, for the study of the human realm will inevitably bring to light complexity and irregularity such as to make these aspirations unrealistic. Invariably, then, these efforts lead to the sort of denial and distortion characteristic of the post-war enterprise. The pursuit of wisdom is something else entirely. A wise man is not recognisable for his skill in devising and communicating 'theoretically sophisticated' accounts of life, comprehensible only to other professionals exactly like himself. Instead, wisdom is expressed in a capacity for insight and good judgement, itself the gift of breadth and depth of experience. It is expressed, too, in a certain generosity of spirit, a concern for others that leads the wise man to seek to contribute to the lives of those around him. This is what Fuller and Llewellyn offered their readers and students. After fifty years of professionalism, it is time we recovered the spirit of their work.

Notes

1. Llewellyn (1986, p. 255).
2. Fuller (2001a, p. 305).
3. Llewellyn (1986).
4. Llewellyn (1962).
5. This notion that activities like reading and writing pursued philosophically are undertaken in a 'high sense' is taken from Henry David Thoreau's *Walden*.
6. Green and Leiter (2005).
7. Ibid.
8. Schauer (2006, pp. 862–9).
9. Kramer (2001, p. 649).
10. An example is provided by Schauer: 'Bringing philosophical sophistication to the theoretical study of the phenomenon of law has yielded great benefits. The clarity of language, precision of argument, and rigor of analysis that are common to much of the best of modern philosophy … have helped us to better understand legal reasoning, legal argument, the relationship between law and morality, the normative force of law, and the nature of law itself. Moreover, drawing on the best philosophical learning about causation, free will, responsibility, actions, intentionality, obligation, promising, and language has facilitated tackling many of the enduring and pervasive problems of law. And still further, our understanding of law's greater goals has benefited from consulting the developments in moral and political philosophy of the past thirty years' (Schauer 2006, pp. 862–3).
11. Again, Schauer acknowledges this, at one point describing Goodhart as a 'titan' of English law (Schauer 2006, p. 859).
12. A good example of this phenomenon, the closing in of the horizon of the professional legal theorists, is provided by Wilfrid Waluchow's *A Common Law Theory of Judicial Review* (2007). With his book, Waluchow attempts to provide a way out of the cul-de-sac constitutional theorists presently find themselves in by looking to the common law. In doing so, however, he looks mainly to Hart and Joseph Raz for his basic understanding of the common law. This is, I think, the equivalent of looking to Richard Dawkins and Christopher Hitchens for insight into the power of prayer. Waluchow does include references to Cardozo (1921), Devlin (1965) Postema (1986) and Simpson (1986) but there is little evidence of real engagement with the common law as described by these authors. The most interesting inclusion, however, is a review of Melvin Eisenberg's *The Nature of the Common Law* by Frederick Schauer (1989). Eisenberg is perhaps best known for co-authoring *Basic Contract Law* with Fuller. Moreover, in his review, Schauer notes how much Eisenberg's account has in common with the account of common law adjudication offered by Karl Llewellyn. Sadly, while Schauer's review is given considerable prominence within Waluchow's book, Eisenberg's actual characterisation of the common law does not appear at all.
13. This is easily the most fascinating yet curiously under-explored aspect of the Hart–Fuller and Hart–Devlin debates, the blank incomprehension that greeted both Fuller and Devlin's interventions. Hart acknowledged this himself in his review of Fuller's *Morality of Law*: 'But I have found and shall find

rereading necessary for other reasons. For though the main positions which the author wishes to defend are clearly and frequently stated, and though they are often illustrated with suggestive examples and analogies drawn from science or economics, it is nonetheless often difficult amid the author's firm and clear assertions of what is right and wrong in jurisprudence to identify any equally firm and clear argument in support of these assertions. Yet in saying this I am haunted by the fear that our starting points and interests in jurisprudence are so different that the author and I are fated never to understand each other's work. So it may be that where I find the author's thought obscure it is really profound and out of my reach. I wish that I dare hope that where he finds my thought misguided it is really, or even merely, clear' (Hart 1965, p. 1281). Fuller acknowledged the problem in his 'Reply to My Critics', included with the revised edition of his book *Morality of Law*: 'As critical reviews of my book came in, I myself became increasingly aware of the extent to which the debate did indeed depend on "starting points" – not on what the disputants said, but on what they considered it unnecessary to say, not on articulated principles but on tacit assumptions' (Fuller 1964, p. 189).

14. I take this from F. R. Leavis's response to C. P. Snow's famous 'Two Cultures' lecture. There are interesting parallels between the Hart–Fuller and Snow–Leavis debates. Leavis felt that what was most interesting about Snow's lecture was not its content – he felt Snow understood little of what he was discussing – but the change in the intellectual climate the man himself represented: 'The abundant adverse comment directed against my lecture hasn't advanced the argument by leaving me something to answer. The Spectator was indulgent when it called the mass of correspondence it printed a "debate". I say "adverse comment" because to say "criticism" would be inappropriate: the case I presented wasn't dealt with – there was no attempt to deal with it. The angry, abusive and strikingly confident utterances of Snow's supporters merely illustrated the nature of the world or "culture" that had made Snow a mind, a sage, and a major novelist … The confidence is remarkable and significant because the demonstrators see themselves, unmistakably, as an intellectual elite and preeminently capable of grounded conviction, and yet, when they sense criticism by which their distinction and standing are implicitly denied, can only, with the flank-rubber's response, enact an involuntary corroboration of the criticism' (Leavis 1962, p. 5).
15. Leavis goes on to offer his judgement of Snow himself: 'The judgment I have to come out with is that not only is he not a genius; he is intellectually as undistinguished as it is possible to be. If that were all, and Snow were merely negligible, there would be no need to say so in any insistent public way, and one wouldn't choose to do it. But I used the adverb "portentously" just now with full intention: Snow is a portent. He is a portent in that, being in himself negligible, he has become for a vast public on both sides of the Atlantic a master-mind and a sage. His significance is that he has been accepted – or perhaps the point is better made by saying 'created': he has been created as authoritative intellect by the cultural conditions manifested in his acceptance. Really distinguished minds are themselves, of course, of their age; they are responsive at the deepest level to its peculiar strains and challenges: that is why they are able to be truly illuminating and prophetic and

to influence the world positively and creatively. Snow's relation to the age is of a different kind; it is characterised not by insight and spiritual energy, but by blindness, unconsciousness and automatism. He doesn't know what he means, and doesn't know he doesn't know. That is what his intoxicating sense of a message and a public function, his inspiration, amounts to. It is not any challenge he thinks of himself as uttering, but the challenge he is, that demands our attention'. Though Fuller was himself more restrained in his criticism, I suspect that much of what Leavis says here of Snow could equally have been said of Hart (see Leavis 1962, pp. 10–11).

16. Hart (1958, p. 594)
17. Hart (1958, p. 595)
18. Ibid.
19. Lacey (2004, p. 1).
20. There is no small novelty, I think, simply in putting Fuller's response in this way. In a recent article on the debate, for instance, Lacey portrays Fuller as having long 'ploughed a rather lonely jurisprudential furrow as a scholar and teacher committed to exploring the morality of law', a characterisation very much in keeping with Fuller's post-war reputation (Lacey 2010, p. 1). Yet this seems to me entirely the wrong way in which to approach Fuller's response to Hart. For if we place Fuller's scholarship alongside the scholarship produced by his immediate predecessors and contemporaries – the likes of Maine, Holmes, Maitland, Pollock, Vinogradoff, Pound, Llewellyn, Goodhart and Stone – it quickly becomes clear that his response makes most sense if seen as an attempt to provide what might be thought of as a corporate response to a challenge made by an unsympathetic, and uncomprehending, outsider.
21. For a sense of the difference between the two approaches, consider the following analogy. We can easily imagine a similar debate taking as its subject matter the wisdom or otherwise of a particular form of economic regulation. Let us take for our illustration the way banks have been regulated in the UK and US these past thirty years. Three decades after the introduction of the regulatory regime in question, a debate arises as to the weaknesses of the approach taken, weaknesses which, some argue, have led to a recent catastrophic failure of the sector. Now imagine the same clash of motivation and sensibility, with one disputant seeking to discuss how poorly the regulations have fared in practice, while the other chooses to approach the matter in a purely abstract, speculative manner, as if the regulations were still on the drawing-board and the criticisms themselves wholly theoretical or logical in nature. For the latter, the exercise would largely be an academic one, an opportunity to engage in a bout of armchair philosophy. For the former, however, the exercise would be the altogether more substantial one of seeking to learn from the mistakes of the past and secure from this examination surer guidance for future conduct.
22. Fuller (1958, p. 635).
23. Fuller (1940).
24. Fuller (1940, p. 16).
25. See, e.g., Bentham (1970b, p. 232) where he sets out his ambitions for his work. He sought to 'lay the foundation for the construction of a complete body of laws', adding that the field of legislation was yet then a 'trackless wild'. He went on then to state his hope that his work would be found to

'exhibit a plan to work upon, a standard to be guided by in digesting or reducing a body of customary law or a mixed body of customary and statute law together into a pure body of statutory law'.

26. Austin (1832, pp. 30–3) Fuller discusses Austin's strategy in his book *Anatomy of the Law* (Fuller 1968, pp. 43–9).
27. During this period, Kelsen stood out as a notable exception.
28. See White (1949).
29. Fuller (1958, p. 644).
30. White (1949, p. 13).
31. Frank (1949).
32. See, e.g., Fuller (2001b).
33. Hart (1961, pp. 1–17).
34. Fuller (1964).
35. Fuller (1964, p. 207).
36. Fuller (1964, p. 192).
37. Fuller (1958, p. 646).
38. Fuller (1958, p. 644).
39. For an excellent introduction to the common law theorists, see Postema (1986).
40. Bentham (1843). See also the Preface to his *An Introduction to the Principles of Morals and Legislation*: 'Common law, as it styles itself in England, judiciary law, as it might more aptly be styled every where, that fictitious composition which has no known person for its author, no known assemblage of words for its substance, forms every where the main body of the legal fabric: like that fancied ether, which, in default of sensible matter, fills up the measure of the universe. Shreds and scraps of real law, stuck on upon that imaginary ground, compose the furniture of every national code' (Bentham 1970b, p. 8).
41. Austin (1832, p. 32).
42. That this is an appropriate characterization of Fuller's interests is supported by the subtitle of the recent collection of essays revisiting his work: *Reconsidering Fuller: Essays in Implicit Law and Institutional Design*. The subtitle could just as easily have been 'Essays in Custom and Process'. For a good example of how Fuller's interests have led him to be misunderstood by his post-war audience, consider the following in the light of what has been discussed here. The following passage is from Frederick Schauer's contribution to *Reconsidering Fuller*: 'Thus, Fuller's increasing interest in decision-making outside of the legal system, his increasing interest in the sociological, anthropological, and cross-cultural dimensions of decision-making, his increasing interest in legislation, and his general interest in what he called eunomics – "the theory of good order and workable social arrangements" – all suggest that, as Fuller's thinking progressed, his interest in law qua law, or even in law as legal system, decreased substantially' (Schauer 1999, p. 139).
43. See, e.g., the following from Bentham's *An Introduction to the Principles of Morals and Legislation*: 'The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder the meaning of it is often lost. When it has a meaning, it is this. The community is a fictitious body, composed of the individual persons who are

considered as constituting as it were its members. The interest of the community then is, what? – the sum of the interests of the several members who compose it' (Bentham 1970b, p. 12).

44. Postema (1986, p. 27).
45. See, e.g., Hayek (1960).
46. Polanyi (1951).
47. Goodhart (1953).
48. Goodhart's argument is presented over four lectures. The first addresses the relationship between law and morality more generally, with subsequent chapters exploring the relationship as it is found to exist in 'Constitutive, Administrative and International Law' (Lecture 2), 'Criminal, Torts and Contract' (Lecture 3) and 'Other Branches of Civil Law' (Lecture 4).
49. Devlin (1965).
50. Devlin (1965). Lack of space prohibits a discussion of Devlin's debate with Hart. This is unfortunate because Devlin's intervention is best read alongside Fuller's. In the end, what divided Hart and Devlin was the same difference in 'starting points', with Hart taking for granted a managerial direction understanding of criminal law, while Devlin sought to sketch out a common law influenced, custom and process account.
51. Fuller (1978).
52. Fuller (1971).
53. See, e.g., Fuller (1964, pp. 170–7).
54. Fuller (2001b).
55. See, e.g., Part 1 of Fuller (1968), 'The Pervasive Problems of Law'.
56. Bentham (1823).
57. Kuhn (1962); Polanyi (1951); Drucker (1954).
58. In the spirit of Drucker, we might describe positivism as a form of 'Legal Taylorism'. In a section with the title 'Employing the Whole Man', Drucker sets out his case against Frederick Taylor's 'Scientific Management', particularly as developed by his successors: 'The human being also has control over how well he works, over the quality and quantity of production. He participates in the process actively – unlike all other resources which participate only passively by giving a preconditioned response to a predetermined impulse' (Drucker 1954, p. 265). A little later, Drucker continues: 'the confusion between analysis of work and action in work is a misunderstanding of the properties of the human resources. Scientific Management purports to organize human work. But it assumes – without any attempt to test or verify the assumption – that the human being is a machine tool'. (Drucker 1954, p. 283).
59. Fuller cites Kuhn and Polanyi in Fuller (1964, p. 242).
60. Polanyi (1951).
61. Polanyi (1951, p. 39).
62. Kuhn (1962, p. 182); Kuhn (1970, p. 271).
63. For a reference to the way in which 'morals' have a hand in coordinating the efforts of judges, see Devlin (1965, p. 42): 'To my mind the law of tort is the least satisfactory branch of English law. It may not be accidental that it is also the one which of its nature has least to do with morals. The criminal law is shaped by the moral law; the quasi-criminal is based on it; the law of contract is the legal expression of the moral idea of good faith; the law

of divorce formulates the permissible relaxations from the moral ideal of the sacramental marriage. The judges of England have rarely been original thinkers or great jurists. They have been craftsmen rather than creators. They have needed the stuff of morals to be supplied to them so that out of it they could fashion law; when they have had to make their own stuff their work is inferior.'

64. Fuller (1964, pp. 33–8). Interestingly, Fuller and Kuhn found their theories opposed in very similar ways, but from, as it were, opposite directions. Kuhn's theory provoked something close to outrage in Karl Popper, who took scientists to be radically independent, the very embodiment of his cherished 'open society'. With this commitment in mind, he vehemently opposed Kuhn's emphasis on group coordination within the 'normal science' phase of scientific inquiry (Popper 1970). Hart, conversely, sought to depict legal officials as largely deferential, and as such objected to the more independent depiction offered by Fuller. Ultimately, what thinkers like Fuller, Kuhn, Polanyi and Drucker sought to explore was the subtle way independence and deference are reconciled in the large-scale enterprises they investigated. For a sense of how well Fuller's conception reflected the common law tradition, see Lobban (1991, pp. 14–16). Lobban describes common law adjudication as functioning through the combination of the 'multiplicity of sources' judges draw upon, themselves a 'reflection of the haphazard morality of society', with the shaping influence provided by the adjudicatory form itself.
65. According to this interpretation of Fuller, law is an example of what is sometimes referred to as a 'stochastic art'. A stochastic art does not involve the creation of an object but rather the tending, maintenance or cultivation of something that already exists and, ultimately, is beyond the power of the craftsperson. In the *Rhetoric*, Aristotle used medicine to illustrate the principle. Having declared rhetoric a useful art, he continues: 'It is clear, further, that its function is not simply to succeed in persuading, but rather to discover the means of coming as near such success as the circumstances of each particular case allow. In this it resembles all other arts. For example, it is not the function of medicine simply to make a man quite healthy, but to put him as far as may be on the road to health; it is possible to give excellent treatment even to those who can never enjoy sound health' (Aristotle 1946, p. 5). Law presents us with an excellent example of just such an art. Good order and health and well-being are not created by lawyers and doctors, after all. The best these professionals can hope to do is cultivate these conditions through artful intervention. Fuller sought to get this quality across to his readers in his discussion of the moralities of duty and aspiration in *Morality of Law* (Fuller 1964). In the same book, with his allegory of Rex, he sought to illustrate the folly of a lawgiver who lacked the attentiveness such arts require and who sought instead simply to impose order upon his people (Fuller 1964). In my classes, I always ask my students whether Rex reminds them of anyone. The question rarely proves difficult for them. They answer: 'Bentham!'. In the *Rhetoric*, Aristotle continues: 'Furthermore, it is plain that it is the function of one and the same art to discern the real and the apparent means of persuasion, just as it is the function of dialectic to discern the real and the apparent syllogism. What makes a man a "sophist" is not his faculty,

but his moral purpose' (Aristotle 1946, pp. 5–6). This last passage sums up very well, I think, Fuller's motivation in answering Hart.

66. To return to the parallels with medicine, the following passage captures very well, I think, the view of legal practice Fuller sought to get across to his students and readers. The passage is taken from the book *Better* by the surgeon Atul Gawande. Early in his introduction, Gawande asks: 'What does it take to be good at something in which failure is so easy, so effortless?' A little later, he continues: 'People often look to great athletes for lessons about performance. And for a surgeon like me, athletes do indeed have lessons to teach – about the value of perseverance, of hard work and practice, of precision. But success in medicine has dimensions that cannot be found on a playing field. For one, lives are on the line. Our decisions and omissions are therefore moral in nature. We also face daunting expectations. In medicine, our task is to cope with illness and to enable every human being to lead a life as long and free of frailty as science will allow. The steps are often uncertain. The knowledge to be mastered is both vast and incomplete. Yet we are expected to act with swiftness and consistency even when the task requires marshalling hundreds of people – from laboratory technicians to the nurses on each change of shift to the engineers who keep the oxygen supply system working – for the care of a single person. We are also expected to do our work humanely, with gentleness and concern. It's not only the stakes but also the complexity of performance in medicine that makes it so interesting and, at the same time, so unsettling' (Gawande 2007, pp. 3–4). Fuller sought to present legal practice in much the same light.

References

Aristotle (1946). *The Works of Aristotle*, W. D. Ross (ed.), vol. XI (London: Oxford University Press).

Austin, J. (1832, 1863). *Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (London: Weidenfeld and Nicolson, 1954).

Bentham, J. (1843). 'Truth versus Ashhurst; or, Law as it is, Contrasted with What it is Said to Be', in *The Works of Jeremy Bentham,* published under the superintendence of his executor, John Bowring, vol. V (Edinburgh, Tait; London, Simpkin, Marshall).

Bentham, J. (1970a). *An Introduction to the Principles of Morals and Legislation*, J. H. Burns and H. L. A. Hart (eds) (London: Athlone Press).

Bentham, J. (1970b). *Of Laws in General* (London: Athlone Press).

Cardozo, B. (1921). *The Nature of the Judicial Process* (New Haven: Yale University Press).

Devlin, P. (1965). *The Enforcement of Morals* (London: Oxford University Press).

Drucker, P. F. (1954). *The Practice of Management* (New York: Harper).

Eisenberg, M. A. (1988). *The Nature of the Common Law* (Cambridge: Harvard University Press).

Frank, J. (1949). *Law and the Modern Mind* (London: Stevens).

Fuller, L. L. (1940). *The Law in Quest for Itself* (New York: AMS Press, 1978).

Fuller, L. L. (1958). 'Positivism and Fidelity to Law: A Reply to Professor Hart', *Harvard Law Review,* 71, 630–72.

Fuller, L. L. (1964). *The Morality of Law,* Rev. edn (New Haven: Yale University Press, 1969).
Fuller, L. L. (1968). *Anatomy of the Law* (Harmondsworth: Penguin, 1971).
Fuller, L. L. (1971). 'Mediation', *Southern California Law Review*, 44, 305–39.
Fuller, L. L. (1978). 'The Forms and Limits of Adjudication', *Harvard Law Review*, 92, 353–409.
Fuller, L. L. (2001a). 'Philosophy for the Practicing Lawyer', in K. I. Winston (ed.). *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Publishing).
Fuller, L. L. (2001b). 'The Lawyer as the Architect of Social Structure', in Kenneth I. Winston (ed.). *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Publishing).
Gawande, A. (2007). *Better: A Surgeon's Notes on Performance* (New York: Picador).
Goodhart, A. L. (1953). *English Law and the Moral Law* (London: Stevens).
Green, L. and B. Leiter (2005). 'Letter to the Editor', *Times Literary Supplement*, Mar. 11, 2005.
Hart, H. L. A. (1958). 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, 71, 593–629.
Hart, H. L. A. (1961). *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994).
Hart, H. L. A. (1965). 'The Morality of Law by Lon L. Fuller', *Harvard Law Review*, 78, 1281–96.
Hayek, F. A. (1960). *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1976).
Kramer, M. H. (2001). 'Rediscovering Fuller: Essays in Implicit Law and Institutional Design', *Modern Law Review,* 64, 649–50.
Kuhn, T. (1962). *The Structure of Scientific Revolutions*, 3rd edn (Chicago: University of Chicago Press, 1996).
Kuhn, T. (1970). 'Reflections on my Critics', in I. Lakatos and A Musgrave (eds). *Criticism and the Growth of Knowledge* (Cambridge: Cambridge University Press), 231–78.
Lacey, N. (2004). *A Life of H. L. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press).
Lacey, N. (2010). 'Out of the "Witches' Cauldron"?', in P. Cane (ed.). *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart Publishing), 1–42.
Leavis, F. R. (1962). *Two Cultures? The Significance of C. P. Snow* (London: Chatto & Windus).
Llewellyn, K. N. (1962). 'Study of Law as a Liberal Art', in *Jurisprudence* (Chicago: University of Chicago Press).
Llewellyn, K. N. (1986). 'A Required Course in Jurisprudence', in W. Twining and N. MacCormick (eds). *Legal Theory and Common Law* (Oxford: B. Blackwell), 255–8.
Lobban, M. (1991). *The Common Law and English Jurisprudence 1760–1850* (Oxford: Clarendon Press).
Polanyi, M. (1951). *The Logic of Liberty* (London: Routledge & Kegan Paul).
Popper, K. (1970). 'Normal Science and its Dangers', in I. Lakatos and A. Musgrave (eds). *Criticism and the Growth of Knowledge* (Cambridge: Cambridge University Press), 51–8.

Postema, G. J. (1986). *Bentham and the Common Law Tradition* (Oxford: Clarendon Press).
Schauer, F. (1989). 'Is the Common Law Law?' *California Law Review*, 77, 455–71.
Schauer, F. (1999). 'Fuller on the Ontological Status of Law', in W. J. Witteveen and W. van der Burg (eds). *Rediscovering Fuller: Essays in Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press), 124–42.
Schauer, F. (2006). '(Re)Taking Hart', *Harvard Law Review,* 119, 852–83.
Simpson, A. W. B. (1986). 'The Common Law and Legal Theory', in W. Twining and N. MacCormick (eds). *Legal Theory and Common Law* (Oxford: B. Blackwell), 8–25.
Waluchow, W. J. (2007). *A Common Law Theory of Judicial Review* (Cambridge: Cambridge University Press).
White, M. G. (1949). *Social Thought in America: The Revolt against Formalism* (New York: Viking Press, 1952).

2
Analytical Jurisprudence and Contingency

Michael Giudice

Someone interested in analytical jurisprudence is bound to find self-characterisations of the discipline both intriguing and frustrating. They are intriguing since they offer an attempt at articulating the methods and purposes of a complex enterprise with a long and rich history. They are frustrating since they often appear as brief preliminaries or short concluding remarks which leave unanswered as many questions as they answer. Perhaps two of the best known statements of the task of analytical jurisprudence are made by H. L. A. Hart and Joseph Raz. In the Preface to his most famous work, *The Concept of Law*, Hart said that his book might be characterised as an 'essay in descriptive sociology',[1] and in the concluding section of a now famous article, Raz wrote that it 'is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.'[2] Fortunately, in recent years reflection on the methods and purposes of analytical jurisprudence has grown from isolated statements into sustained self-reflection, as there is an emerging and sophisticated literature focused squarely on the methodology of legal theory itself.[3] The range of existing views, and the insights they draw from recent work in the social sciences, epistemology, and philosophy of language, are far too broad to treat properly in one short essay, so I propose to concentrate on what I think is a critical issue, which is not yet settled, in the development and understanding of analytical jurisprudence.

2.1 The task of analytical jurisprudence

Consideration of a recent book review by Ronald Dworkin will serve nicely to illustrate the critical issue for analytical jurisprudence and, in particular, for contemporary variants of legal positivism. Dworkin

argues that legal positivism is to be rejected not only because of its inadequate explanation of law. It is also to be rejected on the grounds of its flawed methodological approach to legal theory. Dworkin makes plain his opposition to descriptive-explanatory approaches in legal theory in the following statements. First, he argues that 'positivists are drawn to their conception of law not for its inherent appeal, but because it allows them to treat legal philosophy as an autonomous, analytic, and self-contained discipline'.[4] According to Dworkin this leads them to 'make little attempt to connect their philosophy of law either to political philosophy generally or to substantive legal practice, scholarship, or theory'.[5] He explains the positivists' narrow or exclusionary approach as one of creating and defending their own 'guild'. In a passage worth quoting at length, he says:

> Positivists since Hart … have defended with great fervor a guild-claim: that their work is conceptual and descriptive in a way that distinguishes it from a variety of other crafts and professions. On their understanding, legal philosophy is distinct not only from the actual practice of law, but also from the academic study of substantive and procedural fields of law because both practice and academic study are about the laws of some particular jurisdiction, whereas legal philosophy is about law in general. It is also distinct from and independent of normative political philosophy because it is conceptual and descriptive rather than substantive and normative. It is different from the sociology of law or legal anthropology because those are empirical disciplines, whereas legal philosophy is conceptual. It is, in short, a discipline that can be pursued on its own with neither background experience nor training in or even familiarity with any literature or research beyond its own narrow world and few disciples.[6] [Author's notes omitted]

There is certainly a degree of truth in Dworkin's contentions.[7] Hartian conceptual analysis is not normative or political philosophy, nor is it sociology or anthropology of law, and its defenders do maintain that it can be done without directly engaging in any of these or other fruitful directions. However, it is one thing to say what conceptual analysis is not, and hence to define its 'guild', and quite another to suppose, as Dworkin does, that the distinct role of conceptual analysis means that it is unconnected to or *must by nature* ignore these or other approaches.

But recent statements and commitments of some contemporary positivists have certainly not helped to show the way to a fruitful response

to Dworkin's charges. Consider, for example, the following characterisation of analytical jurisprudence offered by Raz:

> What then counts as an explanation of a concept? It consists in setting out some of its necessary features, and some of the essential features of whatever it is a concept of. In our case, it sets out some of the necessary or essential features of the law.[8]

And earlier Raz had settled on this stark difference between philosophy of law and sociology of law:

> This is the difference between legal philosophy and sociology of law. The latter is concerned with the contingent and with the particular, the former with the necessary and the universal. Sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.[9]

Part of the task of analytical jurisprudence, so conceived, is to identify the necessary features of law, and leave contingent features of law to other types of study. In this way, at least some analytical jurisprudes appear to accept, even embrace, Dworkin's characterization of their discipline as narrow and autonomous.

In what follows I intend to take a critical look at this approach. To be sure, I do not intend to dispute – as others do[10] – the value of pursuing necessary features in the general understanding of law. In fact, below I will suggest that something like them, though perhaps better characterised as modest universal features, must remain part of the task of legal theory. Nonetheless, I believe it is a mistake for analytical jurisprudes to lose sight of the significance of contingent features and relations[11] in the pursuit of a broad and rich conceptual understanding of law and legal phenomena. A lack of emphasis on contingent features and relations both misrepresents some paradigm work in analytical jurisprudence, and, worse, threatens to entrench what are already unhelpful divisions between analytical jurisprudence and other theoretical approaches to understanding law.

2.2 A descriptively false picture of Hart's analytical jurisprudence

The view that analytic jurisprudence need not proceed solely by identifying necessary features of law can be supported by attention to Hart's

philosophically constructed concept of law.[12] The aim of such a concept of law, in Hart's view, is to address three 'recurrent issues'. Hart asks:

> How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?[13]

Hart's settled answers to these questions are well known: (a) all legal systems must have at their foundation a social rule of recognition; (b) while coercion has no central role to play in explanation of what it means to be under an obligation, legal or otherwise, all legal systems must have, by natural necessity, centralised enforcement; and (c) there is no necessary connection between law and morality; the degree to which particular legal rules or legal systems satisfy or reproduce the demands of morality is utterly contingent.[14]

Following a suggestion by Keith Culver in a recent article on the Hart–Dworkin debate, I will call Hart's concept of law a relational concept of law, as it proposes to take a 'sidelong view' of law in relation to social rules, coercion and morality.[15] We can also characterise the propositional content of such a concept as the set of interconnected theoretical theses Hart defends which are meant to identify and explain significant insights about law and its place in social life.

There are two main observations to make about Hart's relational concept of law. First, the relations and their accompanying explanations which together constitute Hart's account of the concept of law are meant to be organisational and explanatory tools for understanding diverse legal phenomena, ranging from primitive non-systemic law to state law to international law. Understood in this way, the relations are general tools for use in conceiving law – understanding what it means to live under law – not only in particular contexts, but whenever and wherever law is to be found. The relations, in other words, are tools we are meant to carry with us as we experience and consider diverse manifestations of law. Indeed, I think the very structure of *The Concept of Law* bears this out. When Hart moves to international law in the final chapter he takes all the relations and their explanations with him, though, as readers familiar with that chapter know, he finds significant differences in the result of their application to international law.[16]

The second observation to make about Hart's relational concept of law is that it would be a distortion to suppose that each relation – by nature and application – is exclusively concerned with identifying

necessary features and relations, leaving consideration of contingent features and relations to other types of study as Raz suggests we should. The features and relations include contingent features and relations, in such a way that the contingency of the features and relations is to be borne in mind at all times when conceiving of law in particular contexts as well as in general. This requires a bit of elaboration.

Consider, for example, Hart's separation thesis, understood as the claim that the existence or validity criteria of law need not include moral criteria.[17] It is certainly correctly supposed that whether this or that particular law or legal system does in fact satisfy demands of morality is a sociological – or perhaps anthropological or historical – question, and so is not a properly philosophical or conceptual issue. However, while Hart is no doubt concerned with the morality of *particular* laws and legal systems,[18] the morality of *particular* laws and legal systems is not his central, conceptual concern. Hart's aim, instead, is to show that in thinking about law in general, at the conceptual or philosophical level, we must keep in mind law's contingent relation to morality. In other words, having determined that laws and legal systems could be utterly immoral or unjust does not mean that one's concept of law must therefore purge itself or eliminate morality from its reference. This would be a serious practical as well as philosophical mistake. Instead, the contingent relation between law and morality – and its accompanying philosophical explanation – is to be considered part of the concept of law, and so must remain among its constitutive elements.[19]

2.3 Goals of conceptual analysis

Attention to Hart's theory of law reveals that conceptual analysis can proceed meaningfully by identifying both necessary features and contingent relations. It is also important to note that Hart's approach can be applied beyond the three relations on which he chose to focus. Relations between law and the state, law and development, and law and information communication technologies are ripe for philosophical analysis of the sort Hart brought to bear on law's relations to social rules, morality and coercion.[20] I will say more about this later on. But at this point we can draw some lessons from consideration of the general goals of conceptual analysis in understanding social phenomena. In what follows, I do not propose to offer a comprehensive view of conceptual analysis.[21] Instead I will continue my approach in selecting what I take to be some critical observations.

Consider the following four goals of conceptual analysis.

1. *Determination of categories or subject matter*. Before theories about why law exists, persists, and takes the form(s) that it does in particular communities can be pursued, we first need an understanding – even if it is revisable – of what law is so that we know what is going to be investigated, explored, etc.[22]

   There are two observations to keep in mind when dealing with concepts which prove elusive to explain on first thought. First, in the explanation of concepts of social phenomena such as law, ordinary or participant understanding serves initially but only roughly to define the category or subject matter.[23] As Hart notes, most people understand that there are special law-making and law-applying institutions, and most people can quite easily give examples of rules of law.[24] Initial views such as these give philosophers a point of departure but also a responsibility. Philosophers must ask what exactly it is that can be made and applied in these institutions and exists in the form of special kinds of rules. Philosophers must also ask whether there are questions which participants have not thought about or perhaps are puzzled about; for example, whether courts are strictly law-applying institutions or also function as law-making institutions on occasion; or whether law is really only coercion in fancy dress.[25] Answers to these questions might not exist in participant understanding, or might be found to be a matter of disagreement or confusion.[26] Yet philosophers must also not depart too far from ordinary or common understanding, especially when we have reason to believe that it is not confused or mistaken.[27] A theory of law which denies that judges are officials of law, that Canada has a constitution, or that legislatures can change the rules which govern us, has surely failed to illuminate our understanding of law, and worse, is best understood as having changed the subject rather than determined it.[28]

   The second observation is that concepts which prove difficult to delineate are often concepts of phenomena which share many similarities and connections with other closely related phenomena. The difficulty is that precise boundaries or distinctions are initially (and may very well remain) elusive. Hart took this observation about law and legal phenomena seriously, and so proceeded, as I noted earlier, to explain what law is by taking a 'sidelong view' of it in relation to morality, coercion and social rules.[29] He supposed that much could be learnt about law and its place in social life by investigating how it differed from and how it related to these three other types of

phenomena.[30] Indeed, much of the tradition of philosophy of law can be understood as disagreement about precisely what these relations and others amount to.

2. *General knowledge*. The challenge and reward of philosophically constructed concepts include a type of understanding which both makes sense of and transcends particular instances of the same kind of phenomenon.[31] In other words, to be equipped with a philosophically constructed concept means to be equipped with a kind of knowledge useful for understanding similar phenomena existing at different times and in different places.[32] It is a kind of knowledge which is meant to travel well.[33]

   As an example of the generality of concepts, and their reference to both necessary and contingent features, consider Hart's any-reasons thesis.[34] Although a social rule of recognition is required to explain the existence of law, Hart supposes that we cannot identify an exclusive or unique content to the internal point of view. The reasons why officials accept and follow any particular rule of recognition, or what sorts of substantive reasons they suppose the rule of recognition demands, can and do vary. On the allegiance of legal officials, Hart writes that '… their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude, or the mere wish to do as others do'.[35] Part of the challenge of offering a general theory of law which aims to describe accurately and explain the social reality of law is not to exclude from consideration the diversity of experiences and appearances of law.[36]

   It may be objected at this point that the pursuit of concepts which are general and so cross intelligibly time and culture is simply the re-emergence of analytical jurisprudence which proceeds by assembling necessary features. This objection has some merit, and I will return to it again below. For example, it is true that wherever there is law there must be at least one social rule, constituted by patterned behaviour coupled with an internal reflective attitude. But, more importantly, we must be clear about what is involved when a general concept or distinction is employed in thinking about or understanding law. Although the ideas of social rule and internal point of view are meant to be of general use in understanding law wherever and whenever it exists, the ideas are in one important sense not generalisations. Rather, part of the insight of the related any-reasons thesis is that the attitudes of those whose conduct constitutes social rules can have diverse and variable content. In this way, the any- reasons thesis, and

its emphasis, represents a clear *unwillingness* to generalise, a reminder that the content of the internal point of view – the particular reasons officials and others have for accepting rules – is contingent. General concepts thus have a dual purpose or nature: they allow us to group together and explain law by way of shared features, but also remind us that in social reality important differences and variations exist.

3. *Moral neutrality*. In addition to being general, Hart also notes that his philosophically constructed concept of law is descriptive in the sense that 'it is morally neutral and has no justificatory aims'.[37] Hart maintained that the value of such a morally neutral account consisted of both its provision of a clarifying account of law and its place in social life, and its use as a kind of preliminary or accompanying framework to any subsequent moral criticism of law.[38]

   Moral neutrality is one of the most criticised aspects of Hart's general positivist concept of law. Ronald Dworkin and John Finnis, among others, maintain that the very nature or practice of law shows that a morally neutral approach to understanding law will distort or simply miss what is truly important about law and its possibilities.[39] I believe such arguments are misguided, but not unimportant, and I have tried to address them elsewhere.[40] More relevant to my aim here, however, is to note that there is nothing inherent in the idea or commitment to morally neutral descriptive-explanation which requires identification of necessary features to the exclusion of contingent features and relations.

4. *Improved understanding*. The ultimate goal of conceptual analysis, which encompasses establishing categories and concepts of general and morally neutral application, is improved understanding. Although it is difficult to state precisely when understanding has been improved, I believe there are at least three ways philosophically constructed concepts attempt to do so. First, philosophical analysis of existing concepts or participant understanding aims at revealing confusion and disagreement, with the goal of clearing a way for the construction of more adequate theories or models with which to understand ourselves.[41] Even if new or better concepts are not easy to find or develop, recognition of the limits or pitfalls of existing concepts marks progress. Second, conceptual analysis also shares the goal of theories in general, in that it seeks to explain, organise and structure what could otherwise be a disparate collection of features of social life. In other words, a conceptual theory of law or philosophically constructed concept of law seeks to find basic organising and structuring claims or theses which possess much explanatory power.

Third, philosophically constructed concepts typically introduce new vocabularies with additional concepts useful in illuminating some subject matter. Hart's introduction of terms of art such as 'rule of recognition', 'open texture' and 'internal point of view' are meant to provide additional and better means of explaining, understanding and speaking about various features of law and legal phenomena.[42] Although success is often difficult to measure, new vocabularies offer the possibility of influencing the direction in which law is understood towards greater illumination.

As I said, this is not meant to be a comprehensive account of the nature and purpose of conceptual analysis. I do think, however, that it is not objectionably selective. Still more importantly, there is nothing inherent in the four goals I have identified which makes necessary features the exclusive focus of conceptual theories of law. Determination of categories and subject matter can proceed relationally, situating law's place in social life by explaining both its necessary and contingent relations to other phenomena. In terms of general knowledge, conceptual understanding consists of a combination of both knowledge of universal features of law as well as emphasis on aspects of law which cannot be generalised. Also, there is nothing inherent in the idea or commitment to morally neutral descriptive-explanation which requires identification of necessary features to the exclusion of contingent features and relations. One can be morally neutral in explanation of both contingent and necessary relations. And finally, improved understanding, like determination of categories and subject matter, can also consist of knowledge of law's contingent relations to other social phenomena, especially in contexts where it is precisely puzzles about law's relations to other social phenomena which give rise to confusion or misunderstanding, and so the need for conceptual explanation of law in the first place.

2.4 Continuity and improved understanding

So much, then, for a redescription of Hart's analytical jurisprudence. Are there any metatheoretical virtues of a relational concept of law? To answer that question, we first need to introduce some of the further elements of the commitment legal theory has to improving understanding of law, to ward off the often justifiable criticism that legal positivists suppose they have a monopoly over the question and the answer to 'what is law?'. General theories of law, which each find something in the nature of law to support a distinct approach to understanding what

law is, typically come in three kinds.[43] Descriptive-explanatory theories observe that law is filled with abstract concepts and ideas whose explanations are far from straightforward, and so merit analysis.[44] Morally committed theories observe that law is morally significant: legal decisions affect and alter peoples' lives and interests in ways well worth moral concern.[45] Social-scientific theories begin with the observation that law depends for its existence and practice on human agents who are subject to all sorts of causal and social influences as humans are.[46] I think the best way to view this diversity is in terms of continuity: while there is always the possibility of partial conflict, each *type* of theory is necessary for a broad and complete understanding of law. For example, someone who had general, morally neutral understanding of the concept of law, but no idea about how, in general or in particular circumstances, law's claims or effects are to be morally assessed, would certainly have a deficient understanding of law (and not just a deficient understanding of this or that law or legal system). And someone who had both moral and conceptual knowledge of law, but no idea of the typical or special conditions under which law comes into existence, persists, or disintegrates, also lacks a complete, general understanding of law.[47] But I think we can add to this idea of continuity by drawing on the account of contingency I have sketched above. As I noted, Hart chose three particular relations around which to develop his philosophically constructed concept of law. We also noted that there are several others, and likely far too many to treat properly in any one attempt. How are analytical jurisprudes to choose? Here, I think, is the possibility for continuity or connection which Dworkin supposes analytical jurisprudes are committed to ignoring.

In general, development of philosophically constructed concepts of law can be sensitive to the aims and concerns of moral and political philosophy by seeking to elucidate relations between law and related concepts in those fields. For example, a concept of law which investigates law's relation to justice, democracy and human rights would both satisfy many of the goals of conceptual analysis yet also be meaningful to disciplines separate from but not unconnected to analytical jurisprudence. I suspect that such a concept is not typically pursued by characteristically analytical jurisprudes since law's relations to justice, democracy and human rights are considered to be contingent and so outside the focus of analytical jurisprudence.[48] But I hope I have shown why this attitude is mistaken, supposing as it does that analysis of contingent relations is not part of a general theory of law. Choice of relations to investigate might also be driven by issues and phenomena

which serve not as the focus of morally evaluative disciplines, but of more empirical disciplines instead, such as comparative law, international relations theory, and political science more generally. Here, a concept of law could be constructed around law's relations to system or tradition, governance networks, and power.[49]

2.5 Five places for contingency in analytical jurisprudence

It is important to notice that the discussion so far has made use of different kinds of – or, perhaps more accurately, different places for – contingency in analytical explanations of the concept of law. In this section I aim to take stock, and identify five different places where contingency has a role to play in the development of a philosophically constructed concept of law.

The first place for contingency has been the central theme of this article, and can be identified very briefly: a philosophically constructed concept of law can be developed by examining law's relations to various related social phenomena. Hart's theory focused on law's relations to morality, coercion and social rules, but other theories might focus on other relations. Most importantly, the relations examined might either be necessary or contingent, or some mixture, with both necessary and contingent aspects or dimensions. Consider again the example of the relation between law and coercion, a relation which has several dimensions. It might be that the relation between *legal obligation* and coercion is contingent, as coercion seems to play no necessary role in explanation of what it means to be under a legal obligation (are judges in common law systems acting under coercion when they apply precedents?).[50] And still, it could be the case that the relation between *legal system*, of the state-based kind, and coercion is necessary, as many have argued that such a form of political society requires ultimate authority over the use of force.[51]

The second place for contingency has also been observed in the account of Hart's any-reasons thesis. There we noticed that while legal systems must have at their foundation an officially accepted and practised social rule of recognition, constituted by a combination of regular conduct and a special normative attitude towards that conduct, the reasons why officials accept and follow the rule of recognition can and do vary. In this way a general, abstract concept with structural features – the idea of a social rule – makes room for and highlights its variable or contingent content.

Third, and also implicit in the argument advanced so far, there is contingency in the interests or puzzles chosen to be addressed. What is interesting or puzzling will vary depending on what is interesting or puzzling to those living under law as well as to theorists attempting to explain the concept of law in a way sensitive to what is considered most important or confusing to norm-subjects.[52] It might be, for example, that in some era and social situation, explanation of the nature of *authority* best responded to questions about the nature of law, as citizens and theorists alike were concerned to understand the nature of their relation to the state. In another era and social situation, explanation of the nature of *governance* might be more responsive to concerns about the nature of law, as citizens and theorists might seek to understand new forms of private regulation and their relation to public forms of law in a globalising world. Similarly, in one era, attention to the nature of state legal systems might have been prominent, but this may also be changing as new forms of non-state legal orders seem to be emerging. Indeed, the idea of a theory of law or explanation of the concept of law which was unresponsive to the questions which give rise to philosophical problems in understanding the concept of law would no doubt risk meaninglessness.[53]

A fourth place for contingency concerns the *choice of concepts* used to explain some range of phenomena. Consider the example of a legal system, composed of norm-applying institutions which claim with a degree of success to govern via a system of norms supremely, comprehensively and openly the normative lives of a group of norm-subjects in some defined territory.[54] Such a concept of legal system historically does very well in explaining Westphalian states where legal and political authority is centralised and concentrated, but may not fare very well in explanation of some federal states where legal and political authority is divided,[55] the European Union,[56] or indeed the varying sources and normative force of international law.[57] In such instances, the variability of the phenomena bears directly on the success of the application of the concept.

A fifth and final way in which analytical jurisprudence is subject to contingency is in the *range of phenomena* chosen to be explained, or the range of phenomena from which a theorist advances general claims about the nature of law. Consider the following example. There can be little doubt that analytical jurisprudence of the last two centuries has focused almost entirely on state law. Indeed, in an article devoted entirely to explaining the problems legal theory is meant to address, Raz explains that 'it is a criterion of adequacy of a legal theory that it is true of *all the intuitively clear instances of municipal legal systems*'.[58]

It is certainly possible to restrict the object of explanation of analytical jurisprudence to state legal systems, and perhaps even a subset of these. Yet not all analytical theorists agree that this is a wise approach. Brian Tamanaha, for example, argues that there is a much wider range of phenomena to investigate, which has important implications for general jurisprudence:

> Law *is* whatever we attach the label *law* to, and we have attached it to a variety of multifaceted, multifunctional phenomena: natural law, international law, state law, religious law, and customary law on the general level, and an almost infinite variety on the specific level, from lex mercatoria to the state law of Massachusetts and the law of the Barotse, from the law of Nazi Germany to the Nuremberg Trials, to the Universal Declaration of Human Rights and the International Court of Justice. Despite the shared label 'law', these are diverse phenomena, not variations of a single phenomenon, and each one of these does many different things and/or is used to do many things … No wonder, then, that the multitude of concepts of law circulating in the literature have failed to capture the essence of law – it has no essence.[59]

If we admit contingency's role in conceptual explanation of law, as I am suggesting we do, why not go all the way to non-essential pluralism of the kind Tamanaha advocates?[60] I think there are several questions to be raised about Tamanaha's approach, but I'll raise only a few here.[61] First, it seems to me that Tamanaha's conclusion is premature, since so few have attempted the kind of project for general jurisprudence he describes. Perhaps more successful theories are yet to be constructed. Second, Tamanaha's approach assumes that law exists and is to be identified when relevant actors, as a matter of convention, use the label 'law' to describe what they have. But what explanation does it provide to those who are unsure about whether what they have or what they see amounts to law? For example, some theorists of transnational law are uncertain about whether there is such a thing as transnational law, or that the phenomena they are observing amount to a distinct kind or form of law at all.[62] In this way, questions about transnational law ask about the emergence of prima facie legal phenomena for which no settled convention exists. In fact I think many of the new forms of normative order which now exist (at local, national, and global levels) are interesting precisely because their emergence tends to precede any settled linguistic convention about their nature.[63] But, third, perhaps

the more important reason for resisting Tamanaha's approach is pragmatic. Giving up on pursuit of necessary or essential features of law, and focusing only on contingency, risks turning analytical jurisprudence into a parochial project, or perhaps, more accurately, risks entrenching its existing parochialness. If concepts do not have any necessary or essential features which give rise to broad and general knowledge which travels across time and place, then analytical jurisprudes might finally have conclusive reason not to attempt this kind of general knowledge, and to focus instead on what is local and familiar.

We have now come full circle to the critical issue analytical jurisprudence faces. I have argued for essentially two recommendations for philosophically constructed concepts of law. First, that pursuit of necessary or essential features of law proceed not by presumption built solely on the back of familiar experience, but instead by revisable determination of categories and subject matter coupled with consideration of both familiar and unfamiliar experiences of legal phenomena aiming at modest universalism. I think what should worry analytical legal theorists is not the need to fix features and categories of the concept of law, but unresponsiveness to reasons for re-drawing such features and borders in light of new experiences and new problems.[64] Second, and equally important, conceptual theories of law should welcome contingent relations in their construction, via sensitivity to the aims and concepts of related disciplines and empirical shifts in the phenomena of law. I think such claims and their supporting reasons provide the germ of an answer to Dworkin's criticisms identified at the outset, but more importantly they provide something of a better agenda for a discipline with much unfinished business.

Notes

I owe thanks to Keith Culver, Maks Del Mar, Julie Dickson, Ken Ehrenberg, Andrew Halpin, and Wil Waluchow for helpful comments and discussion.

1. Hart (1994, p. v).
2. Raz (1995, p. 322).
3. See, e.g., Bix (2003), Culver (2001a), Dickson (2001, 2003, 2004), Dworkin (2002, 2004), Ehrenberg (2009), Finnis (2003), Giudice, Waluchow and Del Mar (2010), Halpin (2006), Leiter (2007), Patterson and Oberdiek (2007), Perry (2001), Priel (2007), Raz (1996, 2001, 2005, 2009) and Rodriguez-Blanco (2003).
4. Dworkin (2002, p. 1656).
5. Ibid., p. 1678.
6. Ibid., p. 1679.

7. Dworkin's claims about positivism perhaps apply, with least distortion, to Hans Kelsen's attempt to construct a 'pure' theory of law.
8. Raz (2001, p. 8). Julie Dickson also explains: '[A]nalytical jurisprudence is concerned with explaining those features which make law into what it is. A successful theory of law of this type is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law', Dickson (2001, pp. 17–18).
9. Raz (2009, pp. 104–5).
10. See, e.g., Tamanaha (2001). See also Schauer (2010a, 2010b).
11. Depending on the context of discussion, in what follows I will refer to both *features* and *relations* of law in elucidating the role of contingency in analytical jurisprudence. I do not wish to draw any sharp difference between features and relations, as in some instances either expression will do. For example, it is possible to speak of the relation between law and social practice, or, alternatively, of social practice as a feature of law. I have kept both terms as neither alone will do and both together are useful in identifying the full range of places for contingency in analytical jurisprudence.
12. My purpose in this section is not to evaluate Hart's conceptual theory of law. Rather, my primary aim is to provide an illustration with which to identify some general features of the philosophical method of conceptual analysis of social phenomena.
13. Hart (1994, p. 13).
14. For important criticism of Hart's version of the separation thesis see Raz (2003) and Green (2008).
15. See Culver (2001a, p. 371).
16. See Culver and Giudice (2010, ch. 1).
17. It should be noted that this is an 'inclusive' version of the positivist separation thesis. An 'exclusive' version states that morality can never be among the existence or validity criteria of law. See Waluchow (1994).
18. See Hart (1963).
19. But there are several relations between law and morality that need distinguishing. See Green (2005, 2008), and Raz (2003).
20. Still other relations include law's relations to religion, gender, culture and practical reason.
21. See, e.g., Bayles (1990), Bix (1995), Halpin (1998) and Rodriguez-Blanco (2003).
22. See Bix (2003, p. 542).
23. In interpreting Hart's claim to be offering an essay in 'descriptive sociology', Jules Coleman writes '… investigation of [common] usage serves to provide us, in a provisional and revisable way, with certain paradigm cases of law, as well as helping us to single out what features of law need to be explained. Descriptive sociology enters not at the stage of providing the theory of the concept, but at the preliminary stage of providing the raw materials about which one is to theorize' Coleman (2001, p. 200).
24. Hart (1994, pp. 4–5).
25. Hart notes that we must first ask what is puzzling about law: Hart (1994, pp. 5–6).
26. Halpin (1998).

27. See Raz (2003).
28. So although Hart speaks of 'choice' among concepts, it is not anything goes: Hart (1994, p. 209).
29. Hart (1994, p. 13). For the argument that Hart is best understood as offering a 'relational account of the concept of law', see Culver (2001a).
30. Similarly, Coleman observes that 'A theory of law must explain law's relationship to a range of cognate concepts in the normative and practical domains': Coleman (2001, p. 199).
31. For example, the concept of law Hart provides is meant to explain not just any particular community with law, but all communities with law. As he says, his theory of law is '… *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect. This institution, in spite of many variations in different cultures and in different times, has taken the same general form and structure, though many misunderstandings and obscuring myths, calling for clarification, have clustered round it' (Hart 1994, pp. 239–40).
32. Similarly, Brian Tamanaha writes '[t]here is … a cost to forgoing the attempt at a general theory. Without such theory it is difficult to formulate a sense of the whole, to spot patterns and relationships across contexts, to observe large-scale or parallel developments. As we are confronted with confusing and possibly contradictory changes – like globalization of law on the world level, simultaneous with an apparent profusion of legal pluralism on the local level – more than ever there is a need to put it all together in a single framework, if possible' (Tamanaha 2001, p. xiv).
33. See Twining (2005).
34. For discussion, see Culver (2001b).
35. Hart (1994, p. 203). See also Hart (1982, p. 265).
36. See, however, Postema (1998) for criticism of Hart's success on this score. See also Giudice (2005a).
37. Hart (1994, p. 240).
38. Ibid.
39. See Dworkin (1986) and Finnis (1980).
40. See Giudice (2005b).
41. See Berlin (1999).
42. On the value of introducing new vocabularies, see Harris (1979, pp. 16–18) and Hacker (1977, p. 2).
43. See Green (2005).
44. See Hart (1983) and Raz (1986, p. 63).
45. See Dworkin (1978, p. 15), Dworkin (1986, p. 1), and Finnis (2003).
46. See Leiter (2007).
47. For a fuller account of the idea of continuity in legal theory, see Giudice (2005b).
48. Two notable exceptions are Gardner (2000) and Green (2008).
49. See Green (2005).
50. Hart (1994, ch. v).
51. See Hart (1994, pp. 197–9), and Raz (1980, p. 3).
52. See Priel (2007, pp. 193–5).

53. It is important to note that Raz acknowledges this contingent aspect of analytical jurisprudence, to ward off the possible misunderstanding that Raz's view is hostile to contingency in analytical jurisprudence at every turn. In a recent article Raz (2001, p. 10) maintains that there are no 'uniquely correct explanations' of the concept of law. Good explanations are interest-dependent, being sensitive as they must to what puzzles people about the nature of law. Nonetheless, Raz may still be guilty of an unbalanced view of analytical jurisprudence, emphasising as he does that good explanations must still attempt to discover law's necessary features. Though I cannot argue for the claim fully here, I think there is a tension in Raz's statements about the method and aims in legal theory which needs elucidation.
54. See Raz (2009, pp. 116–20).
55. See Culver and Giudice (2010).
56. See MacCormick (1999).
57. See Berman (2007).
58. Raz (2009, 104) [emphasis added].
59. Tamanaha (2001, p. 193).
60. See Priel (2007).
61. See also Culver and Giudice (2010, pp. 143–8).
62. See Scott (2009).
63. See also Twining (2009, pp. 88–103), Himma (2002) and Cotterrell (2008, p. 8) for criticism of Tamanaha's view.
64. Though I cannot defend the view here, I believe that something like Brian Leiter's project of naturalized jurisprudence can be broadened to include much more than his restricted focus on adjudication. See Leiter (2007).

References

Bayles, M. (1990). 'What is Jurisprudence About? Theories, Definitions, Concepts, or Conceptions of Law?', *Philosophical Topics*, 18, 23–40.

Berlin, I. (1999). 'The Purpose of Philosophy', in H. Hardy (ed.). *Concepts and Categories* (London: Pimlico).

Berman, P. S. (2007). 'A Pluralist Approach to International Law', *Yale Journal of International Law*, 32, 301–30.

Bix, B. (1995). 'Conceptual Questions and Jurisprudence', *Legal Theory*, 1, 465–79.

Bix, B. (2003). 'Raz on Necessity', *Law and Philosophy*, 22, 537–59.

Coleman, J. (2001). *The Practice of Principle* (Oxford: Oxford University Press).

Cotterrell, R. (2008). 'Transnational Communities and the Concept of Law', *Ratio Juris*, 21, 1–18.

Culver, K. (2001a). 'Leaving the Hart-Dworkin Debate', *University of Toronto Law Journal*, 51, 367–98.

Culver, K. (2001b). 'Legal Obligation and Aesthetic Ideals: A Renewed Legal Positivist Theory of Law's Normativity', *Ratio Juris*, 14, 176–211.

Culver, K. and Giudice, M. (2010). *Legality's Borders* (New York: Oxford University Press).

Dickson, J. (2001). *Evaluation and Legal Theory* (Oxford: Hart Publishing).

Dickson, J. (2003). 'The Central Questions of Legal Philosophy', *Current Legal Problems*, 56, 63–92.
Dickson, J. (2004). 'Methodology in Jurisprudence: A Critical Survey', *Legal Theory*, 10, 117–56.
Dworkin, R. (1978). *Taking Rights Seriously* (Cambridge, MA: Harvard University Press).
Dworkin, R. (1986). *Law's Empire* (Cambridge, MA: Harvard University Press).
Dworkin, R. (2002). 'Thirty Years On', *Harvard Law Review*, 115, 1655–87.
Dworkin, R. (2004). 'Hart's Postscript and the Character of Political Philosophy', *Oxford Journal of Legal Studies*, 24, 1–37.
Ehrenberg, K. (2009). 'Defending the Possibility of a Neutral Functional Theory of Law', *Oxford Journal of Legal Studies*, 29, 91–113.
Finnis, J. (1980). *Natural Law and Natural Rights* (Oxford: Clarendon Press).
Finnis, J. (2003). 'Law and What I Truly Should Decide', *American Journal of Jurisprudence*, 48, 107–29.
Gardner, J. (2000). 'The Virtue of Justice and the Character of Law', *Current Legal Problems*, 53, 149–84.
Giudice, M. (2005a). 'Normativity and Norm-Subjects', *Australian Journal of Legal Philosophy*, 30, 102–21.
Giudice, M. (2005b). 'Ways of Understanding Diversity among Theories of Law', *Law and Philosophy*, 24, 509–45.
Giudice, M., W. Waluchow, W. and M. Del Mar. (eds) (2010). *The Methodology of Legal Theory* (Surrey, UK: Ashgate).
Green, L. (2005). 'General Jurisprudence: A 25th Anniversary Essay', *Oxford Journal of Legal Studies*, 25, 565–80.
Green, L. (2008). 'Positivism and the Inseparability of Law and Morals', *New York University Law Review*, 83, 1035–58.
Hacker, P. M. S. (1977). 'Hart's Philosophy of Law', in P. M. S. Hacker and J. Raz (eds) *Law, Morality, and Society* (Oxford: Oxford University Press).
Halpin, A. (1998). 'Concepts, Terms, and Fields of Enquiry', *Legal Theory*, 4, 187–205.
Halpin, A. (2006). 'The Methodology of Jurisprudence: Thirty Years Off the Point', *Canadian Journal of Law and Jurisprudence*, 19, 67–106.
Harris, J. (1979). *Law and Legal Science* (Oxford: Oxford University Press).
Hart, H. L. A. (1963). *Law, Liberty, and Morality* (New York: Random House).
Hart, H.L.A. (1982). *Essays on Bentham* (Oxford: Oxford University Press).
Hart, H. L. A. (1983). 'Definition and Theory in Jurisprudence', in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press).
Hart, H. L. A. (1994). *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994).
Himma, K. (2002). 'Do Philosophy and Sociology Mix? A Non-essentialist Socio-legal Positivist Analysis of the Concept of Law', *Oxford Journal of Legal Studies*, 24, 717–38.
Leiter, B. (2007). *Naturalized Jurisprudence* (Oxford: Oxford University Press).
MacCormick, N. (1999). *Questioning Sovereignty* (Oxford: Oxford University Press).
Patterson, D. and J. Oberdiek. (2007). 'Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology', *Current Legal Issues: Law and Philosophy*, 10, 60–75.

Perry, S. (2001). 'Hart's Methodological Positivism', in J. Coleman (ed.). *Hart's Postscript* (Oxford: Oxford University Press).
Postema, G. (1998). 'Jurisprudence as Practical Philosophy', *Legal Theory*, 4, 329–357.
Priel, D. (2007). 'Jurisprudence and Necessity', *Canadian Journal of Law and Jurisprudence*, 20, 173–200.
Raz, J. (1980). *The Concept of a Legal System*, 2nd edn (Oxford: Clarendon Press).
Raz, J. (1986). *The Morality of Freedom* (Oxford: Clarendon Press).
Raz, J. (1995). *Ethics in the Public Domain*, rev edn (Oxford: Clarendon Press).
Raz, J. (1996). 'On the Nature of Law', *Archiv fur Rechts-und Sozialphilosophie*, 82, 1–25.
Raz, J. (2001). 'Two Views of the Nature of the Theory of Law: A Partial Comparison', in J. Coleman (ed.). *Hart's Postscript* (Oxford: Oxford University Press), 1–37.
Raz, J. (2003). 'About Morality and the Nature of Law', *American Journal of Jurisprudence*, 48, 1–16.
Raz, J. (2005). 'Can There Be a Theory of Law?', in M. P. Golding and W. A. Edmundson (eds). *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing).
Raz, J. (2009). *The Authority of Law*, 2nd edn (Oxford: Oxford University Press).
Rodriguez-Blanco, V. (2003). 'A Defence of Hart's Semantics as Nonambitious Conceptual Analysis', *Legal Theory*, 9, 99–124.
Schauer, F. (2010a). 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law', *Ratio Juris*, 23, 1–21.
Schauer, F. (2010b). 'Necessity, Importance, and the Nature of Law', paper delivered to the 1st Conference on Philosophy and Law: Neutrality and the Theory of Law, Girona, Spain, 20–2 May 2010. [on file with author]
Scott, C. (2009). '"Transnational Law" as Proto-Concept: Three Conceptions', *German Law Journal*, 10, 859–76.
Tamanaha, B. (2001). *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press.
Twining, W. (2005). 'Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context', *International Journal of Law in Context*, 1, 5–40.
Twining, W. (2009). *General Jurisprudence* (Cambridge: Cambridge University Press).
Waluchow, W. (1994). *Inclusive Legal Positivism* (Oxford: Clarendon Press).

3
Jurisprudence and Psychology

Dan Priel

3.1 Introduction

Psychology, the study of the mind, was until late in the nineteenth century considered part of philosophy. An important catalyst in it gaining independence was when researchers in the field began adopting the experimental methods of the natural sciences. Fairly quickly, a gulf was created between the psychologists, who increasingly turned to 'external' means of enquiry, and the philosophers who continued to rely on introspection.[1] These methods soon led to opposed substantive paradigms to the explanation of human nature: in psychology, behaviourism was the leading theory of the day; in philosophy it was theories that emphasised 'understanding', the examination of the workings of human reason as understood from 'within'.

The behaviourist focus of psychology in those days led one contemporary psychologist to describe the psychology of the first half of the twentieth century as 'dull, dull, dull' (Pinker 1997, p. 84). This has allowed philosophers to be able to claim for themselves certain questions that were decidedly of little interest to the mainstream of contemporaneous psychology and for which its methods seemed ill suited. These ideas influenced even those philosophers who were not directly interested in the mind. It was, importantly, in those years, that many of the ideas that are now enshrined within mainstream analytic jurisprudence were born and quickly became orthodoxy.

But then came what is now known as the cognitive revolution. Psychologists (re-)turned to the human mind and revolutionised our understanding of human nature. It took some time, but the impact of this revolution has now become visible all over the social sciences. Law has not been spared. Discussions of legal reasoning, judicial fact

finding and decision making have all been the subject of studies that incorporated the new psychological literature. Through its influence on economics, psychology has also had a notable impact on economic analysis of law. All this work has shown how cognitive psychology can illuminate and challenge the social sciences. Outside the social sciences, cognitive psychology has also had considerable impact in philosophy, influencing work not just in the philosophy of mind, but also in epistemology and moral philosophy.

Against this background, and based on the mainstream understanding of the tasks of jurisprudence, legal philosophers should have been highly interested in these findings. Unlike, say, the division between 'internal', normative moral debate and 'external', descriptive observation of moral attitudes that seems to many – both scientists and moralists – to allow for some sort of *entente cordiale* in the domain of ethics, the centrality of the descriptive enterprise to contemporary jurisprudence might have suggested that legal philosophers would explore the ways in which the best data available on the human mind could help us understand one of its notable products, the law. But legal philosophers have largely preferred the safety of mulling over ever finer points from a handful of modern classics to examining whether the assumptions underlying those classics are realistic. The purpose of this essay is to suggest some ways in which interest in psychology could illuminate jurisprudential inquiry.

The following discussion is going to be limited in two important respects. On the side of jurisprudence I limit myself to what is known as 'general' jurisprudence and not to the philosophical investigation of particular branches of the law. Perhaps more importantly, I will mostly consider here work that follows Hart and Austin in seeing jurisprudence as a distinct subject, relatively autonomous from moral or political philosophy. The stand-off between this approach and the competing view (associated today mostly with Ronald Dworkin) that sees jurisprudence as a branch of political philosophy has been one of the most notable aspects of jurisprudence of the last half century, but it is one that seems to have reached a stalemate. I will try to show that one advantage of introducing psychology to the domain of jurisprudence is to suggest a way of moving forward in that debate.

On the side of psychology it must be noted that work in the field is increasingly supplemented by work in neuroscience and ideas from evolutionary theory. There have been some attempts to apply both to law, but they are preliminary and have so far proven controversial. To limit the scope of my discussion and in order to avoid these more

contentious domains, I will ignore this work here. Even within these limitations, I must stress that the essay is intended as a preliminary exploration which, due to spaces constraints, glosses over many issues that deserve longer treatment.

3.2 Where do we come from?

> Only with Frege was the proper object of philosophy finally established: namely, first, that the goal of philosophy is the analysis of the structure of thought; secondly, that the study of *thought* is to be sharply distinguished from the study of the psychological process of *thinking*; and finally, that the only proper method for analysing thought consists in the analysis of *language*.
>
> (Dummett 1978, p. 458).

> I think that the prejudice against social psychology may have been because psychology itself had great difficulty gaining acceptance in Oxford in particular; Gilbert Ryle was against it … The humanities dons may have been against since their model of man was of free, rational agents, and they objected to the idea that their thoughts or behaviour could be predicted and explained.
>
> (Argyle 2001, p. 333)

> I have been terribly mistrustful of sociology in general. That's an Oxford disease.
>
> (Hart Interview 2005, p. 289)

Deeply ingrained in the analytic legal philosophy literature that followed in Hart's footsteps is an ambivalence towards the social sciences, and a conception of jurisprudence as relatively independent of them. This attitude is most conspicuous not in what one finds in discussions of social scientific work by legal philosophers, but rather by their absence. On the few occasions that such work is discussed, it is most often for the sake of dismissing it as based on shaky foundations or for insisting on its irrelevance to jurisprudential inquiries.[2]

To see this we need to distinguish between two ways of articulating the main project of legal philosophy of the last fifty years. In one, what legal philosophers are concerned with is the analysis of concepts like law or obligation. Understood in this way, many legal philosophers have suggested that legal philosophy is independent of the social sciences because it is logically prior to them. Call this the *priority view*.

On the priority view the work of legal philosophers is required to elucidate the fundamental concepts used in law in order to enable social scientists to answer adequately the questions that they are interested in. On the second conception, legal philosophy is concerned with the 'nature' of law or obligation. One way[3] of articulating the separate domain of jurisprudential inquiry is based on the idea that an explanation of the nature of law must take into account certain features that (so the argument goes) cannot be captured by scientific explanation. On this view philosophy is conceived of as the *right way* of doing sociology. Those who were baffled by the lack of references to sociological literature or to the absence of any empirical work in a book that purported to be an essay in 'descriptive sociology' have misunderstood Hart's point: for him, it was *exactly* because the social scientists were too enamoured of the methods of the natural sciences that their work was of little value. Philosophical inquiry, or rather a certain kind of philosophical inquiry, was, if you will, sociology properly so called. Call this the *competition view*.

The most important idea associated with the competition view is Hart's notion of the 'internal point of view'. Hart made it clear that at its most abstract this idea stood in direct opposition to the methods of the social sciences, at least to the extent that they adopted the methods of the natural sciences. As he put it, for understanding normative social behaviour, 'the methods of the natural sciences are useless' (Hart 1983, p. 13), exactly because their externalist methodology could not explain the normative aspect of social behaviour.[4]

Properly understood, the priority view and the competition view have different concerns. In the language familiar to legal philosophers, the two enterprises may be distinguished as, respectively, analysing the concept LAW and explaining the nature of (the practice of) law.[5] Unfortunately, the two inquiries are rarely kept distinct in the work of legal philosophers. Hart, for example, called his book *The Concept of Law* but much of the book was concerned with the examination of social practices, at one point talking in the same sentence of 'the "essence" or the "nature" or "the definition" of law' (Hart 1994, p. 155; cf. pp. 109, 153) and suggesting they could all be explained by examining legal institutions. Though he starts the book with some analysis of concepts like OBLIGATION, by the time we get to the main features of his theory, Hart does not even attempt to demonstrate that it is implicit in anyone's concept LAW. Nor would it likely have succeeded had he tried: the central ingredients of his account (primary and secondary rules and especially the rule of recognition) are not (or, at least, were

not) familiar to lawyers. Rather they were classifications imposed on the object of investigation by Hart, who thought that such ordering would illuminate certain important aspects of the practice, not of the concept. Following him, virtually all work in analytic jurisprudence mixed analysis of the concept LAW with examination of the practice of law.

3.3 What are we?

> [U]nlike concepts like 'mass' or 'electron', 'the law' is a concept used by people to understand themselves. We are not free to choose any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.
>
> (Raz 1995, p. 237)

I claimed that the work of Hart and his followers has two limbs – one analysis of the concept LAW, the other explanation of law as a practice – and that the two are not easily reconciled because their assumptions on the relationship between philosophy and the social sciences are different and inconsistent. Here I deal with each separately and aim to show how work in psychology challenges both.

3.3.1 Categories, concepts and law

When people talk about the concept of law, about conceptual analysis of law, what are they talking about? Despite the supposed centrality of conceptual analysis to jurisprudence, legal philosophers are surprisingly vague on the matter. However, I think the story goes something like this: things (phenomena, events) in the world are members of certain sets according to certain properties they have in common. These sets we call *categories*. There are also certain things in (some) people's heads, *concepts*, that refer to things in the world on the basis of those categories.[6] These concepts are the fundamental units of thought and it is with them that we can understand, remember, infer and perform the rest of the mental activity that has been important for human survival and that makes humans what they are. The study of concepts, thus, is of great interest, and not surprisingly has been the subject of much psychological work that seeks to understand what concepts are.

Alongside this work philosophers have been concerned with a different inquiry, that of articulating, explicating or elucidating the *content* of concepts. Philosophers do this with the aid of familiar philosophical tools like the examination of their intuitions regarding particular cases.

Recently, this kind of work, 'conceptual analysis', has come under attack by certain scientifically minded philosophers for its unreliability.[7] But unlike some other contexts in which the bad reputation of intuitions is deserved, in this context I think the charge is misguided. Intuitive judgements are nothing more than the examination of the scope of application of concepts with the aid of hypothetical examples. In a way, there is nothing apart from intuitions one could appeal to here.[8] The appeal to intuitions in this context is not some illegitimate way of ending a debate; it is simply an indication that there is nothing to debate about. Two people having different intuitions simply indicates that they have different concepts. It is true, however (and not always appreciated), that since there is nothing wrong (as opposed to *useful*) about classifying the world one way or another, debates on such matters are often pointless.

But then, what purpose could 'conceptual analysis' possibly serve? In recent years several legal theorists have sought to justify it for helping people 'understand themselves'.[9] It is in this context that we can understand the appeal to what has been styled 'nonambitious' (Rodriguez-Blanco 2003, p. 106) or 'modest' (Farrell 2006, p. 999) conceptual analysis: conceptual analysis in this sense does not aim to 'draw conclusions about what the world is like from how we wield our concepts' (Farrell 2006, p. 999), only about what people think the world is like.

Such an enterprise is not without interest: to the extent that such an inquiry can help bring to light the hidden, underlying assumptions that structure individuals' thoughts, it helps illuminate why people think and behave the way they do (cf. Ewald 1998). Unfortunately, it is exactly this 'modest' version of conceptual analysis that opens it to challenges from psychology and undermines the neat division of labour presented above between psychologists (concerned with the nature of concepts in general) and philosophers (concerned with the content of particular concepts). In the last four decades psychologists studying concept possession have posed serious challenges to the model of concepts presupposed by philosophers engaged in conceptual analysis. I consider some of them very briefly here.[10]

The way we possess concepts. Much of the conceptual work in jurisprudence is based on the assumption that concepts are possessed as sets of necessary and sufficient features. Though the number of explicit statements to this effect is fairly small (but see Raz 2009b, pp. 20–1 and Giudice, this volume, for recent examples), many of the debates in jurisprudence only make sense on this assumption. A typical way of refuting a suggested analysis of a concept is by offering a counter-example

of something that is unquestionably law but does not exhibit one of the supposed necessary conditions of law. The problem is that much psychological research on concept possession has undermined this 'classical' view on concepts (although there is less of a consensus as to what should come in its stead). If psychologists' findings are true, it is hard to see how philosophical-style conceptual analysis can be vindicated, and this, ironically, is *especially true of conceptual analysis in its modest guise*. Recognising this, some philosophers have sought to maintain the separation between an epistemological-psychological project of dealing with thought and a metaphysical-philosophical project of identifying real-world categories to the extent that those have bearings on the content of concepts. It has been argued that while the psychological literature may be, at best, relevant to the former inquiry, it has little bearing on the latter.[11] But such arguments will work, at best, on concepts referring to natural kinds, not on law.[12]

An alternative strategy is to argue that '[c]oncepts, as objects of philosophical study … are a philosophical creation' (Raz 2009b, p. 18). As a matter of fact this is false with regard to most contemporary philosophical work on concepts, which is in tandem with psychological studies on concepts. Admittedly, by adopting this (immodest) view of concepts Raz avoids the problem of irreconcilability with psychological work; but thus understood, one must wonder whether concepts exist outside philosophical discourse, how one is to identify them, why they should be of any of interest, and how explaining them can assist in humans' self-understanding.

Surveys with a sample of one. Even if we have a valid interest in articulating the boundaries of jurisprudential concepts, reliance on intuitions is worrisome, not because the method of intuition is itself is wrong, but simply because the numbers of individuals sampled is very small (often just one, the legal philosopher herself) and that person, because she is usually a university-trained lawyer, may be unrepresentative. (More on this below.) The responses psychologists will illicit from people if surveying them for their concept LAW will be no less (perhaps more) 'intuitive' than those arrived at by philosophical introspection, but their findings will be based on a much larger sample and a more careful methodology.[13]

Social and cultural diversity. The point just made is exacerbated when we take cultural and social diversity into account. Much of the work in conceptual analysis is premised on the idea that there is *a* concept we are elucidating or analysing. The assumption is, as Hart put it, that 'in spite of many variations in different cultures and in different times,

[law] has taken the same general form and structure' (Hart 1994, p. 240). (Hart talks here about the 'institution' of law, but, as explained above, he did not distinguish clearly between concepts and practices.) Recent research on the psychology of concepts, however, suggests that different people belonging to different cultures, or even within different social groups within a single culture, possess different concepts designated by the same word (Atran, Medin and Ross 2005; Ross and Tidwell 2010). Raz suggested more recently (2009b, pp. 94–5) that it is 'our' concept of law that legal philosophers seek to explicate, but he has said nothing on the way to individuate 'our' concept from others'. (Did the Romans have our concept law? Do contemporary common lawyers have the same concept as contemporary civil lawyers? There does not seem to be a way of answering this question without circularity.) Moreover, psychological research shows that conceptual differences are found even within a single social group. Part of the difference within a group will be the result of different degrees of expertise. Defenders of conceptual analysis often assume that experts (in which they presumably include themselves) have a more complete or less confused view of concepts (Dickson 2004, pp. 138–9, says so explicitly, and seeks to justify conceptual analysis on this ground), but psychological research has shown that experts often have *different* concepts (e.g., Boster and Johnson 1989).

The aims of conceptual analysis. A friend of conceptual analysis may reply that philosophical conceptual analysis may still have an aim absent from the work of psychologists. As Farrell put it '[c]onceptual analysis … attempts to increase our *understanding* of how we use words. The methodology is employed to clarify and to systematize, to make sense of the way we employ certain important terms by making explicit an underlying, inchoate, but nonetheless coherent concept or theory'.[14] This seems to resonate with the kind of careful examination of concepts which has been a staple of Western philosophy at least since Socrates, an inquiry that looks very different from the reports collected by social scientists. There are, however, several problems with this suggestion. The first is captured in the words of Raz quoted at the beginning of this section: there is real danger that philosophical work on concepts will not reflect people's attitudes on a concept like LAW, but merely the attitudes of the small group of people who have thought long and hard about the issues. As such the results of their work will be closer to what scientists do when they try to ascertain what electrons are (and note: not what ELECTRONS are). The suggestion that such factually thin inquiry could help people understand themselves seems rather far-fetched, not least because there is real danger that supposedly

conceptual debates would not refer to anything about the object of investigation (Priel 2008).

To make matters worse, unlike concepts such as ELECTRON where some sort of division of linguistic labour exists (Putnam 1975), matters look different in the case of LAW. No doubt there are experts as to the *content* of laws to which people turn, but it is not clear whether there is such deference with regard to the concept LAW.[15] This means that when we find competing views about the content of the concept LAW (as we also find about scientific questions) we cannot dismiss some of them as mistakes as we can do in the context of scientific concepts.[16] All this makes it difficult to see how conceptual analysis could 'systematise' our concepts.

3.3.2 Practical reason, psychology and the normativity of law

I turn now to the second major limb of general jurisprudence of the last fifty years. Here the focus is on the examination of legal practices. It is in this context that the idea of the internal point of view played a fundamental role in the work of Hart and many others. Rules, Hart argued, have an 'internal aspect', and it is only attention to this internal aspect (which can only be noticed by a theorist adopting the internal point of view) that can account for law's normativity. It is probably the significance given to the internal point of view that has led to the conflation of the examination of the concept of LAW and the role of attitude in the practice of law, for introspection was relevant to both and was being relied upon as a means of answering two distinct questions. The result was that the two issues became fused and often confused.

But what is the internal point of view and how does it help us understand the practice of law? Hart was emphatic in rejecting any psychological interpretation of the internal point of view. 'To *feel* obliged and to have an obligation are different though often concomitant things. To identify them would be one way of misinterpreting, in terms of psychological feelings, the important internal aspect of rules' (Hart 1994, p. 88; also Hart 1983, pp. 166–7). The reason is that there are instances (Hart talks of the 'hardened swindler') of people who are under a legal obligation even though they feel no compulsion to follow it. This, even by Hart's own terms, is less than compelling. That such people exist is not in question, but their views are neither here nor there as far as the internal point of view goes since these people just treat the law as a threat. According to Hart's own theory the reason why such persons are under legal obligation is because *other people* take the internal point of view (and, as he clarified later, even they need only have this

attitude towards the rule of recognition). The question still remains as to what the internal point of view consists of for those people who do take the internal aspect of rules into account. And about those the puzzle remains: if it is not an emotive attitude, what does the internal point of view add to our understanding of the normativity of legal rules?

Hart's answer, which allowed him to ignore psychology, was social. Threats become (social) rules when they are part of a practice in which they are treated 'as a *public, common standard* of correct judicial decision, and not as something which each judge merely obeys for his part only' (Hart 1994, p. 116, emphasis added). Hart's focus was on the public element in the rules. He explicitly rejected attempts to psychologise the notion of acceptance (pp. 139–40) and was insistent that it can be had for all kinds of reasons, even 'the mere wish to do as others do' (p. 203). So he was satisfied with a statement of the form 'This is a valid rule' (p. 117) as an expression of the internal point of view. But on this account it remains mysterious what gives this 'normative use of legal language' (p. 117) any normative force. It looks as though Hart says that normativity exists when it exists.[17] It is not entirely clear why Hart seems satisfied with demonstrating language use and does not delve deeper, but I suspect it is because he thought that as far as the social practice of law is concerned (as opposed to individual beliefs about the moral merit of the law), there is nothing more to explain, and any attempt to say more would entangle the theorist in 'much metaphysics, which few could now accept' (p. 188; cf. p. 84).

Three approaches have emerged in response. Some found Hart's basic approach sound, and sought to show that through some elaboration on the idea of convention thought to be implicit in his work we can construct a convincing account of normativity (e.g., Postema 1982; Shapiro 2002). Others found Hart's failure symptomatic of the entire enterprise of trying to explain the normativity of law without appeal to morality, but, unlike Hart, they believed that doing so did not require appeals to any 'spooky' (Dworkin 1978, p. 139) entities. Still others, also thinking Hart's explanation does not work, have maintained that this is because he tried to explain something for which there was no explanation. Law's normativity according to them is nothing but power (Griffith 1979, p. 19; Ladenson 1980, pp. 143–5).

Recent psychological research suggests that there may be another way. This route was perhaps obscured from Hart when psychologists were still under the behaviourist spell. But work done since then can show the way to a more fruitful understanding of the question of

normativity. In a way, what I suggest is to do what Hart, ironically, never did: to examine the relations between the concept and the practice, or, more specifically, to examine the normative pull of the former on the latter.

3.4 Where are we going?

> There is no such thing as first-person science.
>
> (Dennett 2001, p. 230)

Here I wish to suggest, very tentatively, how what emerges from the discussion so far could lead to jurisprudential theories that take genuine interest in the work of psychologists. My argument builds on two points already mentioned: the need to keep separate the distinction between the concept LAW and the practice of law; and recognition of the way in which, though distinct, they influence each other. What I will seek to demonstrate here is that an important key to answering some of the vexing questions of jurisprudence lies in understanding the difference and relationship between the concept and the practice.

Concepts, according to one (by no means universally accepted) view, must be understood in terms of the role they play within mental theories, 'theories' in the sense that they are part of a network of information about the world (Murphy and Medin 1985, p. 298; also Medin and Wattenmaker 1987). If that is true, then to understand the concept LAW calls for examination of the theory into which it is embedded. Here, I rely on work by social psychologist Tom Tyler, work that set out to identify the attitudes of individuals about the law. Among his findings are that '[p]eople obey the law because they believe that it is proper to do so, they react to their experiences by evaluating their justice or injustice, and in evaluating the justice of their experience they consider factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect' (Tyler 1990, p. 178). This short summary highlights two factors that seem to matter to people in their thinking about law: the fairness of the procedures associated with the promulgation and use of these laws, and their perceived substantive justice.

The findings on procedural justice, though important for understanding certain central ideas about law such as the rule of law, are true of other non-legal settings as well in non-legal decision-making contexts. But litigation is only part, albeit probably the most visible part, of the law. The second element, the one concerned with substantive justice

and moral worthiness of what the law requires, is relevant to law even outside the narrow confines of the courtroom or contacts with other officials.

The question is which such attributes are associated with law, even in those places where the practice of law often fails to live up to those ideals (e.g., Gibson 2003). I believe that at least in part the answer has to do with the kind of issues that law normally deals with. This means that even if it is true that legal rules help us by absolving us from the need to decide moral questions on our own, at the same time coming into touch with them primes us to think about the moral considerations that underlie the legal rules, thus creating a conceptual association between law and morality. In fact, the extent to which people are willing to defer to the authority of law and refrain from engaging in evaluative judgement themselves is itself the product of a judgement of the legitimacy of the legal institutions in question (Tyler 2006, p. 390). Translated to the language of jurisprudence, the extent to which a legal system may be successful in excluding certain reasons for action, and thus seemingly succeed in separating legality from morality in particular cases, may depend on the existence of a more fundamental moral judgement of its legitimacy.

In some sense the question of the legitimacy of law presented here is merely a reflection of the question of the legitimacy of state coercion directed at one of its more visible manifestations. (Even in this sense it is worth remembering just how much this idea is a product of the modern 'regulatory' state where law is no longer exclusively, or even primarily, concerned with dispute resolution.)[18] But it is important to notice that the question of legitimacy is often specific to particular institutions within the apparatus of the state and relates to their composition, organisation and operation. Questions of legitimacy thus have a specific legal flavour in debates over judicial legislation, interpretation of statutes, judicial review and so on. Though these questions are often considered as separate from, and irrelevant to, the questions of 'general' jurisprudence (which is perhaps believed to be general exactly because it does not deal with these questions), there are good reasons for thinking that they are closely tied. There is thus a complex relation between changes in the practice (themselves brought about by societal and technological changes) and changes in the concept. On the one hand, the former often lead to change in the latter; on the other hand, the connection of LAW to legitimacy puts pressure on the shape that legal institutions can take. If this is true, it is also highly plausible (although a matter that may require empirical evidence in order to be validated)

that this tie also affects attitudes that impose constraints on the *content* of laws.

All this suggests the concept LAW denotes not merely a social practice made up of certain familiar institutions (courts, judges, professional bar, prisons) or of certain practices typically thought to take place in these institutions, but also a set of evaluative judgements that tie those institutions to *justice, fairness, and through both with legitimising state power*.[19] These considerations are in this way tied to questions about the limits of the law, which in turn call into question the *balancing of autonomy and authority*. This characterisation may be parochial in the sense that it was derived from examining only the attitudes of Americans and thus may not completely reflect the attitudes of people elsewhere,[20] but that is a perfectly plausible possibility. The uniformity of the concept LAW needs to be shown, not assumed.

What follows from that? I cannot offer here a full-blown account of what that concept is or its effects on jurisprudential debates, but in what follows I do offer a few suggestions. They are intended to illustrate how the distinction between the concept LAW and the practice law helps us both understand some familiar features of legal discourse and, by providing a necessary anchoring in facts, to long-standing questions of jurisprudence.

The normativity of law. This ambiguous term is used to describe several issues. Here I limit myself to the political question of the conditions under which social practices create obligations. At one level, the sociological one if you wish, the existence of beliefs about law's power to create obligation is an important fact for understanding the operation of law. When such beliefs – for whatever reason – disappear, legal practices change quite dramatically with them, as seen in an account of law and legality in contemporary Russia (Kurkchiyan 2003). Significant though this fact is, it might be countered that it cannot, by itself, say much about the question of normativity. As Stephen Perry pithily put it (in a critique directed at Hart), 'believing does not make it so' (Perry 1995, p. 122).

I think the explanation has to take beliefs into account, but not in the simple fashion in which people's (or officials') beliefs that law create obligations make it so. The starting point should still be that for most people the law is associated with some vague ideas on the conditions for the legitimate use of force. From this starting point we must consider whether certain beliefs about what role law can play in the organisation of society may affect the shape law can take in order to be able to satisfy the requirements of normativity. The question of normativity

is thus broken into two components addressing it from two different directions. A successful account on this view is one in which the two components meet. From one end this inquiry calls for the articulation of the concept LAW, a question that as we have seen could benefit from the work of psychologists, although it leaves open additional *normative* work of sharpening up the concept and of highlighting what it is about this concept that creates the conditions under which a particular social institution could create obligations. From the other end, it requires an examination of what features legal institutions must have in order to satisfy the normative constraints of the concept, and, importantly, recognition of the possibility that there may be different ways of satisfying those requirements. (Notice that in this way the question of the normativity of legal institutions is kept related to but distinct from the question of the normativity of the state.)

An important aspect of this approach, and one that I consider to be an advantage, is that the question of normativity of law cannot be fully answered in the abstract, but only through the examination of the specific arrangements adopted by particular legal systems. However, the very same fact alerts us to the possibility that the answers given to these two questions will not coincide. The natural assumption is that such a happy meeting can be found, perhaps even must be found. Many, no doubt, share the view that the only means for ensuring the attainment of certain goods or preventing certain bads, at least in the (contingent) conditions of life in which most people in contemporary Western societies find themselves, is the existence of a legal system. But though such lines of argument are appealing, presenting the question in the way suggested above shows two ways in which an account of the normativity of law may fail. From the first side of the inquiry, philosophical anarchists argue that even under the most favourable conditions, no successful argument for the legitimacy of law can be defended. Translated to the framework suggested here, the argument is that the concept LAW involves a form of self-delusion. From the other side, on which I say more in the next paragraph, critical scholars who focus more on reality seek to show that actual practices fail to live up to the concept.

The critique of law. It is a familiar feature of legal practice that it is open to normative critique. The most familiar critique, directed especially to particular legal rules, is that they are immoral or unjust. This, on most (although not all) thinkers' view, is an external critique: the legal rule is juxtaposed against the requirement of morality and is criticised for whatever discrepancy exists between the two. But there is a different kind of critique, one that all too often – perhaps by default – is treated

as a case of the first kind but is in fact different. The critique here is that a certain social organisation is 'not really' law, even if it looks like one.

This sort of critique is best understood as 'internal' in the sense that it seeks to show a divergence between the concept LAW and the practice of law. But it is not a critique that a Hartian account, for all its insistence on the internal point of view, could explain. Typically, such a critique maintains that certain institutions, though they have the appearance of law, are disguised politics.[21] How should such critiques be understood? Sometimes, they are presented in conceptual terms, backed up by assertions as to what law, or a certain area of law, really is. Such claims point to the ways in which an institution fails to live up to certain values that are tied to individuals' concept LAW.

Thus, for example, a system of social control that fails Fuller's desiderata is often deemed not to be a legal system; but why? On the Hartian account that equates the concept with the institution, the answer has to be this: we examine some unquestionable instances of law and identify their important features. We then compare them to other systems of social control and decide that they are not legal systems simply because they are not sufficiently similar. To the question why it is those features and not any others determine what counts as law, there is apparently no answer. Empirical evidence, however, suggests that considerations of procedural justice – (themselves bound to ideas of legitimacy) are embedded in most people's concept LAW – which is why they are considered relevant for distinguishing law from non-law.

Much of the work of critical legal theorists – often thought to have little connection to analytic jurisprudence – may be understood in a similar fashion.[22] Such works are best understood as arguing that there is a large gap between the concept LAW and the practice of law. They then either suggest ways of bridging this gap by changing the practice, or, more pessimistically, claim that such reform could not succeed and that we should revise our concept instead, as, effectively, Griffith (1979) urged us to do.

Theoretical disagreements. Dworkin pointed out that legal disputes among judges and lawyers are rarely confined to disagreements on the boundaries of vague concepts, but rather go to the concepts' core. How are we to make sense of such disagreements? Dworkin offered his answer, but it was one that came with considerable theoretical baggage that many did not wish to carry. There is, however, an alternative that may explain at least some of the cases: people have different concepts LAW. On a structural account like Hart's, this does not seem plausible, or even relevant, as an explanation of theoretical disagreements of the

content of law. But if we recognise that the concept LAW, at least the one that many individuals in Western countries have, is a theory tied to notions of procedural fairness, neutrality, separation of powers, legitimate authority and others, then we have the beginning of an explanation as to where disagreements come from, and why, when they occur, they tend to be *global*. (This point also shows why Dworkin is right to blur the line between 'law' and 'the law': differences in the concept LAW will often have an effect on 'the law' of individual cases.) Many disagreements can be traced to different views on those evaluative questions, which in turn affect different people's concept LAW.

Legal positivism or natural law? Both and neither. The argument presented here is meant to be broadly naturalistic, both in seeking to ground its arguments in facts and in suggesting that such facts are relevant for explaining some of the normative aspects of law. There is a tempting assumption that naturalism entails, or is in some other way closely associated with, legal positivism (Leiter 2007, ch. 4), but in fact most contemporary legal positivist theories are anti-naturalistic (Priel forthcoming). The account outlined here may be able to bridge the gap by offering a naturalist theory of natural law. It is, of course, an unusual kind of natural law, one from which many card-carrying natural lawyers may well wish to dissociate themselves: it says little about reason and less about God; and unlike secular versions of natural law it does not presuppose the existence of objective morality. But it also departs from many of the features that have been the hallmark of legal positivism and accepts certain fundamental features of natural law. First, it denies the view that an adequate explanation of legal phenomena is nothing more than an account of the practice. This is found in Bentham, who said that 'law ... taken indefinitely, ... when it means any thing, can mean nothing more nor less than the sum total of a number of individual laws taken together' (Bentham 1996, p. 294 [§17.23]), and, as I have argued above, despite appearances, this is also the main focus of Hart's account. Second, the view developed here shifts focus from examining potential connections between law and morality, which due to the influence of legal positivism has been largely confined to the question of legal validity, to the question of connections between LAW and morality. Third, following from the last point, the view proposed here countenances (and has a straightforward explanation for) *something like* the proposition 'unjust law is not law', if reformulated as 'unjust law is not LAW'. Fourth, this view shows a connection between law and political and moral values; it recognises that since reliance on such moral and political values is necessary, and since

there is no way that such values may be simply described, a theory of law will not be morally neutral. Finally, the view suggested here can explain the way changes in these values will result in changes in the laws of a given state. It thus rejects the view strongly tied with contemporary legal positivism that separates general jurisprudence from questions about the content of legal norms.

Changing the aims of jurisprudence. Jurisprudence has been obsessed with the elusive aim of describing law for quite some time now.[23] One way of understanding this chapter is as an attempt to offer some suggestions as to how a more empirically grounded inquiry could make such an enterprise more plausible. But philosophy could at best play only a secondary role in such research for which the methods of the social sciences (including psychology) are clearly superior to those of analytic philosophy. To the extent that jurisprudes are interested in maintaining a philosophical project (broadly conceived), its focus should be different. One way of doing this is by relying on psychology for the sake of better informing jurisprudes' views on what law can and cannot effectively do, which may be relevant to the question of what it should and should not do. Another is by highlighting, as I have tried to do here, the role of ideals within jurisprudence. This is an approach with a long history (e.g., Cohen 1936). What I say here may be understood as an attempt to modernise it and put it on firmer empirical grounds.

3.5 Conclusion

> 'A naturalistic jurisprudence will have to incorporate within itself the best of current information and interpretation from psychology and psychiatry, and it will have to go beyond that to a formulation of problems surmising of results within realms that the conventional mind would not admit to be legal at all.
>
> (Robinson, 1935, p. 76)

> Jurisprudence – or, more precisely, the theory of adjudication – is 'naturalized' because it falls into place, for the Realist, as a chapter of psychology (or anthropology or sociology).
>
> (Leiter 2007, p. 40)

The first quotation above comes from the heyday of legal realism; the second, from a contemporary defender of realism, expresses the same idea, even employing the same terminology.[24] Central to both is the idea that a more naturalistic approach to jurisprudence, one grounded in

empirical work, could prove illuminating. I am sympathetic to this view (Priel forthcoming). In applying this idea, however, the two authors seem to take different routes. The former quotation, written by a psychologist, comes from a book that emphasised the value of psychology to law; the latter quotation, by contrast, comes from a book that displays a more ambivalent attitude towards psychology. Despite the nod to psychology in explaining what naturalised jurisprudence would look like, Leiter seems sympathetic to work in which 'deterministic causes rule, and in which volitional agency plays little or no explanatory role' (Leiter 2007, p. 135).[25] I do not question that such work can offer valuable insights, but it is hard to see what legal philosophers could contribute to it. In this chapter I have suggested ways in which the naturalistically inclined legal philosopher could use work in psychology to get a better grasp of the foundational questions of jurisprudence without thereby giving up the subject altogether.

Notes

Thanks are due to Maks Del Mar, apologies to Paul Gauguin

1. The story, obviously, is a good deal more complicated, but for present purposes it will suffice. For a fuller account see Danziger (1979, 1980).
2. Hart (1994, pp. 193–4); Raz (2009a, pp. 104–5).
3. Not the only one: Raz (2009a, pp. 104–5) has argued that legal philosophy and the sociology of law are distinct because the former deals with the necessary and general while the latter deals with the contingent and particular. But see Priel (2007b).
4. Here and elsewhere (Hart 1994, p. 289) Hart follows Winch (1958/1990, pp. 86–94) in positing an unbridgeable chasm between psychological and non-psychological events. Cf. also Hart and Honoré (1959, p. 50), where the distinction between reasons and causes is drawn. This was a popular view at the time but it was repudiated in Davidson (1963). See also Locke and Pennington (1982), an article that considers both the philosophical and the psychological literature on the subject.
5. I follow typographical convention by referring to things in the world (law) in roman letters and to concepts in small capitals (LAW).
6. For the distinction between categories and concepts see Murphy (2010, pp. 13–14); cf. Jackendoff (1989, p. 69) distinguishing I-concepts from E-concepts.
7. In legal philosophy this critique has been made by Leiter (2007, p. 180), who cites the work of other philosophers voicing scepticism about intuitions.
8. Contra Rodriguez-Blanco (2003, p. 113).
9. These words by Raz quoted at the beginning of this section. Similar views are found in Green (1996, p. 1717); Dickson (2001, p. 40).

10. See also Harman (1994), Ramsey (1992) and Stich (1992, pp. 246–50), all works informed by findings of psychologists.
11. See Rey (1983, 1985).
12. Even in this context there are doubts. See Mayr (1992).
13. This point is accepted by Jackson (1998, pp. 36–7; 2008), but not (or not explicitly) by his jurisprudential followers, e.g., Rodriguez-Blanco (2003), Farrell (2006).
14. Farrell (2006, p. 1001); and along similar lines Rodriguez-Blanco (2003, pp. 102–3); cf. Strawson (1965, p. 315). I do not discuss here views that seem to be committed to immodest conceptual analysis such as Raz (2009b, chs 2, 3). They raise other problems, but I have no space to consider them here.
15. One can understand certain social clashes over legal matters as resulting from exactly this tension between the lay and the expert concepts of LAW. While non-lawyers are willing to defer to lawyers on matters regarding the content of laws, they are often less willing, and therefore enraged, when they perceive legal or social elites adopting a different concept LAW. Since, as I say below, views on the concept LAW affect the content of laws, such differences are not merely 'academic'. For example, on a certain 'legal science' concept of LAW, the attitudes of the public have little or nothing to do with what the law is or should be; not so on a more populist concept, according to which 'true law' reflects the values of the people. Such, all too familiar, disagreement on the concept LAW can have ramifications for the content of laws.
16. Even in the case of scientific concepts, the picture is more complex. See Dupré (1981).
17. Consider: 'a standing recognition (which may be motivated by any of a variety of ultimate reasons of a commander's words as generally constituting a content-independent peremptory reason for acting is a distinctive *normative* attitude … and in my view this is the nucleus of a whole group of related normative phenomena' (Hart 1982, p. 256).
18. To see just how much the law has changed in this regard consider: 'In the fourteenth century there was no law of England, no body of rules complete in itself with known limits and visible defects; or if there was it was not the property of the common law courts or any others. … [The lawyer's] business was procedural, to see that disputes were properly submitted to the appropriate deciding mechanism' (Milsom 1981, p. 83).
19. Contrast this with the 'structural' features listed in Hart (1994, p. 240), which are derived from focusing on the practice, not the concept.
20. Cf. Brockner et al. (2001) reporting somewhat different attitudes in different countries.
21. It is an indication of the failure of analytic jurisprudence to acknowledge this sort of criticism that the relationship between law and morality (the basis for the first type of criticism of law) has been the subject of endless discussion, whereas the relationship between law and politics (the basis of the second type of criticism) has received much less attention.
22. This is connected to the idea of 'immanent critique', which has strong connections with critical legal studies. See Hunt (1987, pp. 10–16).
23. Criticised in Priel (2007a, 2010).

24. I do not claim that Robinson and Leiter's respective views are identical; there is considerable difference in focus between the two books, and the seventy-odd years between them clearly show their mark. Nonetheless, the basic idea of naturalistic jurisprudence is very similar. It is therefore odd that Leiter, in his single reference to Robinson, aligns him to what he calls the anti-scientific, 'sociological wing' of the realists along with Jerome Frank and Joseph Hutchinson (Leiter 2007, p. 35).
25. Leiter's views are not entirely clear on the matter. The quoted commitment to research from the external point of view, which Leiter associates with 'hard positivism', must be read together with his claim (p. 188) that this work 'relies centrally on Hermeneutic Concepts' and on the truth of the 'Legal Model' (p. 189), but he does not explain how. Similarly, at one point he says that the 'political science literature ... has not been much more successful' (p. 56) than alternative explanations, while elsewhere he says about the very same literature that it 'ha[s] often fared better' (p. 135).

References

Argyle, M. (2001). 'The Development of Social Psychology in Oxford' in G. C. Bunn et al. (eds). *Psychology in Britain: Historical Essays and Personal Reflections* (Leicester: BPS Books) 333–43.

Atran, S., D. Medin and N. Ross (2005). 'The Cultural Mind: Environmental Decision Making and Cultural Modeling within and across Populations', *Psychological Review*, 102, 744–76.

Bentham, J. 1996 (1780/89). *An Introduction to the Principles of Morals and Legislation* (Oxford: Oxford University Press).

Boster, J. S. and J. C. Johnson (1989). 'Form or Function: A Comparison of Expert and Novice Judgment of Similarity among Fish', *American Anthropologist*, 91, 866–89.

Brockner J., G. Ackerman, J. Greenberg et al. (2001). 'Culture and Procedural Justice: The Influence of Power Distance on Reactions to Voice', *Journal of Experimental Social Psychology*, 37, 300–15.

Cohen, M. R. (1936). 'On Absolutisms in Legal Thought', *University of Pennsylvania Law Review*, 84, 681–715.

Danziger, K. (1979). 'The Positivist Repudiation of Wundt', *Journal of the History of the Behavioral Sciences*, 15, 205–30.

Danziger, K. (1980). 'The History of Introspection Reconsidered', *Journal of the History of the Behavioral Sciences*, 16, 241–62.

Davidson, D. (1963). 'Reasons, Actions, and Causes', *Journal of Philosophy*, 60, 685–700.

Dennett, D. C. (2001). 'Are We Explaining Consciousness Yet?', *Cognition*, 79, 221–37.

Dickson, J. (2001). *Evaluation and Legal Theory* (Oxford: Hart Publishing).

Dickson, J. (2004). 'Methodology in Jurisprudence: A Critical Survey', *Legal Theory*, 10, 117–56.

Dummett, M. (1978). *Truth and Other Enigmas* (Cambridge: Harvard University Press).

Dupré, J. (1981). 'Natural Kinds and Biological Taxa', *Philosophical Review*, 90, 66–90.
Dworkin, R. (1978). *Taking Rights Seriously*, rev edn (London: Duckworth).
Ewald, W. (1998). 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"', *American Journal of Comparative Law*, 46, 701–7.
Farrell, I. P. (2006). 'H. L. A. Hart and the Methodology of Jurisprudence', *Texas Law Review*, 74, 983–1011.
Gibson, J. L. (2003). 'Russian Attitudes towards the Rule of Law: An Analysis of Survey Data', in D. J. Galligan and M. Kurkchiyan (eds). *Law and Informal Practices: The Post-Communist Experience* (Oxford: Oxford University Press), 77–91.
Giudice, M. (this volume). 'Analytical Jurisprudence and Contingency'.
Green, L. (1996). 'The Concept of Law Revisited', *Michigan Law Review*, 94, 1687–717.
Griffith, J. A. G. (1979). 'The Political Constitution', *Modern Law Review*, 42, 1–21.
Harman, G. (1994). 'Doubts about Conceptual Analysis', in M. Michael and J. O'Leary-Hawthorne (eds). *Philosophy in Mind: The Place of Philosophy in the Study of Mind* (Dodrecht: Kluwer Academic Publishers), 43–8.
Hart, H. L. A. (1982). *Essays on Bentham* (Oxford: Clarendon Press).
Hart, H. L. A. (1983). *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press).
Hart, H. L. A. (1994). *The Concept of Law*, 2nd edn (Oxford: Clarendon Press).
Hart, H. L. A. and D. Sugarman (2005). 'Hart Interviewed: H. L. A. Hart in Conversation with David Sugarman', *Journal of Law and Society*, 32, 267–93 (cited as 'Hart Interview').
Hart, H. L. A. and A. M. Honoré (1959). *Causation in the Law* (Oxford: Clarendon Press).
Hunt, A. (1987). 'The Critique of Law: What is "Critical" about Critical Legal Theory', *Journal of Law and Society*, 14, 5–19.
Jackendoff, R. (1989). 'What is a Concept that a Person May Grasp It', *Mind and Language*, 4, 68–102.
Jackson, F. (1998). *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford: Clarendon Press).
Jackson, F. (2008). 'Book review of J. Knobe and S. Nichols (eds). *Experimental Philosophy* (New York: Oxford University Press, 2008)', *Notre Dame Philosophical Reviews*, http://ndpr.nd.edu/review.cfm?id=14828.
Kurkchiyan, M. (2003). 'The Illegitimacy of Law in Post-Soviet Societies', in D. J. Galligan and M. Kurkchiyan (eds). *Law and Informal Practices: The Post-Communist Experience* (Oxford: Oxford University Press), 25–46.
Ladenson, R. (1980). 'In Defense of a Hobbesian Conception of Law', *Philosophy and Public Affairs*, 9, 134–59.
Leiter, B. (2007). *Naturalized Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press).
Locke, D. and D. Pennington (1982). 'Reasons and Other Causes: Their Role in Attribution Processes', *Journal of Personality and Social Psychology*, 42, 212–23.

Mayr, E. (1992). 'Species Concepts and their Application', in M. Ereshefsky (ed.). *The Units of Evolution: Essays on the Nature of Species* (Cambridge: MIT Press), 15–26.

Medin, D. L. and W. D. Wattenmaker (1987). 'Category Cohesiveness, Theories, and Cognitive Archaeology', in U. Neisser (ed.). *Concepts and Conceptual Development: Ecological and Intellectual Factors in Categorization* (New York: Cambridge University Press), 25–62.

Milsom, S. F. C. (1981). *Historical Foundations of the Common Law*, 2nd edn (London: Butterworths).

Murphy, G. L. (2010). 'What Are Categories and Concepts?' in D. Mareschal, P.C. Quinn and S. E. G. Lea (eds). *The Making of Human Concepts* (New York: Oxford University Press), 11–28.

Murphy, G. L. and D. L. Medin (1985). 'The Role of Theories in Conceptual Coherence', *Psychological Review*, 92, 289–316.

Perry, S. R. (1995). 'Interpretation and Methodology in Legal Theory', in A. Marmor (ed.). *Law and Interpretation: Essays in Legal Philosophy* (Oxford: Clarendon Press, 1995), 97–135.

Pinker, S. (1997). *How the Mind Works* (London: Penguin).

Postema, G. J. (1982). 'Coordination and Convention at the Foundation of Law', *Journal of Legal Studies*, 11, 165–203.

Priel, D. (2007a). 'Evaluating Descriptive Jurisprudence', *American Journal of Jurisprudence*, 52, 139–58.

Priel, D. (2007b). 'Jurisprudence and Necessity', *Canadian Journal of Law and Jurisprudence*, 20, 173–200.

Priel, D. (2008). 'The Boundaries of Law and the Purpose of Legal Philosophy', *Law and Philosophy*, 27, 643–95.

Priel, D. (2010). 'Description and Evaluation in Jurisprudence', *Law and Philosophy*, 29, 633–67.

Priel, D. (Forthcoming 2011). 'Jurisprudence between Science and the Humanities', *Washington University Jurisprudence Review*, 3, available at http://ssrn.com/abstract=1566858.

Putnam, H. (1975). 'The Meaning of "Meaning"', in *Mind, Language, and Reality: Philosophical Papers Volume 2* (Cambridge: Cambridge University Press, 1975), 215–71.

Ramsey, W. (1992). 'Prototypes and Conceptual Analysis', *Topoi*, 11, 59–70.

Raz, J. (1995). *Ethics in the Public Domain: Essays on the Morality of Law and Politics*, revised edn (Oxford: Clarendon Press).

Raz, J. (2009a). *The Authority of Law: Essays on Law and Morality*, 2nd edn (Oxford: Oxford University Press).

Raz, J. (2009b). *Between Authority and Interpretation* (Oxford: Oxford University Press).

Rey, G. (1983). 'Concepts and Stereotypes', *Cognition*, 15, 237–62.

Rey, G. (1985). 'Concepts and Conceptions: A Reply to Smith, Medin and Rips', *Cognition*, 19, 297–303

Robinson, E. S. (1935). *Law and the Lawyers* (New York: Macmillan).

Rodriguez-Blanco, V. (2003). 'A Defence of Hart's Semantics as Nonambitious Conceptual Analysis', *Legal Theory*, 9, 99–124.

Ross, N. and M. Tidwell. (2010). 'Concepts and Culture', in D. Mareschal, P. C. Quinn and S. E. G. Lea (eds). *The Making of Human Concepts* (New York: Oxford University Press) 131–48.
Shapiro, S. J. (2002). 'Law, Plans, and Practical Reason', *Legal Theory*, 8, 387–441.
Stich, S. (1992). 'What is a Theory of Mental Representation?', *Mind*, 101, 243–61.
Strawson, P. F. (1965). 'Analysis, Science, and Metaphysics', in R. Rorty (ed.), *The Linguistic Turn: Essays in Philosophical Method* (Chicago: University of Chicago Press), 312–20.
Tyler, T. R. (1990). *Why People Obey the Law* (New Haven, Yale University Press).
Tyler, T. R. (2006). 'Psychological Perspectives on Legitimacy and Legitimation', *Annual Review of Psychology*, 57, 375–400.
Winch, P. (1990). *The Idea of a Social Science and Its Relation to Philosophy*, 2nd edn (London: Routledge) (first edition 1958).

Part II
Reasoning and Evaluating

4
Pre-Reflective Law

Jonathan Crowe

Legal reasoning is commonly regarded as a reflective process, in which legal actors – be they ordinary citizens or judges and other legal officials – consciously incorporate legal norms into their deliberations when deciding what to do. However, this picture is misleading. The primary influence of legal norms on practical decision making takes place at a pre-reflective level. In this chapter, I offer an account of this pre-reflective dimension of law. I begin by examining the pre-reflective foundations of normative reasoning generally, and then turn to the place of legal norms within that picture.

I contend that both citizens and judges routinely make pre-reflective judgements about the content of legal norms. Furthermore, their initial engagement with those norms invariably takes place within a broader context of pre-reflective values. I then examine the implications of this account for traditional understandings of legal reasoning. I argue that the pre-reflective dimension of law undermines attempts to draw a sharp distinction between legal and other forms of normative deliberation.

4.1 Normative reasoning

Normative reasoning, like legal reasoning, is often depicted as a reflective process, in which agents consciously identify the relevant options, decide which is best and then act accordingly. Let us call this the *reflective model of normative reasoning*. Recent research in moral psychology, exemplified by the work of Jonathan Haidt (2001; 2002; 2007) suggests that this model is misleading. Moral judgements about specific fact situations are frequently formed at a pre-reflective level.

Haidt's work characterises moral judgement as a process of intuitive assessment, followed by a post hoc search for rational justifications.

People cast around for ways to rationalise their intuitive judgements, potentially resulting in ad hoc or contradictory responses (Haidt and Hersh 2001; Haidt, Koller and Dias 1993). This apparent disjunction between pre-reflective and reflective thought processes leads Haidt to distinguish sharply between *moral intuition* and *moral reasoning* (2001, pp. 817–18).

However, this terminology sells pre-reflective decision making short. There is good cause to regard pre-reflective normative judgements as themselves involving a form of reasoning. Pre-reflective judgements can certainly lead us astray, in which case we may scramble for post hoc justifications. In other cases, however, they lead us to act for sound reasons, even though these are not brought consciously to mind.

4.1.1 Pre-reflective reasoning

The reflective model of normative reasoning might initially seem to deal well with certain types of cases. Suppose I have been offered a new job and I must decide whether to take it. I am likely to call the options to mind, perhaps repeatedly over a period of time, and weigh up their merits before choosing. Changing jobs is a serious decision, which people usually do not make on the spur of the moment.

However, most decisions we make in our lives are not like this. I am presently writing this chapter by typing words into my computer. In order to type each word, I must hit a succession of keys on my keyboard. However, I do not first reflect on the keys and then decide which one to hit. Rather, once I have an idea of what to write, I place my hands over the keys and instinctively start typing.

It seems plausible that my act in hitting the keys involves a type of decision. It would be commonplace to say that I *chose* to hit those specific keys, that I *intended* to hit them and that I am *responsible* for doing so. It is in this sense that we would also speak of me hitting the *wrong* keys, if the words do not come out as I planned. If I hit the wrong keys, it is a *mistake*; I have not succeeded in acting as I intended.

Does my decision to hit the keys involve a form of reasoning? At first glance, it might seem not. We are accustomed to thinking of reasoning as a reflective process. At a more basic level, however, reasoning is the process of identifying and applying reasons. I had reason to hit the keys, because I wished to type a series of words and hitting the keys was the salient way of doing so. It seems right to say that I hit the keys *because* of this reason. In what way, then, did I not engage in reasoning?[1]

Suppose I am at a dinner party. My host is serving dessert; she offers me a large slice of cake. Without thinking about it, I instinctively

decline. My friend then asks me, 'Why didn't you take a piece of cake?' I reply, 'Because I want to lose some weight; it looked very fattening'. Was my action the result of reasoning?

I had reason to decline the cake: I was on a diet and it looked unhealthy. Plausibly, it was *because* of this reason that I declined the cake. I did not make the choice reflectively; there was no conscious process of weighing up the options and reaching a determination. Rather, I intuitively recognised the cake as an unhealthy food; this, combined with my pre-existing desire to lose weight, led me to decline.[2] I acted for and because of a reason; why should we not say reasoning was involved?

There are three obvious objections that might be raised to the idea of pre-reflective normative reasoning, as discussed above. First, it might be objected that reasoning is a rational process, whereas pre-reflective judgement is the slave of the emotions. Research by Haidt and others shows that intuitive judgements can be easily swayed by changes in mood (Bastick 1982, pp. 332–3; Haidt 2001, pp. 823–5; 2002; 2007, pp. 998–9). It is therefore wrong to talk about 'pre-reflective reasoning'.

However, the fact that a process is influenced by emotion does not mean it is not guided by reasons. Emotions themselves plausibly provide reasons for action (Greenspan 1988).They may also reflect other reasons internalised by the agent (Fine 2006, pp. 92–3). Furthermore, reflective reasoning can be influenced by emotion, in much the same way as pre-reflective processes (Haidt and Hersh 2001; Haidt, Koller and Dias 1993). This does not stop us calling it 'reasoning'.

A second possible objection concerns the potential for error in pre-reflective decision making. The preceding paragraphs discuss two examples of pre-reflective thought processes apparently going right. However, it might be objected that pre-reflective decision making often goes wrong. It misidentifies and misapplies the relevant reasons, either because it unduly privileges emotions or due to other types of errors in perception or processing (Bastick 1982, pp. 331–4).

It is certainly true that pre-reflective judgements can lead us astray. However, the same can be said of reflective decision making. Reflective reasoning, like its pre-reflective counterpart, can be unduly influenced by emotion or undermined by errors of perception or processing. This does not mean it is not 'reasoning'.

A final objection runs as follows. Pre-reflective decision making might seem to us to be guided by reasons, but this is the result of post hoc rationalisations. We only identify the reasons implicit in a pre-reflective decision later, upon conscious reflection. The pre-reflective process itself

is purely affective. In order to answer this line of argument, it is necessary to look more closely at how pre-reflective reasoning works. That is what I aim to do in the following sections.

What is at stake in calling pre-reflective decision making 'reasoning', rather than 'intuition', as in Haidt's account? On one level, perhaps not much: what matters is our understanding of the phenomenon, not the label we put on it. At a deeper level, however, our reluctance to call pre-reflective cognition 'reasoning' reflects an unwillingness to acknowledge its central role in identifying and applying reasons for action. Insofar as this is true, the two issues are intertwined.

4.1.2 Normative perception

Pre-reflective decision making is not a blind process of following emotions. Rather, in pre-reflective reasoning, people faced with practical choices place their options within pre-existing normative categories, which help guide their actions. We might view this type of reasoning as an exercise in pattern recognition (Chappell 2008).[3] It involves recognising familiar situations and responding with internalised behaviours. We are able to do this swiftly by drawing on our past experiences.

If I wish to type a word on my keyboard, I am able to instinctively connect that desire to a learned motor skill. It is because I have done a lot of typing that I do not have to reflect in order to realise my intention. A similar analysis applies to my decision to refuse the cake. It is because I have made and internalised similar judgements in the past that I am able to recognise the cake as an unhealthy food and connect this judgement with my desire to lose weight (Fishbach, Friedman and Kruglanski 2003, pp. 303–5). Let us call this the *pre-reflective model of normative reasoning*.

The reflective model of normative reasoning depicts a process where we first consciously bring our reasons to mind, and then subsequently act on them. The pre-reflective model reverses this process. In the cake example, for instance, I instinctively declined my host's offer. It was only when my friend questioned me that I consciously reflected on the decision and offered an account of the reasons behind it. In other cases, such as the typing example, I might never consciously reflect on my reasons at all.

It is tempting to depict pre-reflective judgement as an arbitrary process, which is later given a veneer of respectability through post hoc rationalisations. However, this attitude in itself reveals a bias towards a reflective model. A balanced view is appropriate: pre-reflective reasoning, like other cognitive processes, can function either well or badly.

A close analysis of the components of pre-reflective normative reasoning enables us to see what is necessary for the process to be reliable.

The typing and cake cases outlined above are two examples of sound pre-reflective reasoning. Both examples involve forms of reasoning that the pre-reflective model often executes well. The former case involved the use of a learned motor skill (typing) to achieve a familiar objective (producing a sequence of text). The latter applied a learned value judgement (disapproval of fattening foods) to a new instance of a familiar situation (being offered the opportunity to eat an unhealthy dish).

Both these examples, then, applied a learned response to a new situation by invoking a pre-existing category. If the learned response is appropriate, the situation is accurately classified and the corresponding decision or action is properly executed, then the reasoning process will be sound. In other words, the soundness of pre-reflective reasoning depends upon inputs (learned attitudes and skills), judgements (perception and pattern recognition) and outputs (decisions or actions). If any of these three elements is defective, this will affect the reliability of the process as a whole.

The process of pattern recognition involved in pre-reflective reasoning may or may not entail the application of conceptual knowledge. A person who has read widely about giraffes in books may pre-reflectively recognise one in the wild by associating it with the concept. On the other hand, a person who has seen a drawing of a triangle without knowing its name or formal properties may pre-reflectively recognise another instance of the shape without making use of conceptual information.

The first of these examples illustrates the *feedback loop* that often exists between pre-reflective and reflective thought processes. Reflective engagement with a situation or concept may lead to the internalisation of knowledge or attitudes that form the basis for future pre-reflective reasoning.[4] These pre-reflective thought processes, in turn, provide the framework for future reflection. For example, I may be puzzled by an unfamiliar animal, discover by poring over books that it is a giraffe, apply this knowledge pre-reflectively in future encounters, then later reflect upon these experiences.

4.1.3 The reflective model revisited

We will return to pre-reflective normative reasoning shortly. First, however, let us look again at the reflective model outlined at the start of this section. I said there that the reflective model seems to deal well with decisions like choosing whether to take a new job. However, this is only partly true. In deciding whether to accept the job, I certainly engage in

a process of reflective deliberation. Nonetheless, the reflective model yields, at best, a partial explanation of my reasoning process.

I noted above that in deciding whether to change jobs, I am likely to call the options to mind and reflect on their merits. How do I know what features of a particular option count as a merit or demerit? Well, I might reflect on that, also. Then again, I might not. And even if I am determined to carefully interrogate my reasons for action, I will almost certainly take some of my assumptions for granted.

Suppose my current job allows greater flexibility, while the new job would offer significantly better pay. Anyone who has spent much time thinking about their employment is likely to recognise instinctively that flexibility and greater pay are both generally positive features of a job offer. A person with this sort of experience is unlikely to make the mistake – and it would be a mistake, in most ordinary cases – of identifying these attributes as prima facie reasons *not* to accept a new position.

This sort of basic value judgement is unlikely to require much, if any, reflection. However, given the seriousness of the decision, I might wish to examine my assumptions further. For example, I might ask myself: what's so good about being paid more? I could buy a nicer house, but would that really make my life much better? Would it really be worth it, if it meant seeing less of my friends and family?

We might understand this type of thought process as working through different orders of reasons for action. Let us say that a *first-order reason* is a reason to behave in a particular way, while a *second-order reason* is a reason to confirm or alter one's first-order reasons.[5] Flexibility and better pay are both first-order reasons to accept a job offer. In asking whether these reasons are really as compelling as they seem, I am interrogating the second-order reasons I have to value them.

I have reason to value higher pay because I could buy a nicer house. On the other hand, I have reason to value flexibility because it enables me to spend time with my loved ones. I then ask myself: why should I value having a nicer house? It is at this third-order level that I begin to question my initial judgement.

I *could* also ask myself: what's so good about spending time with my friends and family? But I probably wouldn't. Most people intuitively recognise that spending time with their loved ones is worthwhile; indeed, many of us would look askance at someone who had to reflect in order to reach this conclusion. The underlying point is that even serious and complex decisions, which appear to involve careful and deliberate reflection, make pivotal use of pre-reflective value judgements.

The reflective model of normative reasoning is necessarily incomplete, since it fails to explain how we arrive at the normative judgements that provide the ground for our reflective engagement. Practical deliberation does not start from scratch; it invariably begins with and often returns to our pre-reflective value judgements. We sometimes go on to question those judgements, seeking second-, third- and even higher-order reasons for our assumptions. However, almost nobody ever bothers questioning all the normative factors that we perceive as favouring a given outcome.

4.2 Pre-reflective values

The previous section of this chapter offered an account of the role of pre-reflective judgements in normative deliberation. I argued that pre-reflective judgements themselves reflect a form of reasoning. The reasoning process in question can be understood as a type of pattern recognition, where learned responses are applied to new situations by invoking pre-existing categories. Finally, I argued that even reflective modes of normative reasoning make fundamental use of pre-reflective values.

It will be useful at this stage to discuss in more detail the pre-existing value judgements that make both pre-reflective and reflective reasoning possible. How do we recognise new types of situations as fitting into pre-existing normative categories? I wish to suggest that the judgements in question can be understood as a form of human disposition. I begin by examining human dispositions generally, before looking more closely at the inclinations that provide the basis for normative reasoning.

4.2.1 Human dispositions

Pre-reflective value judgements are a form of disposition. A disposition is a tendency to behave in a certain way under particular conditions. Inanimate objects have dispositions: a wine glass has a disposition to shatter if dropped on a concrete floor. At present, however, we are concerned with human dispositions: the tendencies of humans to respond in certain ways to specific types of situations.

Human dispositions take many forms, but we can usefully understand them as falling along two broad continuums. The first continuum concerns the extent to which they are *learned*. Some human dispositions are innate. The disposition to withdraw from painful stimuli, for example, is typically present at birth (Vernon 1969, pp. 14–15). Others are acquired gradually over time. Most adult humans have a disposition to

grasp a cup in a way that orients it for drinking. Infants, however, must learn how to do this.

It is tempting to describe all human dispositions as either learned or innate. However, there is a range of possibilities between these two descriptions. Innate dispositions may change over time in response to an individual's experiences. An infant's sucking reflex is replaced by a disposition to eat and drink specific types of sustenance at certain habitual times (Vernon 1969, pp. 15–16). The disposition to eat a large meal at dinner time reflects an innate drive to satisfy hunger, but its details are learned.

The second continuum we can use to classify human dispositions concerns their *resistibility*. Some human dispositions are automatic, hard-wired responses that it is impossible to resist under normal conditions. Others incline us to behave in particular ways, but are routinely overridden. We can describe human dispositions as relatively strong or weak, depending on where they fall on this continuum.

It bears noting that weak dispositions may be resisted or overridden at either a reflective or a pre-reflective level. Let us return to the cake example introduced above. I am at a dinner party and my host offers me a huge slice of cake. It looks delicious; I am tempted to eat the whole thing. However, this disposition is relatively weak: just because I am tempted to eat the cake does not mean I have to do it.

One way the disposition may be overridden is through conscious deliberation. I might think, 'That cake looks delicious, but I shouldn't eat it, since I'm trying to lose weight.' In other cases, however, this process may take place at a wholly pre-reflective level. The disposition to eat the cake may not be dominant. I may be tempted to eat the cake, and then experience a stronger inclination not to eat it.

4.2.2 Three types of dispositions

We can use the two continuums described above to distinguish three types of dispositions that humans characteristically hold. All animals, including humans, have dispositions known as *reflexes*. A reflex is an automatic physiological response to stimuli. If I accidentally touch a hot stovetop, my automatic response is to withdraw my hand from the hot surface. This reaction takes place at a pre-reflective level: it is typically neither necessary nor possible to deliberate before performing the action.

Reflexes are innate, rather than learned. As mentioned above, the withdrawal reflex is present at birth. The resistibility of reflexes is low. Most people cannot resist the withdrawal reflex; it requires intensive, specialised training to do so.

A second type of human disposition involves what we might call *instincts*. An instinct resembles a reflex in that it involves a pre-reflective physiological response. However, it differs from a reflex in both the extent to which it is learned and its resistibility. Instincts reflect innate biological drives, such as hunger or a desire for positive affect. However, their exact form is typically learned. The replacement of the infant's sucking reflex by regularly timed meals is an example.

Instincts are also more resistible than reflexes. They are typically capable of being modified or overridden, either through conscious deliberation or by competing pre-reflective motivations. I am disposed to eat regular meals and seek pleasure, but I do not have to do so. Some people choose to fast or lead an ascetic lifestyle. Almost everyone pre-reflectively moderates and resists at least some of their desires.

The third type of human disposition involves what we might call *inclinations*. These are both learned and resistible. Examples include complex motor skills such as grasping a cup or typing a line of text. Language skills and broader comprehension abilities, such as recognising different types of everyday objects, also fall into this category. These abilities are not innate, although humans typically possess the capacity to acquire them. They must be built up gradually over time.

Humans do not have to follow their inclinations; as with instincts, they may be overridden either consciously or pre-reflectively. For most adults, it becomes second nature to grasp a cup so that it is oriented for drinking. However, even adults with full command of this skill do not have to hold a cup in that way. They can override their learned inclination and hold the mug awkwardly, if they wish to do so. Sometimes, they may do this without reflection, such as when handing the cup to another person.

4.2.3 Normative inclinations

Pre-reflective value judgements are a species of inclination. They are complex human dispositions that are both learned and resistible. Humans develop their capacity for normative judgement gradually over time. They apply their normative judgements both consciously and pre-reflectively to moderate their instincts and, in some cases, their other inclinations. However, the normative judgements themselves can also be moderated or overridden by competing instincts and inclinations.

What, then, distinguishes these sorts of *normative inclinations* from other learned and resistible dispositions, such as motor and language skills? Here is one plausible difference. Reflexes, instincts and inclinations are all dispositions to act or not act in certain ways. Normative

inclinations, however, have an additional component. They involve both a disposition to *act* in a specific way and a disposition to *believe* that the course of action in question is worthwhile or required.[6]

Consider, once again, my inclination to decline the slice of cake offered by my host. I have a disposition to decline the cake, but I also have a disposition to believe that declining the cake is a worthwhile thing to do. The dispositions that give rise to a normative inclination may both sometimes be overridden by competing factors. In some cases, this may cause the two types of dispositions to come apart. For example, I may decline the cake, then come to believe that I did so too hastily; in that case, my disposition to act is realised, but the associated disposition to believe is overridden.

Alternatively, we can imagine a case where the cake looks utterly delectable and, in addition, I am extremely hungry. I may therefore accept the cake, overriding my inclination to decline it, then later come to believe that I was unwise to do so; in that case, my disposition to act is overridden, but my disposition to believe is realised. However, a normative inclination will result in both action and belief under suitable conditions: roughly, where the agent is not confronted with competing motivational or epistemological factors sufficiently weighty to override the relevant dispositions.

It is instructive to contrast the picture of normative inclinations outlined above with an alternative account that might be offered. Let us say that a *first-order disposition* is a disposition to behave in a particular way, while a *second-order disposition* is a disposition to confirm or alter one's first-order dispositions.[7] (This tracks the distinction between first- and second-order reasons examined above.) It is tempting to say that normative inclinations characteristically operate as second-order dispositions, leading agents to accept or modify their instincts and other inclinations.[8]

However, this account proves inadequate. All three types of human dispositions discussed in the previous section can operate as either first- or second-order dispositions. In the initial version of the cake example, my first-order disposition to accept the cake is overridden by my second-order disposition to decline it. However, this is wholly contingent on the relative strength of my instincts and inclinations. Consider the alternative scenario where I accept the delicious-looking cake against my better judgement. I still have an inclination to decline the cake. However, that inclination is pre-reflectively overridden by my strong desire to accept it. In other words, my strong desire to eat the cake gives me a second-order disposition to modify my first-order disposition to decline it.

Normative inclinations do frequently dispose us to modify our other dispositions, but that is not what distinguishes them from the other

categories discussed above. They do not always operate as second-order dispositions; they may be first-, second- or higher-order dispositions, depending on the other factors in play.

4.2.4 Evaluative strength

Normative inclinations, then, are human dispositions both to act in certain ways and to believe that the actions in question are worthwhile or required. Some normative inclinations reflect ethical norms. Some reflect the rules of games. Some reflect norms of grammar or etiquette. And some reflect legal norms.

We have so far used the twin continuums of learnedness and resistibility to classify various types of human dispositions. There is a third continuum we can use to classify normative inclinations. It concerns their *evaluative strength*. Some normative inclinations are strongly evaluative: they strongly dispose us to believe that we should perform the relevant courses of action and, if necessary, modify or override our other dispositions in order to do so. Others are more weakly evaluative: our belief that the actions in question are either worthwhile or required is revisable or limited.

The evaluative strength of a normative inclination is apprehended pre-reflectively. Humans constantly make judgements about which of our dispositions *ought* to prevail over others, based on our beliefs about the relative normative significance of various potential courses of action. These types of judgements of ethical significance play an integral role in both pre-reflective and reflective normative reasoning.[9]

A normative inclination is *revisable* if the associated normative belief is prone to be modified or overridden at a pre-reflective or reflective level. It is *limited* if its scope is restricted to a particular normative context. Suppose, for example, that I am playing a game of chess. I have a normative inclination to both follow the rules of the game and believe that doing so is required. However, if my enemy credibly threatens to kill an innocent person unless I break the rules, I would no longer believe that following the rules is the right thing to do.[10] Furthermore, my inclination to follow the rules ceases when the game is over. It is limited to a specific normative context.

There is some correlation between evaluative strength and the notion of resistibility discussed previously. However, the two concepts are distinct. The former reflects the belief component of a normative inclination, while the latter concerns the motivational component that is common to human dispositions. Reflexes and some instincts have low resistibility, but lack any associated normative attitude.

The key characteristic of normative inclinations, as noted above, is that they dispose us to believe that we *should* override other dispositions in their favour. This disposition is not always realised; the belief may be pre-reflectively or reflectively overridden by other considerations. However, forming a positive normative belief about the appropriateness of performing an action in particular circumstances will tend to strengthen the disposition to repeat the same action in future. The fact that normative inclinations dispose us to both perform actions *and* hold a favourable normative attitude towards them therefore helps explain *why* they often operate as higher-order dispositions. However, it is not this higher-order character itself that sets them apart.

4.3 Pre-reflective law

I have so far been concerned with the role of pre-reflective values in normative reasoning. In the previous section, I argued that pre-reflective value judgements can be understood as normative inclinations: that is, human dispositions both to *act* in specific ways and to *believe* that the courses of action are worthwhile or required. I then noted that normative inclinations come in different evaluative strengths. Strongly evaluative normative inclinations tend to trump weaker ones at a pre-reflective level.

In setting out this account, I have put aside a number of important and interesting questions. These include whether any normative inclinations are shared by all humans; how normative inclinations are acquired by individuals and shared among populations over time; and how we can incorporate normative inclinations into a theory of practical rationality. There is no room in the present chapter to give these issues the attention they deserve. I plan to discuss them in detail elsewhere.

In the remainder of this chapter, I wish to draw out the implications of the preceding theory of normative inclinations for the nature of legal reasoning. We may begin by asking how legal norms fit into the picture of normative reasoning outlined above. I begin by claiming that legal reasoning, like the other forms of normative deliberation discussed above, gives a central role to normative inclinations. Legal reasoning always begins – and frequently ends – at a pre-reflective level.

4.3.1 Legal inclinations

I argued above that some forms of normative reasoning occur at a wholly pre-reflective level. Others involve a reflective component, but nonetheless begin with pre-reflective value judgements. I wish to

suggest that a similar analysis applies to legal reasoning. Many legal determinations are wholly pre-reflective. Others involve reflection, but nonetheless make integral use of pre-reflective values.

Here is an example of a wholly pre-reflective legal reasoning process. Suppose a friend describes to me how she earned some extra income and failed to declare it on her tax return. I say to her, 'But that's illegal!' I do not reflect on the rules of tax law before reaching this conclusion. Rather, I intuitively assess my friend's conduct as a breach of the law by placing it into a pre-existing category.

My assessment of my friend's actions involves a type of normative inclination. It draws on my awareness of a presumptive legal rule: namely, that all income must be declared for tax purposes. This knowledge disposes me to both act in certain ways – for example, declare my income and criticise others who fail to do so – and believe that these actions reflect a relevant legal norm. Let us call this a *legal inclination*.

In some cases, legal reasoning will begin and end with legal inclinations. A single legal inclination may give rise to an immediate judgement; alternatively, multiple inclinations may be integrated at a pre-reflective level. In other cases, legal inclinations provide the starting point for legal reasoning, but are modified or overridden after conscious reflection. Suppose, for example, that my friend directs my attention to a specific aspect of tax law that validates her behaviour. If her argument is persuasive, it may well cause me to reflect upon the matter and revise my initial judgement.

Legal inclinations, like other types of normative inclinations, may result in faulty reasoning. As discussed earlier, this may be due to defects in any of the three components of the process: inputs, judgements or outputs. Suppose, for example, that I have heard on television that all tax returns must be filled out in blue ink. I see my friend completing her return in black ink and exclaim, 'That's illegal!'[11] My comment reflects a legal inclination – I am disposed to believe it is supported by a legal norm – but the associated reasoning process is unreliable, because it rests upon inaccurate information.

On the other hand, people may form reliable legal inclinations in many different ways. Lawyers and judges form reliable legal inclinations by attending law school and engaging in legal practice. Members of the public do so by learning from sources such as family, friends, teachers, public officials and the popular media. Television shows such as *Law & Order* sometimes lead people to form faulty legal inclinations, but they also help them gain reliable knowledge about basic legal concepts.

Most people have at least a basic intuitive understanding of legal categories such as murder, theft, perjury, exceeding the speed limit,

tax evasion and the like. These sorts of notions are ubiquitous in social discourse and popular culture.[12] Members of the public regularly judge that particular actions are legally prohibited or required and use these judgements to guide their behaviour. They may not grasp the technical legal details, but this does not prevent them judging correctly in many everyday cases.

4.3.2 Against legal purity

How do legal inclinations interact with other pre-reflective values? Suppose I am driving along a quiet stretch of road towards an intersection with a set of traffic lights. As I approach the intersection, the light turns red. I can see for miles along the road and there are no other cars in sight. Nonetheless, I see the red light, slow down my car and stop. I do this without any conscious reflection. My previous experience as a driver prompts me to recognise the situation and respond at a pre-reflective level.

I am disposed to stop at the red light. I am also disposed to believe that my stopping at the red light is legally required. My judgement therefore fits the model of a legal inclination outlined above. However, the legal requirement to stop at red lights is unlikely to provide a full explanation of my decision. It is equally plausible that I stopped for safety reasons, to avoid paying a fine or out of habit. The best and fullest explanation for my actions would likely make reference to all these factors.

It is possible, upon reflection, to separate out all these influences on my decision. However, this is not how things work at a pre-reflective level. Pre-reflective judgements are *holistic* (Bastick 1982, ch. 5).[13] They quickly classify new situations based on prior experiences. Sometimes, the main reason for the resulting judgement will be relatively clear. In other cases, however, there may be multiple reasons for a particular course of action, which all play some role in the decision-making process.

In some cases, agents will be aware of a clash between legal and other forms of normative inclinations. They may judge, for example, that a particular action is prohibited by law, but morally required. The potential for clashes between legal and moral norms has been the subject of much philosophical discussion.[14] Relatively little attention, however, has been paid to the way in which moral and other normative judgements necessarily influence legal inclinations at the pre-reflective level.

We saw above that people routinely make pre-reflective judgements about the content and force of legal norms. Legal judgements are a specific form of normative judgement; they mirror the rules of a particular normative practice. In this respect, they are similar to the normative

judgements associated with games, such as chess. We saw in the previous section that the normative judgements associated with chess are both revisable and limited. They are prone to be crowded out by other normative factors.

Legal judgements, too, are generally revisable. Most people do not think they have an absolute obligation to obey the law.[15] Unlike the rules of a game like chess, however, legal rules are not limited to a particular normative context. My obligations under the rules of chess cease to apply when the game is over; furthermore, I may typically end the game at any time by indicating my intention to do so. However, I cannot escape legal norms by claiming that I am no longer playing the game of law.[16]

What follows from the idea that legal judgements are both holistic and revisable, but not confined to a specific normative context? We might summarise the implications for legal reasoning in terms of the following three theses:

1. *Overlap thesis*. Legal norms tend to correspond or overlap with ethical and other types of social norms. Law claims to regulate almost all facets of social life (Raz 1999, p. 154). The holism of pre-reflective judgement therefore entails that putative legal decisions will rarely, if ever, be made on solely legal grounds. They will also be influenced at a pre-reflective level by other normative inclinations.
2. *Infiltration thesis*. It follows from the overlap thesis that any full explanation of a putative legal judgement will typically refer to other types of normative reasons. As we have seen, these wider normative factors infiltrate legal judgements at a pre-reflective level. They will also tend to shape post hoc justifications for legal judgements, whether or not this influence is fully realised and acknowledged.
3. *Crowding thesis*. Legal norms often overlap with strongly evaluative ethical or social norms. We saw in the previous section that strongly evaluative norms tend to dominate weaker norms at a pre-reflective level. Legal norms are more strongly evaluative than many other types of norms. Nonetheless, they will have a propensity to be crowded out by serious ethical and social obligations.

My decision to stop at the red traffic light involved a legal inclination. However, the decision was by no means based solely on legal reasons. It also rested on a range of other types of normative factors. If the overlap thesis is correct, this type of situation will be very common. My decision to stop at the red light was not a case of *pure* legal reasoning; however,

if the above theses are sound, such a thing will be rare, if it exists at all. Only the most technical fields of legal discourse could plausibly claim to keep other normative considerations out of the picture.

4.3.3 Judicial reasoning

Legal inclinations are not confined to lawyers and judges. The legal inclinations of experts, however, are more likely than those of laypeople to reflect the technical meanings of formal legal materials, such as legislation and precedents. They therefore give rise to a specialised form of normative discourse. It is this specialised normative discourse in which judges engage when they decide cases. However, this does not mean judicial reasoning is unaffected by the theses outlined above.

There are at least two ways in which the above account threatens dominant understandings of the judicial role. In the first place, judicial deliberation is widely viewed as a highly reflective process. On this account, judges decide cases by considering the legal arguments, reflecting carefully and then rendering a judgement.

Furthermore, it might be thought that if pure legal reasoning is to be found anywhere, it will be in the courtroom. As mentioned above, judicial reasoning partakes in a specialised form of normative discourse. The only reasons normally considered admissible in courtroom argument are those from within the law. Additionally, when a court makes a ruling, it typically only justifies it by recourse to legal argument. Courts do not routinely support their judgements by reference to extra-legal reasons.[17]

The traditional view of judicial reasoning, then, is of a highly reflective process that is guided purely by legal reasons. However, this view is false. Judges, like other legal actors, possess legal inclinations. These inclinations will have been learned and internalised over many years of interaction with the law. Any encounter with a factual scenario or set of legal arguments will provoke some kind of pre-reflective judgement about which side ought to prevail.[18] This initial judgement may not always be decisive, but it will provide the implicit framework for the reflective reasoning that follows.

Furthermore, judges may think and claim that they decide cases based purely on legal reasons, but this is highly unlikely to be true. The overlap thesis means that legal inclinations typically reflect a holistic assessment of not only legal reasons, but also other kinds of normative factors. The infiltration thesis suggests that these normative judgements will tend to shape not only judges' pre-reflective thought processes, but also their post hoc explanations of these initial assessments.

The crowding thesis further suggests that judicial attempts to remove legal issues from their broader normative context are likely to be futile. Legal norms are typically more strongly evaluative in the courtroom than in everyday life. However, they will still overlap (and sometimes clash) with other strongly evaluative normative judgements. This raises the prospect that they may be modified or overridden at a pre-reflective level. The judge will then be in a position of seeking post hoc legal explanations for a reasoning process in which other types of normative judgements play a central role.

Some forms of pre-reflective reasoning involve an unambiguous clash between legal and other kinds of normative judgements. In these cases, the agent may perceive herself as being subject to competing normative demands. However, as we saw above, legal norms are typically both strongly evaluative and contextually unlimited, particularly in the courtroom. This means there is strong motivation for judges, as well as other agents, to integrate the various normative factors at a pre-reflective level. In this respect, the strongly evaluative character of legal norms undermines, rather than sharpens, the distinction between legal and other forms of normative reasoning.

This sort of pre-reflective integration is particularly likely in cases involving legal ambiguity. Judges often purport to clarify the scope of legal norms through close engagement with statutes and precedents. However, the above analysis suggests that this picture is misleading. Legal ambiguities will typically be resolved at least partly through pre-reflective integration with other normative judgements. These judgements will then provide the implicit framework for the judge's reflective reasoning.

A full discussion of the pre-reflective dimension of judicial reasoning would also consider the issue of textual interpretation. Debates about the judicial role often revolve around different views about how judges should interpret legal documents. I cannot consider this topic in detail here. It bears noting, however, that textual interpretation is itself a largely pre-reflective process: every competent reader, upon encountering a text for the first time, forms a pre-reflective conception of what it means.

Furthermore, this pre-reflective textual understanding depends crucially on the reader's past experiences (Gadamer 1979; Heidegger 1962). Like the other inclinations discussed above, it is a complex form of pattern recognition that is learned and refined over time. The holism of pre-reflective judgement suggests that the reader's interpretation of a legal text is also prone to be influenced by her normative inclinations. This signals the potential relevance to textual interpretation of the three theses proposed above.

Notes

1. For a brief discussion of a similar example, see Smith (1994, pp. 131–2).
2. For empirical studies supporting this analysis, see Fishbach, Friedman and Kruglanski (2003, pp. 303–5). The authors found that study participants who were successful in watching their weight made faster judgements about health-related categories than a control group after being primed with unhealthy temptations.
3. For a useful discussion of normative perception, emphasising the role played by imaginative acquaintance, see Church (2010).
4. In this respect, the term 'pre-reflective' may be slightly misleading, since the thought process in question will often be shaped by prior reflective engagement. However, I have not thought of a better term. Maks Del Mar and David Hamer have both suggested 'non-reflective', but that fails to capture the important sense in which pre-reflective reasoning prepares the ground for its reflective counterpart.
5. Compare the famous distinction between first- and second-order desires outlined in Frankfurt (1971).
6. This account of normative inclinations roughly mirrors the theory of normative reasons set out in Smith (1994).
7. Note that this distinction differs from the way these terms are sometimes used in the philosophical literature. See, for example, Broad (1949).
8. Compare Lewis (1989). See also Smith (1994, pp. 142–7).
9. I have discussed these types of judgements in more detail elsewhere. See, for example, Crowe (2005; 2006; 2007a; 2009a; 2009c).
10. For further discussion of this example, see Crowe (2009c, pp. 48–9).
11. Thanks to Maks Del Mar for suggesting this example.
12. For an extended discussion of the role of popular culture in informing public understandings of law, see MacNeil (2007).
13. This is not to deny that pre-reflective thought processes often reveal discrete normative demands that seem to pull the agent in different directions. Even in these cases, however, the precise reasons for the different normative pulls are unlikely to be sharply individuated. Compare Goldie (2007, pp. 359–60).
14. See, for example, Hart (1994, ch. 9); Kelsen (1961, pp. 373–6, 407–10).
15. For further discussion, see Crowe (2009b, pp. 2–5).
16. For a contrasting account of the parallels between law and chess, see Marmor (2006).
17. For further discussion, see Crowe (2007b, pp. 785–6).
18. For a classic discussion of this point, see Dewey (1924, p. 23).

References

Bastick, T. (1982). *Intuition: How We Think and Act* (Chichester: John Wiley and Sons).

Broad, C. D. (1949). 'The "Nature" of a Continuant', in H. Feigl and W. Sellars (eds). *Readings in Philosophical Analysis* (New York: Appleton-Century-Crofts), 472–81.

Chappell, T. (2008). 'Moral Perception', *Philosophy*, 83, 421–37.
Church, J. (2010). 'Seeing Reasons', *Philosophy and Phenomenological Research*, 80, 638–70.
Crowe, J. (2009a). 'Explaining Natural Rights: Ontological Freedom and the Foundations of Political Discourse', *New York University Journal of Law and Liberty*, 4, 70–111.
Crowe, J. (2009b). *Legal Theory* (Sydney: Thomson Reuters).
Crowe, J. (2009c). 'Levinasian Ethics and the Concept of Law', in D. Manderson (ed.), *Essays on Levinas and Law: A Mosaic* (Basingstoke: Palgrave Macmillan), 39–54.
Crowe, J. (2007a). 'Dworkin on the Value of Integrity', *Deakin Law Review*, 12, 167–180.
Crowe, J. (2007b). 'Natural Law in Jurisprudence and Politics', *Oxford Journal of Legal Studies*, 27, 775–94.
Crowe, J. (2006). 'Levinasian Ethics and Legal Obligation', *Ratio Juris*, 19, 421–33.
Crowe, J. (2005). 'Existentialism and Natural Law', *Adelaide Law Review*, 26, 55–72.
Dewey, J. (1924). 'Logical Method and Law', *Cornell Law Quarterly*, 10, 17–27.
Fine, C. (2006). 'Is the Emotional Dog Wagging its Rational Tail, or Chasing It?', *Philosophical Explorations*, 9, 83–98.
Fishbach, A., R. S. Friedman and A. W. Kruglanski (2003). 'Leading Us Not Unto Temptation: Momentary Allurements Elicit Overriding Goal Activation', *Journal of Personality and Social Psychology*, 84, 296–309.
Frankfurt, H. (1971). 'Freedom of the Will and the Concept of a Person', *Journal of Philosophy*, 68, 5–20.
Gadamer, H-G. (1979). *Truth and Method*, Garrett Barden and John Cumming trans. (New York: Seabury Press).
Goldie, P. (2007). 'Seeing what is the Kind Thing to Do: Perception and Emotion in Morality', *Dialectica*, 347–61.
Greenspan, P. S. (1988). *Emotions and Reasons: An Inquiry into Emotional Justification* (New York: Routledge).
Haidt, J. (2007). 'The New Synthesis in Moral Psychology', *Science*, 316, 998–1002.
Haidt, J. (2002). '"Dialogue Between My Head and My Heart": Affective Influences on Moral Judgment', *Psychological Inquiry*, 13, 54–6.
Haidt, J. (2001). 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment', *Psychological Review*, 108, 814–34.
Haidt, J. and M. A. Hersh. (2001). 'Sexual Morality: The Cultures and Emotions of Conservatives and Liberals', *Journal of Applied Social Psychology*, 31, 191–221.
Haidt, J., S. H. Koller and M. G. Dias. (1993). 'Affect, Culture and Morality, or Is It Wrong to Eat Your Dog?', *Journal of Personality and Social Psychology*, 65, 613–28.
Hart, H. L. A. (1994). *The Concept of Law*, 2nd edn (Oxford: Oxford University Press).
Heidegger, M. (1962). *Being and Time*, J. Macquarrie and E. Robinson trans. (New York: Harper and Row).
Kelsen, H. (1961). *General Theory of Law and State*, A. Wedberg trans. (New York: Russell and Russell).
Lewis, D. (1989). 'Dispositional Theories of Value', *Proceedings of the Aristotelian Society, Supplementary Volume*, 63, 113–37.

MacNeil, W. P. (2007). *Lex Populi: The Jurisprudence of Popular Culture* (Stanford: Stanford University Press).
Marmor, A. (2006). 'How Law is Like Chess', *Legal Theory*, 12, 347–71.
Raz, J. (1999). *Practical Reason and Norms* (Oxford: Oxford University Press).
Smith, M. (1994). *The Moral Problem* (Malden: Blackwell).
Vernon, M. D. (1969). *Human Motivation* (Cambridge: Cambridge University Press).

5
Virtue and Reason in Law

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5.1 Introduction

The concept of virtue figures prominently in current approaches to moral and epistemic reasoning. This chapter aims to apply virtue theory to the domain of legal reasoning. My claim is that a virtue approach to legal reasoning illuminates some key aspects of legal reasoning which have, at best, been peripheral in the standard theory of legal reasoning. From a virtue perspective, I shall argue, emerges a picture of legal reasoning that differs in some essential features from the prevalent rule-based approach to legal reasoning.

The virtue theory of legal reasoning that I shall develop here is Aristotelian, as is most contemporary work on the virtues. More specifically, I shall rely on a particular reading of Aristotle, or strand of virtue theory, that aspires to give a larger role to reason than the instrumental and technical role accorded to it by Utilitarian approaches to practical reasoning – and, in some important respects, a role even more ambitious than the role it plays in Kantian views.[1] This Neo-Aristotelian conception of practical reason may be broadly characterised by the following views: (a) values are plural and qualitatively heterogeneous; (b) reason plays a central role not only in choosing means to ends but also in deliberating about plural and non-commensurable ends; (c) an important part of practical reasoning consists in searching for the best specification of ends with a view to harmonising the ends with one another and further refining them; (d) rational choice cannot be captured in a system of rules or general principles: there is no decision procedure or algorithm that can be set up in advance of the confrontation of the particular case; (e) practical reasoning requires above all the correct description of the relevant features of a situation: the perception of particulars plays a

critical role in deliberation; (f) emotions can be significantly shaped by reason and are, in their turn, essential to rational choice. In short, the Neo-Aristotelian conception of practical reasoning attempts to advance a complex picture of reason's demands by providing a detailed account of the intricate processes of 'thinking', 'feeling' and 'understanding' that are involved in reasoned deliberation.[2]

In the following, I shall examine what legal reasoning would look like from a Neo-Aristotelian perspective. I shall identify and explain some of the main features of a virtue theory of legal reasoning, but my remarks will be general and programmatic. Indeed, each of the different aspects of legal reasoning that come to the surface when analysing the subject of legal reasoning from an aretaic perspective will need to be further thematised. My purpose is to show that a virtue theory of legal reasoning places at the fore some topics the study of which is necessary to give a full account of legal reasoning, rather than developing a virtue model of legal reasoning in detail. I will conclude by suggesting that an aretaic approach to legal reasoning reveals that there are important connections between legal reasoning and legal ethics. Thus, a Neo-Aristotelian conception of reason and rationality has important implications for the way in which the field of legal reasoning is conceived.

5.2 Virtue and principle in legal reasoning

A first aspect that a virtue approach to legal reasoning emphasises is the relevance of appraising the particulars of the case for correct legal decision making. Legal reasoning cannot be explained in terms of rule-application, as this oversimplifies what is involved in legal judgement and leaves out much of what is hard and interesting in reasoning about what to do in the legal context. The 'matter of the practical' is such that it cannot be captured by any system of rules or principles. Aristotle writes:

> Matters concerned with conduct and questions of what is good for us have no fixity, any more than matters of health. The general account [of matters of conduct] being of this nature, the account of particular cases is even more lacking in exactness; for they do not fall under any art or precept, but the agents themselves must in each case consider what is appropriate to the occasion, as happens also in the art of medicine or navigation.[3]

As this passage suggests, the practical domain has some features which make it impossible, even in principle, to capture good choice in a system

of rules.[4] First, practical issues are, by their very nature, indeterminate or indefinable. Good choice cannot be understood in terms of rule-application because it is a matter of fitting one's choice to the complex requirements of a particular situation, which vary greatly from one practical context to another. Second, practical matters are also mutable and unforeseeable. No system of rules is capable of covering all new cases that might eventually arise. Finally, the concrete case may contain some particular and non-repeatable elements. In short, general formulations lack the concreteness and the flexibility required for a good decision.[5] Ultimately, it is the ever present possibility of exceptions and the impossibility of reducing the understanding of what such exceptions would be – and what makes them exceptions – to rules or principles that renders any system of general formulations (and, more generally, any decision procedure) unfit to capture good choice.[6]

Now, to be sure, the limitations of rules and procedures are well known. Nonetheless, the Aristotelian point is, I believe, worth reminding ourselves of, if only to counteract the felt pressure to provide a theory of legal reasoning with more precision than 'accords with the subject matter' and is 'appropriate to the inquiry'[7] – some examples of which will be discussed later. Formalistic tendencies notwithstanding, it is widely acknowledged that rule-application cannot be all there is to legal reasoning. The problem is, however, to determine when a 'formal' approach to legal reasoning, which conceives legal reasoning as primarily a matter of rule-application, should be supplemented or replaced by a 'substantive' approach and what legal reasoning involves beyond reasoning with rules.[8] It is at this juncture, I would argue, that a Neo-Aristotelian perspective may have much to contribute.

On the Neo-Aristotelian view, virtues, rather than principles or rules, are the keystone of a theory of practical reasoning. Central among the virtues is the virtue of practical wisdom or excellence in deliberation, which Aristotle defines as a 'true and reasoned state of capacity to act with regard to the things that are good or bad for man'.[9] Practical wisdom cannot be, insists Aristotle, 'scientific understanding' (i.e. a systematic body of knowledge of universal and general principles), but it is rather concerned with particulars.[10] The person with practical wisdom has the ability to articulate a response that is properly tailored to the specific features of the situation. Wiggins writes:

> The person of real practical wisdom is the one who brings to bear upon a situation the greatest number of genuinely pertinent concerns and genuinely relevant considerations commensurate with the importance of the deliberative context.[11]

Thus, it is a capacity to detect the salient features of a particular situation that characterises the practically wise. More generally, virtue may be defined, following McDowell, as 'an ability to recognise requirements which situations impose on one's behavior'.[12] Such sensibility to requirements is what allows the virtuous person to detect the various reasons for action which obtain in a particular case. Critically, these considerations are not isolated but they add up, in the Aristotelian view, to a unified conception of the components of the good life. It is in light of such a conception that the practically wise person detects which reasons obtain in the particular case and what virtue requires her to do under the circumstances.[13]

Now, if virtue is a capacity to detect the relevant concerns or requirements which provide reasons for action in a particular situation, then, surely, the virtuous person can be relied on to recognise when the situation is such that, in light of a general conception of rightness, a departure from a rule is justified. The practically wise person thus knows when to apply a rule or principle to a particular case or when, to the contrary, there are circumstances which defeat their applicability. The judge with practical wisdom has, that is to say, the ability to detect 'exceptions' or, more technically, the capacity to recognise when a defeasibility condition obtains.[14] The Aristotelian judge can be counted on to scrutinise the situation of choice in full detail, being alert to the possibility that there might be 'an extraneous, unexpected factor',[15] which may lead to problematising the application of a rule.

The knowledge of exceptions – which, as claimed, is distinctive of the person of practical wisdom – resists 'codification'.[16] That is to say, there is no procedure that can tell us beforehand when the situation is such that merely applying the relevant rules or principles will not do. The person of practical wisdom is open to the possibility that the case confronting her may not be one about which she already knows how to deliberate and is prepared to 'improvise' what is required.[17] Central to this picture of deliberation is the idea that there is no general procedure that can extricate us from the difficulties inherent in good practical reasoning. It is the mark of a judge of practical wisdom, on this account, to be fully responsive to the complexities of a case and ready to 'invent' an answer to the problem,[18] which may require a substantial refinement and reworking of the values at stake in light of a general conception of law and, in some cases, even an innovation or further specification of the very conception of law.[19] In extreme situations, cases may also be occasions for coming up with new views about what deliberation involves. The practically wise judge is both

ready and able to engage in the imaginative effort that good deliberation at times demands.

The impossibility of capturing the requirements of virtue in terms of a set of principles or rules formulated in advance to the circumstances of action has important implications for the way in which the standard of practical reason is understood. The Aristotelian analogy between matters of conduct and the art of navigation is again instructive. Nussbaum writes: 'The experienced navigator will sense when to follow the rule book and when to leave it aside. The "right rule" in such matters is simply: do it the way the navigator would do it.'[20] In the realm of practical reasoning, as in the art of navigation, the good decisions are those that the wise person would take. Aristotle does not provide any criterion of rightness external to the practice of the virtuous.[21] The correct legal decision is as the virtuous judge determines it. Thus, in a Neo-Aristotelian picture of legal reasoning, virtues play, as it were, a 'constitutive' role, in that the correctness of a decision is a matter of whether it is a decision in accordance with virtue; that is, a decision a virtuous judge would have taken.[22] It is the standard of practical reason as embodied in the practically wise that allows us to determine when the case is a 'rule-case'[23] or when, to the contrary, the rule's applicability to the case ought to be questioned. Virtues are, in this sense, prior to rules in a theory of legal reasoning.

This is not to deny – as Aristotle did not – that rules play a role of the utmost importance in legal reasoning.[24] Indeed, if a virtue approach to legal reasoning were to imply the dispensability of rules it could not possibly count as a perspective on legal reasoning, but as a change of subject altogether. However, the role that a virtue theory of legal reasoning accords to rules is more modest than the predominant conception of legal reasoning takes it to be, as the appropriateness of solving a case by applying a rule is, ultimately, checked against the particulars of the case. Nonetheless, many of the virtues of rules may be perfectly recognised on an aretaic theory of legal reasoning. Furthermore, there is an important role that rules may serve in a system of law which comes to light when we analyse legal reasoning from within a virtue-based framework, namely, rules are extremely useful aids to perception. I have argued that the recognition of the salient factors of a situation is critical to good legal reasoning. Rules play an important role in legal reasoning insofar as they inform the description of a case and focus attention on relevant aspects of a situation which might otherwise go unnoticed.[25] As Nussbaum succinctly puts it, 'rules help us to see correctly'.[26] Thus, rules importantly facilitate the perceptual tasks that

are involved in good deliberation, the study of which is the target of the next section.

5.3 Perception and legal judgement

I have argued that in an aretaic approach to legal reasoning, there is emphasis on deliberating about the particulars of a case. Good legal decision making is, above all, a matter of fitting one's decision to the requirements of the particular case. A particularistic pole of legal reasoning – which, to repeat, need not be viewed as a move designed to underplay the relevance of rules – is a first feature that a virtue approach to legal reasoning brings into focus. Along with an emphasis on the particulars, there is also a focus on the relevance of perception to good legal judgement, for the 'discernment' of particulars rests, says Aristotle, with 'perception'.[27] Thus, there is – and this is a second feature which a virtue theory exposes – an important perceptual dimension to legal reasoning.[28]

A fine-tuned perceptual capacity is the mark of the person with practical wisdom. The sensibility to requirements which, as claimed, virtue consists in, is a sort of perceptual capacity. On the Aristotelian view, the high order of 'situational appreciation'[29] that characterises the practically wise is but an ability to perceive the salient features of a situation, or what really matters in a specific case. The virtuous person's judgement results from a distinctive way of seeing a situation. McDowell describes the virtuous perception of a situation as follows:

> The view of a situation which he [the virtuous] arrives at by exercising his sensibility is one in which some aspect of the situation is seen as constituting a reason for acting in some way; this reason is apprehended, not as outweighing or overriding any reason for acting in other ways which would otherwise be constituted by other aspects of the situation ... but as silencing them.

Thus, it is not only that the virtuous is able to appreciate all the relevant features of a situation, but that she has the ability to perceive which – in the concrete situation – are salient and may be rightly seen as constituting a reason for a decision. Critically, such reason is not viewed by the virtuous as overriding or defeating any reasons which other aspects of the situation may provide, but as 'silencing' – in McDowell's fortunate metaphor – those considerations. That is to say, on this view, the virtuous judge's decision does not result from a weighing and balancing

of competing considerations, but from a picture of the situation which misses nothing of relevance and in which some aspects are perceived as requiring action in a certain way.

It is essential to note that the perceptual capacity that the virtuous judge possesses does not need to be characterised as an unerring ability to see into the right. An intuitionist reading of the virtuous person's perceptual abilities would make it a non-starter for a theory of legal reasoning. Whatever role one might want to give to perception in legal reasoning, it has to be compatible with the basic requirement that reasons for a legal decision ought to be public and sharable – reasons for action in law cannot possibly be private or idiosyncratic. Indeed, if the deliverances of the perceptual sensibility in which virtue consists were a matter of immediate apprehension that does not admit of discursive justification, then the notion of virtue could not play any substantial role in the legal domain. However, it is possible to provide an alternative interpretation of the perceptual sensibility of the virtuous which is more in tune with the public nature of legal reasoning. The perceptual capacity may be construed as a sensibility that enables the virtuous judge to appreciate the reasons which obtain in a particular case, and to provide the corresponding justifications for her decision. As Wallace has suggested, virtue may be understood as a form of 'connoisseurship', for the connoisseur or expert has precisely the ability to discern case-specific reasons for choice by means of perception and can provide, in every case, a justification for her choice.[30] Thus, a conception of virtue as a kind of practical expertise allows us to put to rest worries about the inability of virtue theory to account for the public dimension of legal reasoning.[31]

Neither should the perceptual capacity that distinguishes the virtuous person be understood as a capacity that makes it unnecessary or otiose for the virtuous judge to deliberate about a case. While the judge with practical wisdom will in very many cases immediately discern the reasons or justifications which obtain in a particular situation, nothing in the perceptual model of virtue that has been defended thus far implies that there will not be cases that would pose a challenge, even to the practically wise. The virtuous person, like the expert in a practical skill, has developed the abilities necessary to respond to difficult problems, but such a response does not exclude, but rather, typically requires active engagement and reflection.[32] Deliberation of the hardest sort is called for in some cases, and the perception which grounds, as argued, the virtuous judge's decision may be the result of considerable effort, on the part of the judge, to describe and re-describe the case in increasing

detail as well as to refine and specify the concerns that impinge on a situation.[33]

Finally, the kind of perception that is distinctive of the virtuous agent is not exclusively a cognitive capacity, but an 'inclusive' view of perception, according to which perception has emotional and imaginative as well as intellectual components seems more congenial to the Aristotelian view that makes of virtue a state concerned both with action and feeling.[34] The virtuous judge's perception of the particulars of a case is not a dispassionate or detached vision, but it is rather the result of a 'hot' cognitive process. I turn now to examine the emotional aspects of legal reasoning, and, more specifically, the role that it plays in the perception of the case.

5.4 Virtue and emotion

The role of emotions in legal decision making is a third aspect that a virtue perspective on legal reasoning brings into focus. Virtues, according to Aristotle, are both a way of acting and a way of feeling. Virtue requires one not only to act in a way that is appropriate to the particulars of the case but also to have the right sort of emotional response.[35] Emotions are thus critical to virtuous deliberation. There are several roles which emotions play in moral reasoning and which are also pivotal in the legal domain.[36] First, emotions play a critical 'epistemic' role, in that they are exceedingly useful tools for detecting the reasons for action which obtain in a particular case. That is to say, emotions help us identify the salient features of a case. Sherman writes:

> Often we see not dispassionately, but because and through the emotions. So, for example, a sense of indignation makes us sensitive to those who suffer unwarranted insult or injury, just as a sense of pity and compassion opens our eyes to the pains of sudden and cruel misfortune. We thus come to have relevant points of view of discrimination as a result of having certain emotional dispositions. We notice through feeling what might otherwise go unheeded by a cool and detached intellect. To see dispassionately without engaging the emotions is often at peril of missing what is relevant.[37]

Hence, emotional engagement aids us to track the morally relevant features of a situation. The kind of perception which, as argued, is necessary for correct legal decision making is thus not impeded but, quite the contrary, made possible though the work of the emotions.

Second, emotions have an important 'expressive' function. They assist us in signalling value to ourselves and to others. Emotional attitudes help us convey morally relevant information, for example, that we find a particular decision outrageous or that we feel regret at taking some course of action. This is a useful role for emotions in law, since decisions are often the result of collective deliberation and emotional expressions may be particularly effective ways of conveying one's perspective on a case. In addition, emotional display may also be useful and, most importantly, morally significant, when communicating the verdict to the parties whose case is being disposed. Just as it matters how, for example, we offer help to someone who is in financial trouble or how we refuse an invitation to attend a party or participate in a project, it also matters greatly the emotional tone that a judge conveys to the parties.[38] This expressive function is particularly relevant in cases which pose moral dilemmas. Confronted with such a case, the virtuous judge is aware of the moral reminder which follows action that sacrifices an important value and feels regret in taking a decision in circumstances of deep conflict of values.[39] Expressing that regret (as well as awareness of the complexities of the decision) to oneself and to others may be essential for conveying the importance of the value that has been sacrificed, and it may make it less likely that it not be respected in the future.

Third, emotions also play a 'revelatory' function in that they disclose information that we might not have been aware of had we not experienced those emotions. In this sense, emotions at times reveal to us what really matters in a situation. For example, a judge may not have realised how important gender equality is until he feels overwhelmed with uneasy feelings and distress at the prospects of applying a labour law that clearly fails to protect the rights of pregnant women. In other words, emotions disclose antecedent values and commitments the importance of which we had so far failed to recognise.

Fourth, emotions play an inestimable 'motivational' role. Emotions move us to action. To continue with the previous example, a judge who has experienced frustration and concern when deliberating about a case of pregnancy discrimination that is not properly covered by the applicable law is likely to effortlessly search for a way to grant the claims while making a decision according to the law. In this sense, emotional engagement may be an important source of motivation, particularly when reasoning about hard cases which require considerable intellectual effort and a good deal of imagination.

Finally, emotions play a 'constitutive role' in that appropriate emotional response is partly constitutive of the virtuous decision. Virtuous

choice is a matter, as Aristotle insists, not only of the content's action, but also of feeling. A decision that matches in content a virtuous judge's decision is, nonetheless, morally defective if it fails to be done with the appropriate emotional dispositions. A judge who would congratulate himself on or feel proud of a decision taken when faced with a dilemma will most certainly be short of virtue, regardless of whether it is a decision which a virtuous judge similarly circumstanced would have taken. But the point about the constitutive role of emotions is stronger: the very lack of emotional engagement makes perception defective. It is not only that emotions – as stated above – aid perception, but that perception is in part constituted by appropriate emotional response. As Sherman puts it:

> Even if without the emotion we could somehow see ethical salience, the way we see would still be defective and imperfect. That is, we might have the right (ethical) views, but lack the right modes of seeing and appreciating. We would see with an inferior kind of awareness. The point is that, without the emotions, we do not fully register the facts or record them with the sort of resonance or importance that only emotional involvement can sustain.[40]

Thus, the judge who confronts a case in a detached way not only fails to behave in a virtuous manner (insofar as he fails to exhibit an appropriate emotional response), but his perception of the case would also be defective, as that response is in part what correctly recognising or appreciating the particulars of a case consists in. Emotions are themselves 'modes of seeing': one would not see in 'that' way unless one had certain emotions.[41] Thus, emotional and cognitive capacities are both necessary for successfully carrying out the perceptual tasks which, as argued, are central to legal decision making.

Now, it is evident that the foregoing account of the way in which emotions figure in legal reasoning requires a robust conception of the emotions. Aristotle provides us with just such a conception. On Aristotle's view, emotions are intentional states, and as such they have cognitive content. On this cognitive theory, emotions are partly constituted by evaluations or appraisals, which are central for the identity of the emotion. For instance, anger will not be anger unless one believes that one has been unjustly treated. Thus, emotions involve a kind of judging or evaluation, for example, that one has been unfairly harmed. The emotions that figure in law and morality are thus not uncontrolled impulses or visceral reactions, but rich cognitive states. Furthermore,

it is only 'cultivated' emotions that make a distinctive contribution to sound practical judgement. In contrast to a passive view of the emotions according to which emotions are beyond our control, in the Aristotelian picture, emotional capacities may be educated as part of the process of habituating good character. Thus, the emotions that are claimed to play a significant role in law and morality are not unregulated capacities or raw passions, but rather educated emotions that are properly grounded on examined evaluations. Vindicating a role for the emotions, so conceived, in a theory of legal reasoning does not amount in the least to advocating a less rational picture of decision making. Quite the contrary: insofar as emotions may be, on this view, shaped by reason, the recognition of the emotional components of legal judgement gives reason a broader role in directing legal decision making.[42]

5.5 Legal reasoning as re-description

A virtue approach to legal reasoning brings to light the centrality of the description of the case to legal decision making. Arriving at a fine description of the situation is a most important and hard part of legal reasoning. Studying legal reasoning by focusing on the moment of choice is to start too far down the road. Before any decision as to which rule should be applied and how a case should be solved, there is a complex and extraordinarily important process of description. Cases do not confront us with a list of the features that need to be attended; neither do they come with labels indicating the different values that they touch upon. A lucid description of the problem at hand, which provides, ultimately, the basis for action, is a key part of reasoned deliberation.[43] Correct legal decision making is, in an important sense, a matter of correct seeing.

To be sure, it is widely acknowledged that sometimes the description of the decision task is problematic. Cases which pose 'problems of classification' are considered to be one class of 'hard' cases in the standard theory of legal reasoning. However, such problems are, for the most part, taken to be reducible to problems of interpretation, which are conceived as the most important problems in legal reasoning. In contrast, from a virtue approach, issues of classification stand out as critical to good legal decision making. It is an emphasis on rules rather than facts, on rule application rather than description, on action rather than vision, that leads to placing interpretation at the centre of a theory of legal reasoning to the detriment of problems of classification.[44] In addition, the way in which problems of classification are generally

understood is too narrow. Traditionally, problems of classification concern the subsumption of the disputed facts under the relevant normative categories – this is, in fact, what allows reducing problems of classification to problems of interpretation. But this way of conceiving problems of classification only captures some of the difficulties inherent to seeing that 'this' is a 'that' when reasoning about a legal problem. There is a lot of work to be done before one is in a position to match the facts of the case to an applicable norm. While norms, as argued, play a critical role in directing attention to relevant features of a situation which might otherwise be missed and, in that sense, they importantly inform perception, rule application is only a part of what the process of arriving at a correct appreciation of the situation involves. Much of the work of virtue rests, in fact, in knowing how to construe the case before one.[45] A virtue theory thus reclaims the relevance of problems of classification to a theory of legal reasoning.

The process of description that is pivotal to virtuous legal decision making requires a considerable effort on the part of the decision maker. A correct picture of a situation is the result of on-going efforts at describing and re-describing the case. In order to properly construe a case, judges need to give a careful attention to the individual facts of the case, strive to see accurately and without prejudice the situation confronting them, and actively engage in the process of describing in detail what is before them. Emotional involvement is also necessary for arriving at a correct description of the facts of the case since, as argued, emotions play a critical role in perceiving salience. An attentive and attached gaze is necessary for getting one's description of a case right. It takes moral effort and hard work to direct reflection upon the facts of a case with the appropriate attitude, as well as to undertake the process of description in a way that is conducive to a picture that is fully responsive to the specificities of the case. In hard cases, fine description will also require a difficult imaginative exercise to arrive at novel and more accurate readings of a situation and to come up with the conceptual framework or perspective necessary to capture the salient facts.

It is important to note that the description of a case is a blend of both fact and value. The process of arriving at an accurate description critically involves reflection upon the values which impinge on a situation. The description of a situation – particularly in hard cases – is a process whereby one deepens one's conception of the values involved and how they relate to each other. A 'specification' (more on that later) of the concerns identified as relevant in a situation is an important part of what describing a situation is about. A good description, at times,

depends on the ability to read a case in a different light by refining and revising established conceptions of the values at stake. For instance, deepening one's understanding of the value of freedom of expression is required for describing a case concerning political campaign contributions as a case that bears first and foremost on freedom of speech.[46] A correct description of the facts of a case will also depend occasionally on approaching a case armed with an articulated conception of the relevant values. For example, the asymmetry of power at the work place is now regarded as an essential part of the correct description of cases of sexual harassment.[47] But such description heavily depended, in the first place, on the elaboration of a theory about gender equality. Thus, the description of a case is bound up with the deliberation about the values involved. On the one hand, the description of a case is informed by a previously held conception of values and, on the other hand, refinement of such a conception is sometimes required for correctly describing a particular case.

In short, an important part of legal deliberation consists in perfecting the description of the situations of choice. From this perspective, the moment of choice appears to be, in a way, less important, for decision ideally follows from the correct description of the facts of the case. Murdoch writes, 'If I attend properly, I will have no choices and this is the ultimate condition to be aimed at'.[48] Thus, efforts at seeing properly aim at approximating an ideal situation in which decision is dictated, as it were, by the facts of the case. The virtuous gaze upon the individual facts of a case yields an accurate picture of the situation that unambiguously requires action in a certain way.[49] In this sense, legal decision making at its best is importantly constrained by facts. This is not to reduce legal reasoning to any sort of empirical investigation since, as argued, the description of a case involves to a large extent deliberation about values. I turn now to examine the shape that such deliberation takes from within a virtue theory of legal reasoning.

5.6 Legal reasoning, specification and normative conflict

A central feature of the Neo-Aristotelian approach to practical reason is the idea that practical reasoning deals also with ends. Deliberation is not only necessary to select the best means of realising a previously fixed end, but reasoning about what to do critically involves reflection on the values and practical commitments of the deliberating agent. On this view, the correctness of a deliberative choice cannot be explained in terms of 'efficacy'; that is to say, it is not a matter of whether it

maximises some value or system of values, for, in many cases, one has to deliberate about the very ends to be attained in a particular context of choice. Aristotle's own investigation into the main constituents of happiness provides an exemplary illustration of the kind of non-instrumental reasoning that is necessary when deliberating about practical matters.

The deliberation about ends involves, primarily, a search for the best 'specification' of the values involved. When deliberating about ends, one does not try to select the most causally efficacious way of bringing about a particular value, but rather the aim is to see what really 'qualifies' as a good specification of such value.[50] One may deliberate with a view to determining which value or values are worthy of pursuit and what the content of such values is, or one may deliberate so as to determine what would count as the achievement of a not yet completely specified value in the particular situation. That is to say, when deliberating, one may aim at 'forming' a conception of value or at 'putting into practice' a previously held conception of value.[51] In any of these cases, the train of thought cannot be captured by means-ends inferences, but rather involves a refinement or revision of the values at stake. In other words, the structure of such reasoning is not 'instrumental' but 'specificatory'.[52] There are two main reasons that make specificatory reasoning indispensable when deliberating about a practical question. First, specificatory reasoning is necessary as values are often too vague to serve as starting points for means-end reasoning. Second, values may come into conflict, and, sometimes, we may remove that conflict by further specifying them.[53] In this view, there is no metric that can help us to satisfactorily solve a problem of value conflict, for values are plural and incommensurable. In circumstances of deep conflict, choice cannot but issue from a reflection upon the distinctive contribution of each value and how values relate to one another in light of an overall conception of the good.

This picture of deliberation is, I submit, exceedingly useful for addressing the problems of value conflict that permeate legal decision making. On this view, we may address the problems of value conflict which arise when reasoning about legal cases by specifying the values at stake. For instance, faced with a conflict between freedom of expression and personality rights, one may proceed by further specifying and refining those ends. Through the process of specification, one would need to determine what counts as a good specification of the conflicting values and what realising those values would mean in the case at hand, as well as to construct a theory about how the values thus far specified relate

to each other and how they fit within a general conception of the ends of law. The specification of the conflicting values in light of an overall conception of the ends of law will often require the revamping of those values and, in the hardest cases, it might even require a revision of the very conception of law.

This specificationist proposal importantly differs from the 'balancing' model that dominates the current debate as to how to reason about legal problems in the face of value conflict. Alexy's 'weighing formula' is probably the most popular version of this model.[54] As is well-known, Alexy claims that whenever there is a conflict between two legal principles the conflict should be adjudicated by means of a formula, which gives us the value of the concrete weight of one of the principles in conflict relative to the other competing principles under the circumstances of the concrete case. This formula is meant to capture the formal structure of balancing by using the rules of arithmetic in a way similar to the way in which rules of logic are used to represent in a deductive scheme the formal structure of subsumption. The rationality of subsumption is, of course, undisputed, but doubts have been raised as to the rationality of balancing. Alexy contends that balancing is, however, a rational procedure. The commensurability that is, in Alexy's view, a prerequisite of rational choice is brought about by using a scale which represents the classes for the evaluation of the gains and costs of protecting the values in conflict on the basis of the common point of view provided by the constitution. Such a scale, claims Alexy, may be given a numerical interpretation, which can then be plugged into the weighing formula to calculate the concrete weight of the principles at stake on the basis of which the case is to be decided.

On the specificationist proposal, legal reasoning about cases of value conflict is claimed to be, as in the balancing model, a rational process. But the conception of rationality that underwrites the specificationist approach is quite different from the scientific picture of rationality endorsed by Alexy's proposal. To start with, the Aristotelian view rejects the claim that commensurability is a prerequisite of rational choice. The rationality of a legal decision is based upon reflection about the special nature of each of the values in question and their distinctive contribution to an overall conception of law. Legal decision making cannot be a 'science of measurement',[55] but this does not make it less of a rational enterprise. Legal reasoning is qualitative – quantification is, in fact, neither possible nor desirable, for there is no single metric one may use to measure the different decision alternatives. The correctness of a deliberative choice does not depend on whether it maximises

the quantity of a common value; its rationality is a matter of whether it results from a specification of the values at stake and their fit within a system. It is, in other words, considerations of coherence, rather than considerations of efficacy, that should drive decision making in the face of value conflict. At the end of the day, solving a hard case is a matter of substantive argument about how a case should be read, which features of the case engage a standing concern, how the relevant values should be specified, and what realising those values would require in the particular context. No formal procedure can be used to simplify the difficult task of deliberating in cases of value conflict. There is no ready shortcut to arrive at a good decision, but an attentive description of the situation and an elaborate specification of the values involved are at the heart of virtuous deliberation.

5.7 Conclusions

This chapter has sketched the main lines of a virtue theory of legal reasoning. This theory advances five distinctive claims: (a) correct legal reasoning requires fitting one's judgement to the particulars of the case; (b) perception is central to legal reasoning; (c) emotions play a critical role in legal deliberation; (d) the description (and re-description) of a case is a most important and hard part of legal reasoning; and (e) legal reasoning involves reasoning about ends and, more specifically, the specification of indeterminate and conflicting values. Virtue – as a perceptual capacity concerned with the particulars – occupies a central place within a theory of legal reasoning so conceived. The virtuous judge can be counted on to scrutinise the case before her in an attentive and emotionally involved manner and has the capacities necessary to integrate perception of detail in an overarching conception of rightness.

The different claims of the virtue approach put forward in this chapter are not independent from each other, but they are composite elements of a unitary picture. From the perspective of a virtue approach, legal reasoning is first and foremost concerned with the particulars, which are apprehended by perception. Such perception is not emotionally inert. Rather, emotions are partly constitutive of the perceptual response. Critically, the deliberation about the particulars is done in light of an overall conception of the ends of law that both informs those perceptions and is revised in light of them. Thus, the description of the facts of the situation of decision and the specification of the values that impinge in that situation are but different aspects of the same process.

In this process, the knowledge of exceptions which, as argued, virtue consists in, is critical, for the recognition that one is facing an exceptional case goes hand-in-hand with the specification and refinement of the values involved. Such recognition is, thus, not an immediate intuition into what virtue requires, but the result of an arduous process of deliberation on the part of the virtuous judge. Virtue, far from being a simplifying device that saves its possessor from hard reasoning, endows her with the capacities and motivation necessary to successfully carry out the difficult tasks that can be involved in complex deliberation.

This picture of deliberation does not necessarily involve a break with the dominant conception of legal reasoning. There is room within the standard theory of legal reasoning to accommodate – at least, to some extent – the import of the foregoing claims. However, while the dominant conception of legal reasoning may be, in principle, compatible with the recognition of the centrality of perception, the claims of particularity, the emotional dimensions of legal judgement, and the importance of description and specification to good legal reasoning, these topics have been largely sidestepped in the current debate. There is, in this sense, an important difference in emphasis in that a virtue theory brings to the fore aspects of legal reasoning which have not been central in current approaches to the subject.

This difference in focus also has important implications for the way in which the theory of legal reasoning is conceived. One serious consequence of focusing on rule-based reasoning has been the marginalisation of legal ethics. Questions of legal ethics are not taken to be the proper subject of a theory of legal reasoning, but are dealt with in a separate body of literature with few, if any, connections with the theory of legal reasoning. However, if, as argued, virtue is necessary for successful legal reasoning, then the issue of what makes a legal decision a sound decision cannot be separated from the question about what makes a judge a good judge. That is to say, the study of legal reasoning cannot be divorced from the study of the traits of character and abilities that are required for good legal decision making. Thus, from a virtue perspective, a theory of legal ethics is not merely an ancillary subject, but rather a substantial part of a theory of legal reasoning.

Notes

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1. In contrast, other approaches to virtue theory are mostly motivated by dissatisfaction with Kantian ethics and aim at advancing a picture of morality that gives more recognition to the role that non-rational elements play in practical reasoning. For this classification of virtue ethics, see Nussbaum (1999).
2. Wiggins (2001, p. 296).
3. NE 1104a–10.
4. Nussbaum (1990, pp. 71–2).
5. Nussbaum (1990, p. 69).
6. Wiggins (2001, p. 290).
7. NE 1094b11–22.
8. For the distinction between formal vs non-formal approaches to legal reasoning, see Schauer (2009, pp. 29–35).
9. NE 1140b6.
10. NE 1142 a24.
11. Wiggins (2001, p. 293).
12. McDowell (1998, p. 53).
13. For a defence of the claim that practical wisdom involves perceiving what to do in the particular case in light of a general conception of the good life, see Sorabji (1980, pp. 205–14).
14. Hursthouse has argued for the relevance of the experience of exceptions to arrive at the kind of discernment that the *phronimos* has. See Hursthouse (2006, p. 290). For a defence of the view that virtue is a matter of competence with the defeasibility of practical syllogism, see Millgram (2005, pp. 134–8).
15. Michelon (forthcoming).
16. For a statement and defence of the thesis of uncodifiability, see McDowell (1998), especially Essay 3.
17. On the notion of 'improvisation' see Nussbaum (1990, pp. 71, 94–7, 141).
18. Wiggins (2001, p. 296).
19. On this specificationist aspect of legal reasoning, more follows in Section 7.
20. Nussbaum (1990, p. 97).
21. McDowell (1998, p. 35).
22. For a defence of the claim that virtue plays a constitutive role in legal decision making, see Amaya (forthcoming).
23. The term is Detmold's. See Detmold (1984), quoted in MacCormick (2005, p. 81).
24. It is critical to note that, while there are some important affinities between particularism and virtue theory, these are distinct theoretical positions, as virtue theory may and should give to rules and principles a role that is incompatible with the particularist programme. On the contrast between virtue theory and particularism, see Millgram (2005, pp. 172–4); Sherman (1997, pp. 262–76); and Stangl (2008). For an argument to the effect that the virtuous legal deliberator need not be particularistic, see Schauer (forthcoming).
25. On this role for rules in a theory of legal decision making that accords an important role to practical wisdom, see Michelon (forthcoming).
26. See Nussbaum (2000, p. 64). See also Nussbaum (1990, p. 73).
27. NE 1109b18–23 and 1142a7–23.

28. This is not to say that the relevance of perception to legal judgement is unacknowledged in the literature on legal reasoning, but the role it is claimed to play is ancillary to the application of rules. See MacCormick (2005, ch. 5). As opposed to this deontological approach to perception, a virtue approach does not restrict the role of perception to rule application, but it takes perception to play a more fundamental role in legal decision making. For a defence of a virtue, rather than a deontological conception of perception in the context of legal decision making, see Michelon (forthcoming).
29. See Wiggins (2001, p. 291).
30. See Wallace (2006, pp. 253–8). For a defence of the claim that virtue has the structure of a practical expertise or skill, see Jacobson (2005).
31. For a consideration of the objection that says that virtue theory is incompatible with the public nature of legal reasoning, see Amaya (forthcoming).
32. For a defence of the claim that virtuous activity – like that of experts – is not mindless or passive but rather requires effort on the part of the virtuous agent, see Annas (2008). Cf. Rietveld (2010) – discussing McDowell's and Dreyfus's views on *phronesis* as involving unreflective action.
33. On the shape of such deliberation, see sections 4 and 5.
34. See Nussbaum (1990, p. 80).
35. On virtue and emotion in Aristotle, see Hursthouse (1999, ch. 5); Sherman (1989, ch. 2); and Stark (2001).
36. See Sherman (1997, pp. 39–52).
37. Sherman (1989, p. 45).
38. On the moral relevance of judging a case while showing the appropriate emotional dispositions in the context of legal fact finding, see Ho (2008, pp. 78–84).
39. On the virtuous agent's emotional response to moral dilemmas, see Hursthouse (2008, pp. 243–7) and Hursthouse (1999, pp. 75–7).
40. Sherman (1989, p. 47).
41. Sherman (1989, p. 171). See also Nussbaum (1990, p. 79).
42. This is not to deny that emotions can be sometimes deeply misleading. Like perceptual experiences, emotional experiences provide us with epistemic access to their objects, but not in every case. Only in the absence of defeating conditions do perception and emotion constitute (respectively) evidence for empirical and evaluative beliefs. Indeed, it is a mark of virtue to have the right habits and disposition to check when (and only when) the occasion requires whether the emotions are distorting perception and reason. But in the absence of such defeating conditions, the emotional deliverances of the virtuous person will be epistemically valuable and will positively contribute to arriving at sound judgments. For a defence of the claim that regulated emotions, like perceptions, provide good, although non-conclusive, reasons for belief, see Elgin (2008) and Goldie (2004). Against this view, Brady (2010) has argued that the virtuous person's emotional experiences do not give her *per se* information about the evaluative realm, but that they rather promote the search for reasons which bear on the question of whether such experience is warranted. Either way, however, emotions are claimed to play a vital role in enabling us to achieve evaluative knowledge.
43. On the relevance of description to practical deliberation, see Murdoch (2001), especially Essay 1.

44. Samuel (2003) is a notable exception to this state of affairs.
45. Sherman (1989, p. 29).
46. See Breyer (2005, p. 39–56).
47. Nussbaum (2000, p. 78), quoting *Carr v. Allison Gas Turbine Division, General Motors Corp.*, which overruled a lower-court judgment because the 'asymmetry of positions' between Carr and her (male) co-workers had not been considered.
48. Murdoch (2001, p. 38).
49. This is not to say that there is always a correct answer in a virtue theory of legal reasoning. Nothing in the notion of virtue excludes the possibility of disagreement among the virtuous in the hardest cases.
50. See Wiggins (2001, p. 287). Wiggins's specificationist proposal has been further developed by Richardson (1994). See also McDowell (1998, essay 2).
51. McDowell (1998, p. 32).
52. McDowell (1998, p. 26).
53. On the use of specification to address problems of normative conflict, see Richardson (1994).
54. See Alexy (2003).
55. Plato, *Protagoras,* 356, quoted in Nussbaum (1990, p. 56).

References

Alexy, A. (2003). 'On Balancing and Subsumption: A Structural Comparison', *Ratio Juris*, 16, 433–49.

Amaya, A. (forthcoming). 'The Role of Virtue in Legal Justification', in Amaya and Ho (eds).

Amaya, A. and H. L. Ho (eds) (forthcoming). *Virtue, Law, and Justice* (Oxford: Hart Publishing).

Annas, J. (2008). 'The Phenomenology of Virtue', *Phenomenology and the Cognitive Sciences*, 7, 21–34.

Aristotle (1998). *Nicomachean Ethics* (Oxford: Oxford University Press).

Brady, M. S. (2010). 'Virtue, Emotion, and Attention', *Metaphilosophy*, 41, 115–31.

Breyer, S. (2005). *Active Liberty: Interpreting our Democratic Constitution* (New York: Vintage).

Brun, G., U. Doguoglu, and D. Kuenzle (eds) (2008). *Epistemology and Emotions* (Aldershot: Ashgate).

Burton, S. (ed.) (2000). *The Path of Law and its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Cambridge: Cambridge University Press).

Detmold, M. J. (1984). *The Unity of Law and Morality* (London: Routledge and Kegan Paul).

Elgin, C. (2008). 'Emotion and Understanding', in Brun, Doguoglu, and Kuenzle (eds). 33–49.

Evans, D. and P. Cruse (eds) (2004). *Emotion, Evolution, and Rationality* (Oxford: Oxford University Press).

Goldie, P. (2004). 'Emotion, Reason, and Virtue', in Evans and Cruse (eds). 249–67.

Hursthouse, R. (1999). *On Virtue Ethics* (Oxford: Oxford University Press).

Hursthouse, R. (2006). 'Practical Wisdom: A Mundane Account', *Proceedings of the Aristotelian Society*, 106 (2006): 283–307.
Hursthouse, R. (2008). 'Two Ways of Doing the Right Thing', in Solum and Farrelly (eds). 236–56.
Ho, H. L. (2008). *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press).
Jacobson, D. (2005). 'Seeing by Feeling: Virtues, Skills, and Moral Perception', *Ethical Theory and Moral Practice,* 8, 387–409.
MacCormick, N. (2005). *Rhetoric and the Rule of Law* (Oxford: Oxford University Press).
McDowell, J. (1998). *Mind, Value, and Reality* (Cambridge: Harvard University Press).
Michelon, C. (forthcoming). 'Practical Reason in Legal Decision-Making', in Amaya and Ho.
Millgram, E. (2005). *Ethics Done Right: Practical Reasoning as a Foundation of Legal Theory* (Cambridge: Cambridge University Press).
Millgram, E. (ed.) (2001). *Varieties of Practical Reasoning* (Cambridge: MIT Press).
Murdoch, I. (2001). *The Sovereignty of Good* (New York: Routledge).
Nussbaum, M. C. (1990). *Love's Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press).
Nussbaum, M. C. (1999). 'Virtue Ethics: A Misleading Category?', *The Journal of Ethics,* 3, 163–201.
Nussbaum, M.C. (2000). 'Why Practice Needs Ethical Theory: Particularism, Principle, and Bad Behavior', in Burton (ed.), 50–87.
Richardson, H. (1994). *Practical Reasoning about Final Ends* (Cambridge: Cambridge University Press).
Rietveld, E. (2010). 'McDowell and Dreyfus on Unreflective Action', *Inquiry*, 53, 183–207.
Rorty, A. (ed.) (1980). *Aristotle's Ethics* (Berkeley: University of California Press).
Samuel, G. (2003). *Epistemology and Method in Law* (Aldershot: Ashgate).
Sherman, N. (1989). *The Fabric of Character: Aristotle's Theory of Virtue* (Oxford: Clarendon Press).
Sherman, N. (1997). *Making a Necessity of Virtue: Aristotle and Kant on Virtue* (Cambridge: Cambridge University Press).
Schauer, F. (2009). *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge: Harvard University Press).
Schauer, F. (forthcoming). 'Must Virtue be Particular?' in Amaya and Ho (eds).
Solum, L. and C. Farrelly (eds) (2008). *Virtue Jurisprudence* (New York: Palgrave Macmillan).
Sorabji, R. (1980). 'Aristotle on the Role of Intellect in Virtue', in Rorty (ed.).
Stangl, R. (2008). 'A Dilemma for Particularist Virtue Ethics', *Philosophical Quarterly*, 58, 32–52.
Stark, S. (2001). 'Virtue and Emotion', *Noûs,* 35, 440–55.
Wallace, R. J. (2006). *Normativity and the Will: Selected Essays in Moral Psychology and Practical Reason* (New York: Oxford University Press).
Wiggins, D. (2001). 'Deliberation and Practical Reason', in Millgram (ed.), 279–301.

Part III
Values and the Moral Life

6

Making Law Bind: Legal Normativity as a Dynamic Concept

Sylvie Delacroix

If ever there were an opportunity to 'spring-clean' jurisprudence of its most cumbersome words, 'normativity' would be high on the list. It sounds ugly, and it's come to be associated with a frustratingly vague array of questions.

It became prominent in jurisprudence following Hart's and Kelsen's avowed 'conviction that a central task of legal philosophy is to explain the normative force of propositions of law'.[1]

Underlying this conviction was a common foe. Both Hart and Kelsen firmly rejected the 'legal realist' idea that law could be reduced to a concatenation of sociological facts. Yet when it came to articulate law's normative dimension in positive terms, things became more shaky. They have stayed so ever since.

In a minimalist understanding, the normativity of law is trivial. If we take the sphere of normativity to include all objects or propositions (whether grammatically formulated in terms of 'ought' or not) that are somehow capable of being used for guidance, one may wonder why Hart and Kelsen even bothered to assert such a platitude. To get a sense of what is at stake when upholding the normative dimension of law, one may start from what both Hart and Kelsen took to be implied by its negation: if law weren't normative, all we could speak of would be mere habits (Hart) or raw power relations (Kelsen).

Unlike the idiosyncratic table manners of my hosts, unlike the injunction to hand over my cash at gunpoint, law's demands have a claim on my conduct. This need not mean that I endorse them. I may hold some, or all of them, to be repugnant. It need not mean, in fact, that I have formed any judgement whatsoever about their moral worthiness or their legitimacy.[2] I may be referring to them in a 'detached' way. It certainly does not mean that I will actually comply with them.

So what does it mean, then, to state that the law is normative? Hart had a relatively easy answer to this question: it simply means that law is a social practice towards which some people at least hold a 'critical reflective attitude' (they will criticise any deviation from its standards, and use those to justify their own actions). While Hart's account left his critics craving for more, Kelsen's, for its part, left them puzzled. His acrobatic attempts to secure the purity of his theory (grounding law's normativity in a presupposed Basic Norm free of any factual or moral adulteration) nevertheless had the merit of highlighting, negatively, the challenge at stake. One cannot get anywhere, in one's understanding of legal normativity, without addressing its link with other normative domains (including, most importantly, that of morality).

It's that particular challenge that leads me to emphasise the dynamic aspect in my account of legal normativity. Rather than considering law's normative dimension as a static property that can be 'verified' if and only if a certain number of conditions obtain, I endeavour to explain the way in which law's normativity needs to be 'brought about' on a daily basis. This leads me to outline (Section 6.2) a genealogy of legal normativity: instead of taking law's normative dimension as a given, it enquires into what makes it possible in the first place (Section 6.2.1); instead of stripping it down to its 'essential' bones, it celebrates its contingent dimension (by focusing on 'responsibility as authorship', Section 6.2.2).

Now, a genealogy needs history. There's the history of the phenomenon to be accounted for: this would be a history of all the various and contingent social processes that enable law, in its myriad instantiations, to bind 'us' on a daily basis. Given the minute and constantly shifting details of such a history (even if confined to one particular, local instantiation of law), tracing any part of it would be a doomed venture. There's also the history of the *understanding* of a phenomenon: that's the history I have chosen to pick (very summarily) below.

6.1 Understanding legal normativity: A very brief history

A history has to start somewhere. If one needs to take a shortcut, a major shift or breaking point will prove helpful: if I were to choose a date marking the key transition period between what would be a 'premodern' and a modern understanding of legal normativity, I would go for 28 June 1593 (Delacroix 2006, p. 135 ff).

On that day, the Paris Parliament upheld the devolution law which designated Henri de Bourbon the legitimate heir to the throne, despite

his Protestant denomination. To counter the papal arguments (and the radical Catholic *Ligue*'s), the *Politiques*[3] endeavoured to show that the Loi Salique was to be understood as the direct expression of God's will. Now, in order to promote the Loi Salique as the expression of a will that could not be called into question, even by the Pope himself, the *Politiques* could not merely argue that the order instituted by this devolution law 'imitates nature's order', which would have made it conform to natural law. They had to present this devolution law as 'positive divine law', and by doing so they had to abolish the gap between nature and '*surnature*' – a contrast essential to the scholastic tradition.[4]

The *Politiques*' venture to incorporate a divine foundation *within* the legal corpus – instead of maintaining a distance separating law from its legitimating source – proceeded from the desire to shield man-made laws from the Church's external invocation of divine authority. The eventuality which neither opponent in this controversy fully anticipated, however, amounts to the fact that, by constructing this 'institutionalised' presence of God at the foundation of law, the *Politiques* may actually have provided for the possibility of its oblivion. Once secured in a fundamental, positive law, the link to transcendence traditionally conditioning law's legitimacy does not have to be constantly re-elaborated in a process testing the conformity of positive law to 'natural and divine law'. Law's legitimacy, and hence the practical reasoning that conditions and ascertains law's authority, becomes a matter of tracing its pedigree (a pedigree whose divine character will progressively be forgotten).

While this pedigree approach (whether it were secularised or not) considerably simplified the conceptualisation of law's authority, the progressive disregard for the devolution of law's 'divine' origin concomitantly presented legal thought with a challenge which it had been spared until then: How could law derive from the arbitrariness of social and political practices the binding force necessary to ensure its normativity? As long as human laws were perceived as the mere adaptation of a superior kind of law which – in itself – eluded human ascendancy, the messy character of the practices bringing them about was of little consequence to law's normativity. Once human law was deemed to evolve independently of that superior order, however, its normativity seemed to have to arise out of the 'mess' of human affairs.

This challenge was eloquently encapsulated by Montaigne when he noted: 'Laws are often made by fools, and even more often by men who fail in equity because they hate equality: but always by men, *vain authorities* who can resolve nothing' (Montaigne 1991, p. 1216; emphasis

added). What we 'fools' cannot resolve is the problem of normativity. While it is one thing to establish our authority as lawmakers[5] – here, whatever argument suffices to confer legitimacy on our lawmaking will do – it is quite another to reconcile the genesis of this authority with law's purported bindingness. Once they are stripped of any religious reference, the arguments (or narratives) establishing our law-making authority may look rather bare to the outside eye – the theoretician seeking to understand what it is that enables law to bind us.

> [L]aws gain their authority from actual possession and custom: *it is perilous to go back to their origins*; laws, like our rivers, get greater and nobler as they roll along: follow them back upstream to their sources and all you find is a tiny spring, hardly recognisable; as time goes by it swells with pride and grows in strength.
>
> (Montaigne 1991, p. 658; emphasis added)

The 'peril' from which Montaigne wanted to protect us consists in loathing the authority of law out of disgust for its tenuous and arbitrary beginnings:

> I once had the duty of justifying one of our practices which, far and wide around us, is accepted as having established authority; I did not wish to maintain it (as is usually done) exclusively by force of law and exempla so I traced it back to its origins: *I found its basis to be so weak that I all but loathed it* – I who was supposed to encourage it in others.
>
> (Montaigne 1991, p. 131; emphasis added)

Knowing that the original weakness of law is not susceptible of being overcome, and wanting above all to avoid the 'wild opinions' aimed at denigrating the authority of law, Montaigne was faced with the necessity of 'reconstructing' law's normativity. According to Montaigne, the matter was first and foremost to see to it that the law did not only amount to the product of its historical birth, or at least that its normativity did not flow from there. From this perspective, Montaigne put forward 'The first commandment which God ever gave to Man ... *the law of pure obedience*. It was a bare and simple order, leaving man no room for knowing or arguing' (Montaigne 1991, p. 543; emphasis added). Such a reference is surprising coming from Montaigne, as it indeed suggests a grounding of law's normativity in precisely the kind of ontological principle whose inaccessible and thus illusory character he emphatically denounced. Are

we to understand this 'law of pure obedience' as the starting point for a natural justice of divine inspiration? Such an interpretation would be directly at odds with Montaigne's general perspective, and besides, it would directly contradict his explicit rejection of any kind of natural law justice.[6]

If, by contrast, one keeps in mind the Kantian formulation – '[law] is thought *as if it must have arisen not from men but from some highest, flawless lawgiver*; and that is what the saying "all authority is from God" means' (Kant 1991 (1797), 6:319; emphasis added) – this reference to a 'law of pure obedience' may be understood in a way similar to Kant's 'all authority is from God'. The point of such a reference would be to provide this supplement of authority without which thinking of the normative dimension of law does not seem viable, as it is desperately too grand in comparison to the weakness of its sources. From Kant's *as if* construction to Montaigne's legitimate fictions – 'even our system of Law, they say, bases the truth of its justice upon legal fictions' (Montaigne 1991, p. 603) – the step is easily taken. The essential aim of both Montaigne's 'law of pure obedience' and Kant's 'all authority is from God' is to provide the logical principle thanks to which one can theoretically establish law's normativity. From this perspective, one can understand the putative divine origin of Montaigne's first law as essentially aiming at cancelling its iterative character. The point of this law of pure obedience would above all consist in being ultimate, thus avoiding an infinite – and dangerous – regress in its motives.

At this stage, it is difficult not to mention a tempting parallel with one of the outstanding figures of twentieth-century legal positivism – Hans Kelsen. The ambition of founding the normativity of law on law alone, thus excluding any consideration of political or moral legitimacy, constitutes one of the striking features of the Kelsenian theory, which also gives a first norm – the Basic Norm – the task of founding the binding character of the laws flowing from it.[7] Both Montaigne and Kelsen choose to proceed on the basis of the acknowledgement that there is no remedy to our search for the sources of law's normativity but the necessity of a rigorous attachment to the law in its positivity. On this basis, the famous statement from Montaigne – 'Now laws remain respected not because they are just but because they are laws … If anyone obeys them only when they are just, then he fails to obey them for just the reason he must!' (Montaigne 1991, p. 1216) – may be considered one of the cornerstones of legal positivism, underlining the necessity of distinguishing between law's bindingness and law's justice.

While, in the case of Montaigne's theory, the initial law-making practices were set apart in consideration of the danger they represented for the layman (who couldn't but be disgusted by their precarious and arbitrary appearance), in Kelsen's works a similar kind of danger is at stake, involving the more-than-ever threatening *surrender* of law to politics. Having thus excluded any appeal to either moral or factual considerations, Kelsen is left with the task of accounting for the normativity of law 'from within', without appealing to any external element. This ambition to define an autonomous legal *ought* ultimately fails (Delacroix 2006, pp. 27–60). Kelsen's rejection of the classical natural law model indeed commits him to locating the source of legal normativity *within* human activity, while his methodological dualism[8] rules out any reference to the very 'fabric' of human activity – factual and moral elements.

What about Hart? He does not endorse Kelsen's methodological dualism, and one of the main factors distinguishing Hart's theory from Kelsen's lies in his embrace of the *social facts thesis* – that is, 'the claim that while law is a normative social practice it is made possible by some set of social facts' (Coleman 2001, p. 116). Hart nevertheless does not elaborate much on the link between the initial social practices and the normative dimension of law. His accounting for the difference between coercion and obligation by reference to the 'distinct normative attitude'[9] typically associated with the use of the word 'obligation' presupposes law's normative dimension. Its focus is on the surface phenomena flowing from the fact that law is normative, not on what it takes for law to be normative in the first place. His late reference to a conventionalist framework to explain the emergence of the rule of recognition is made in passing, in a brief passage of his 'Postscript';[10] as if the study of the context of social interaction allowing and conditioning law's normative dimension were unlikely to yield any significant insight as to the meaning and properties of law itself.[11]

Montaigne clearly thought otherwise. His enquiry into the 'sources' of law's normativity led him to find a 'tiny stream'. Montaigne chose to silence it. My genealogy of legal normativity celebrates it.

6.2 Tracing a genealogy of legal normativity

From a 'downstream' perspective, explaining legal normativity involves considering its impact on individuals, its potential conflicts with other forms of normativity, but never what conditions its possibility. By contrast, the ambition of a genealogical account of legal normativity is

to challenge its axiomatic status. It does so by considering the web of social and cultural practices that enable law to bind us, and hence have a claim on our conduct and/or judgement.

6.2.1 What makes law's normative dimension possible in the first place?

A fairly instinctive way of making sense of things is to ask about their origins. If one is not familiar with this or that institution, one will inquire about the circumstances or phenomena that brought it about and gave it its present shape. This effort can be characterised by two contrasted attitudes, translating very different expectations when inquiring into the origins of a phenomenon. One possible attitude seeks to trace the 'pedigree' of a given phenomenon. In that case, one expects to be able to assign it a single, fixed point of origin, generally with a view to legitimising or justifying that phenomenon.

By contrast with the pedigree approach, there is no end to a genealogical enquiry into the origins of a phenomenon. As it progresses 'upstream', a genealogy reveals a conjunction of diverse processes which cannot be brought back to a singular origin. Whether they confirm or downplay the perceived legitimacy of the phenomenon in question, these processes are exposed for the sake of challenging common perceptions.

From this perspective, Montaigne's own quest, challenging the classical natural law model, initially had all the traits of a genealogical endeavour. However, its potential to radically undermine law's accepted authority – based on the belief in the existence of natural laws – drove Montaigne to take a striking turn and ultimately rely on a pedigree approach rather than a genealogy. Montaigne's grounding of law's authority in a 'law of pure obedience' – the 'first commandment which God ever gave to Man' – is indeed meant to 'save' legal normativity from the peril of its contingent beginnings. This safety comes at a price: the alleged divine origin of this law of pure obedience can be deemed a form of 'surrender' on Montaigne's part. The quasi-tautological character of its formulation – obedience to the law would be justified by a law of pure obedience – confirms the necessity of avoiding development of any interest for this last and ultimate law, and yielding to law's authority on the basis of 'obedient faith'.

This attempt to turn attention away from what is meant to 'stand as' the ultimate grounding of law's normativity is a trait characteristic of a certain kind of legal positivism. From the perspective I briefly exposed above (6.1), Kelsen's Basic Norm, like Montaigne's 'law of pure

obedience', comes across as a stopgap measure. The reality it is meant to avoid – the context of social interaction that brings law into being, and maintains it as a *normative* practice – is precisely what a genealogy of legal normativity seeks to highlight.

6.2.2 Celebrating the contingent part of the story: Responsibility as authorship

The interaction of individuals within a community will bring about desires of various sorts. Beyond the obvious physical ones, there will also be desires related to one's self-image – the desire to have a good reputation, for instance – and desires related to the possibility of getting on with one's projects without any interference, as well as the possibility of securing the fruit of these projects. These desires, once coordinated, will give rise to formal and informal rules. Nothing is typically legal in this scenario. What is sometimes deemed to characterise a legal system as a distinct form of normative order is a certain degree of sophistication, as a set of rules organised around some meta-rules or 'rules about rules'. This formal characterisation, however, does not even begin to account for the reason why we resort to law as a distinct form of social organisation. While it is easy to point at law's formal assets and show the way in which it may greatly improve a 'primitive' disciplinary structure, for instance, the story cannot stop there. One can only start to get an idea of why people adhere to legal standards and treat them as normative if one aims at a broad, all-encompassing picture of the various aspirations which a community may seek to realise through law.

Although culturally dependent, these aspirations are not commonly reducible to the mere desire to secure the possibility of non-violent social interaction. Whatever its content, there tends to be a programmatic element meant to encapsulate what that particular society sees as a 'better' way of living together. Relying on the possibility of peaceful coexistence as a presupposition, this programmatic element typically combines instrumental concerns and moral values. Far from being confined to the actual creation of a legal system, this element shapes its evolution and is key to understanding law's normative dimension.

For law's normativity, its capacity to impose some non-optional mode of conduct upon us is concomitant to the project we want it to serve. Instead of considering it as a 'given' established once and for all – provided the officials' minimal commitment condition is verified – law's normativity gains in being understood 'dynamically'. Each time an individual is led to assess law's normative claims in the light of morality's demands, each time a judge is led to rearticulate what we want law

for: these cases contribute to shaping the socio-cultural fabric enabling law's normativity. While it would considerably diminish, and maybe cancel law's efficiency as a social institution if such practical deliberation were to be entered into each time an individual is confronted with law's demands, the total absence of such deliberation would in turn transform legal rules into mere habits devoid of any normative meaning.[12]

Once confronted with the demands of morality or prudence, the reasons provided by law may sometimes, on balance, fail to give rise to an obligation. Does this rob law of its normative force? Answering this question positively would equate the concepts of normativity and obligation and hence forego the possibility – and necessity – of civic responsibility. Answering this question negatively, on the other hand, would imply that law's normativity consists in its making a difference in the subject's practical deliberation, no matter how successful or 'conclusive' law's reasons ultimately are. If law were to systematically fail to give rise to an obligation, being consistently defeated by other types of reasons, there would, however, be a sense of unease in still considering it as 'normative' – and in still considering it as 'law' tout court. This is what prompts authors like Marmor to specify that 'at the very least … the idea that law is a normative social practice suggests that law purports to give rise to reasons for action, and that at least some of these reasons are obligations' (Marmor 2001, p. 25).

Far from being detrimental to law's normative dimension, every opportunity to assess law's claim to bind us – hence rearticulating the project we want it to serve – is vital to keeping legal normativity 'alive' so to speak, in touch with the material that first triggered its emergence: the changing demands of morality and prudence. These efforts of assessment and articulation depend, in turn, on our conception of normative agency: assert the need to track the truth of ethical judgements to some independent moral 'entities' conditioning their objectivity, and you will get a different understanding of what it is we are doing when we dispute law's authority in the name of moral values. Tracing the truth of moral judgements back to our own social practices rather than conditioning their truth to some accurate tracking of independent entities not only affects the nature of disagreement; it also changes the nature of our responsibility when, as lawmakers, judges, or citizens we 'take the law into our own hands' and confront it with our moral expectations.

When it is contaminated with subjectivity, a reference to morality will not be able to provide the comfort of a Sartrian 'screen' we may

safely hide behind; the responsibility we take is a matter of authorship rather than the mere implementation of an external source safely removed from the contingencies of human activities. McDowell aptly captures this qualitative difference when he argues: 'If something utterly outside the space of logos forces itself upon us, we cannot be blamed for believing what we do' (McDowell 1998, p. 181). When we deem morality to be such an 'external' source, we not only avoid the possibility of a certain kind of 'blame' – as McDowell puts it – but when we confront the law with our moral expectations, we basically confront a man-made institution – with all the contingency it implies – with a robustly independent reality.

Of course, we must be careful not to fall for a dualist caricature. The alternative to a 'robustly independent' morality need not be the voluntarist fiat associated with a certain kind of existentialism. The sense of authorship arising from an account of morality highlighting its response-dependent character may come with a pre-set, non-negotiable 'text' or 'content': one way of unpacking it consists in working out what the 'committed we' – our common humanity – entails. As a daily endeavour, this unpacking process is shaped by the way we answer the 'unspoken ethical plea of the other' – to use Levinas's language (Levinas 1961). As this answer is always in the process of being reformulated, our common humanity may be said to be a work in progress, structured around one unalterable moral fact:[13] our inalienable dignity, and our concomitant responsibility for the other.

In this account of normativity, the concept of responsibility operates in two distinctive ways. While, on the one hand, it constitutes the anchor of our commitment to morality,[14] it also encapsulates, on the other hand, the 'plasticity' of that commitment: its substance is shaped by the way we answer the other's summon to responsibility. This malleability in turn engages a distinct, proactive kind of responsibility – responsibility as authorship.

This malleable dimension is key to a genealogy of legal normativity. A genealogical endeavour won't stop at the cheerful acknowledgment that we are all equally dignified human beings who are committed to treating each other as such (maybe throwing in some coordination strategy for good measure). While normative agency is key, it doesn't get us very far if our purpose is to understand what enables law to bind us on a daily basis. The nitty-gritty that gets us there will be shaped by all sorts of aspirations and desires. Some of them will be mundane (the desire to move around the country safely, for instance) and unlikely to yield much controversy. When it echoes deep-seated aspirations touching

upon our very understanding of personhood, however, law's power to bind us will hinge upon the kind of deliberation at play in tragic civil disobedience cases[15] or dramatic revolutionary circumstances. Legal theory's ability to shed light on law's normative dimension depends on its success in weaving together both those mundane and tragic deliberative backgrounds.

6.3 Conclusion

The fact that laws are made by men and women has always been an inescapable truth. My emphasis on the '1593 turn', highlighting legal normativity's progressive detachment from the 'natural and divine order' traditionally grounding it, was meant to point at a significant change in the understanding of what conditions law's normativity: instead of having to be *derived* from a higher order eluding human ascendancy, legal normativity is henceforth meant to be *brought about* by us, morally short-sighted human beings.

Montaigne's candid engagement with the challenge brought about by such a conceptual change, and ultimately his resort to a bypassing strategy – the 'law of pure obedience' – inaugurates a trend that would permeate twentieth-century legal positivism. This trend consists in separating, rather than combining, law's social and normative aspects into two distinct explanatory targets. The existence of law is accounted for by reference to some conventional framework of interaction. Law's normativity is explained in terms of the difference it makes in individual practical deliberation: this explanation presupposes the possibility of legal normativity. It proceeds from the assumption that law is indeed normative to then consider how this manifests itself.

Yet law's normative dimension is not a 'property' that is somehow mysteriously attached to law. Law's power to bind us is concomitant to the project we want it to serve. Each time this project is reformulated, confronted with the demands of morality or prudence, law's normativity is concomitantly 'brought about'. While this quotidian construction presupposes our inalienable dignity (and consequent responsibility for the other), it also engages a distinct sense of responsibility: responsibility for the way we answer the other's ethical plea, for the substance we give to morality, for our answer to that crucial question 'How do we want to live together?' (and hence the substance we give to law). Given the contingency inevitably introduced by this 'responsibility as authorship', as I have called it, it may be tempting to keep it safely apart form one's account of normativity.

Yet that contingency is precisely what makes the concept of normativity worthy of philosophical discussion. To be confronted with a 'norm' does not necessarily entail that one approves (or disapproves) of it, that one will follow it, or that one has an obligation to do so. All it entails is that one is either committed to it (whether that commitment is the product of an act of will or the culmination of a set of circumstances) or that it is part of a system deemed normative in virtue of some people's commitment to it. If that system, like law, typically serves a moral task, one cannot make do with the 'systemic' commitment of a few to understand its normativity: one has to build our daily endeavour to rearticulate that moral task into one's account of normativity, whether that story be called a genealogy or otherwise.

Notes

1. 'I share with him [Kelsen] the conviction that a central task of legal philosophy is to explain the normative force of propositions of law … None the less … my main effort in these two essays is to show that references to both psychological and social facts, which Kelsen's theory in its excessive purity would exclude, are in fact quite indispensable' (Hart 1983, p. 18).
2. The conclusion that some law is authoritative does require, by contrast, that consideration be given to its legitimacy (whether that legitimacy is made dependent upon moral considerations or not). For some further elaboration on the difference between normativity and authority, see below.
3. Referring to a group of jurists and intellectuals defending, for the most part, the idea of Gallicanism and, most crucially, arguing for a distinction between the state and religion, the expression 'Politiques' was mainly used by their critics, the radical Catholic 'Ligue' – which called for the eradication of Protestantism in France.
4. It is indeed the gap between 'nature' and 'surnature' that allows the scholastic tradition to speak of 'natural and divine law' while maintaining a tension between the two, as natural law expresses divine law while never equating it. Because of this tension, the scholastic tradition was able to construct the power to govern as legitimated by its link to God while nevertheless remaining under human scrutiny.
5. While the concept of authority necessarily involves considerations of legitimacy, normativity does not (a law can be deemed illegitimate and still be normative, while its claim to authority will have failed). The concept of authority and the practical reasoning that goes with it (when the legitimacy of law making is made conditional upon its springing from the right 'origin' – see above – the practical reasoning needed in order to ascertain law's authority becomes rather minimal) is essential to my understanding of legal normativity, but not equivalent to or interchangeable with it.
6. Cf: 'Nothing is just per se, justice being a creation of custom and law' (Montaigne 1991, p. 1215).

7. It is worth noting here that in Kelsen's work this first norm ultimately takes the form of a *fiction*, asking us to proceed *as though* the law were irreducibly normative.
8. Kelsen's methodological dualism may be seen as a continuation of the work of his predecessors (such as Laband and Jellinek), which aimed at freeing legal science from the 'vice of methodological syncretism': the illegitimate combination of different methods of cognition. Kelsen nevertheless radicalised this trend by supporting an expansive version of methodological dualism, separating the worlds of normativity and facticity by an 'insuperable abyss', corresponding to two independent spheres that are epistemologically unbridgeable.
9. This distinct normative attitude 'consists in the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity' (Hart 1994, p. 255).
10. 'But the theory remains as a faithful account of conventional social rules which include, besides ordinary social customs (which may or may not be recognised as having legal force), certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts' (Hart 1994, p. 256).
11. As if, more importantly, any such inquiry into its conditions of possibility would inevitably grant the concept of normativity a metaphysical status it should not, and cannot have. His inscription within a philosophical context dominated by Austin – weary of abstract essences whose metaphysical status is supposedly independent of linguistic usage – comforted Hart in his reluctance to question what conditions law's normativity. Given his scepticism as to the possibility of preserving the objectivity of values without adhering to some form of moral realism (a metaphysical option he was committed to rejecting), Hart had every reason to keep looking downstream – as opposed to looking at the social practices lying 'upstream' in relation to law's normativity. For more developments see Delacroix (2010).
12. One could consider the hypothesis of a totalitarian legal regime whose propaganda is aimed precisely at rendering any kind of practical deliberation on the part of its subjects seemingly irrelevant or pointless. As long as this propaganda still has a point – i.e., as long as there are still some individuals out there who will assess law's demands as part of a broader picture including other requirements – one may still speak meaningfully of law's 'normative' dimension. As soon as the possibility of practical deliberation disappears, however, the normative dimension of law becomes illusory, an empty-sounding concept.
13. For an analysis of (legal) normativity based on a 'pragmatic' understanding of agency (rather than referring to the concept of humanity), see Stefano Bertea's *The Normative Claim of Law* (2009), which 'recasts in terms of human agency the concept of humanity that Kant posits as the foundation of normativity. Thus, we no longer have a metaphysical attempt to define the essence of humanity, but a pragmatic one to single out the conceptual features of human agency … reflectivity, rationality, and autonomy' (Bertea 2009, p. 176).

14. Our common humanity entails a certain responsibility towards fellow human beings: we are all summoned to acknowledge each other's dignity, whether we like it or not and whether we heed that summons or not.
15. The classic example here is that of the English doctor deciding to turn off her patient's life-support machine out of what she deems to be her moral duty to respect the dignity of her patient, even though she is aware that in doing so she is acting illegally. Far from robbing law of its normative force, one may consider every challenge to law's legitimacy as an opportunity to reshape the fabric of moral and social expectations conditioning and defining law's normative dimension.

References

Bertea, S. (2009). *The Normative Claim of Law* (Oxford: Hart Publishing).

Coleman, J. (2001). 'Incorporationism, Conventionality, and the Practical Difference Thesis', in J. Coleman (ed.). *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press), 99–147.

Delacroix, S. (2006). *Legal Norms and Normativity: An Essay in Genealogy* (Oxford: Hart Publishing).

Delacroix, S. (2010). 'Meta-Ethical Agnosticism in Legal Theory: Mapping a Way Out', *Jurisprudence*, 1(2), 225–40.

Hart, H. L. A. (1983). *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press).

Hart, H. L. A. (1994). *The Concept of Law*, 2nd edn (Oxford: Oxford University Press).

Kant, I. (1991 (1797)). *The Metaphysics of Morals*, trans. M.J. Gregor (Cambridge: Cambridge University Press).

Levinas, E. (1961). *Totalité et Infini: Essai sur l' Extériorité* (La Haye: M Nijhoff).

Marmor, A. (2001). *Positive Law and Objective Values* (Oxford: Oxford University Press).

McDowell, J. (1998). *Mind, Value, and Reality* (Cambridge Mass: Harvard University Press).

Montaigne, M. (1991). *The Complete Essays*, trans. M.A. Screech (London: Penguin).

7

Tolerance or Toleration? How to Deal with Religious Conflicts in Europe

Lorenzo Zucca

7.1 Introduction

Europe is once again beset by religious conflicts. There are several examples of unrestrained opposition against, and by, religious minorities and majorities alike. Think of the ban on minarets in Switzerland which is spreading like a wildfire in Germany, Italy and beyond. Think also of the veil saga that has occupied French politicians and their society in the last two decades. The target of opposition can be religious majorities as well; one example is the litigation on the crucifix in the classroom.[1] Needless to say, opposition calls for an equal reply, and so religious minorities and majorities respond with individual actions or campaigns against secular societies and their states. Religious conflicts are not new in Europe. Religious wars in the seventeenth century were the bloodiest and most violent confrontation on the Continent. The Treaty of Westphalia of 1648 put an end to them, and organised Europe in such a way that states could rule over religiously homogenous communities.[2] There were Catholic and Protestant states; religious pluralism within each state was limited as much as possible.

Religious conflicts in the seventeenth century were about belief, more precisely about the best Christian faith. Their starting point was theological disagreement.[3] Religious conflicts today are about political disagreement. They are conflicts about whether or not a faithful person can bring to bear her religion in the public sphere in order to regulate her own behaviour (in a classroom, in parliament, in courts, or in the streets). Religious pluralism has not been a characteristic trait of European nation states after Westphalia. In the Council of Europe, there are still many states with an established Church and fairly homogeneous societies.[4] This is markedly different from the United States

of America (USA), for example, where non-establishment is constitutionally protected and religious pluralism is at the foundation of the state.[5] But European societies are changing at a fast pace and are becoming increasingly more pluralist. This makes conflicts more, rather than less, visible.

Toleration emerged in the seventeenth century and was portrayed as the best response to religious conflicts. It was recognised as a key political virtue, which the state imposed as a legal obligation. A famous example of such a legal implementation is the so-called Act of Toleration 1689.[6] Liberal thinkers also promoted toleration. Locke, for example, argued that: 'the toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light'.[7] Locke regarded toleration as an imposition of reason and the lack thereof is explained in terms of being carried away by 'irregular passions'.

Both the Act of Toleration and Locke's 'Letter of Toleration' are examples of a moralising attitude of the political and intellectual elite towards the masses. Toleration is regarded as one chief virtue of morally enlightened people who are capable of regarding wrong beliefs as conditionally acceptable. Most liberal theories that promote toleration follow this path of imposition of reason from an ideal moral viewpoint. These theories are normative through and through and rely on heavy assumptions about the wrongness of some religious beliefs and the rightness of some liberal values. The question is whether toleration as a moralising attitude provides a good enough way of coping with conflicts that involve religion. The short answer is that toleration might have dealt with seventeenth-century conflicts, but does not seem to provide a sound basis to deal with present-day ones.

Recent historical accounts show that the master narrative of toleration as the virtue coming from the elite and spreading through the masses as a solution to religious conflicts is not so accurate as a narrative and not so promising in today's context. Those historical accounts show that tolerance was practised on the ground long before the elite's appeals to toleration. By this, I mean that as a biological, physiological and psychological matter every individual has a disposition to cope with a certain amount of diversity – tolerance of a non-moralising kind – that does not depend on sophisticated moral reasons.[8] The practice of tolerance does not depend on a prior decision to refrain from opposing some categories of beliefs or people.

I shall argue that non-moralising tolerance should be distinguished from moralising toleration and should be understood as the human disposition to cope with diversity in a changing environment. Tolerance thus defined is the basis for an alternative approach to deal with religious conflicts. Such an approach is less dependent on normative assumptions and more responsive to empirical data, including psychological insights as to the human ability to deal with difference. In what follows, I will first present toleration as a moralising attitude. Then I will show the limits of liberal theories based on such an understanding of toleration. I will suggest, instead, that we should pay more attention to tolerance understood as the natural disposition of every individual to cope with difference as the best basis for dealing with religious conflicts.

7.2 Toleration as a moralising attitude

I will start with one definition of religious toleration given by the Oxford English Dictionary (OED): 'Allowance (with or without limitations), by the ruling power, of the exercise of religion otherwise than in the form officially established or recognized'.[9] One of the striking elements of this definition is the suggestion that there is an established religion to start with. According to this definition, toleration implies an act of establishment of a religion. Albeit striking, this is not inconsistent with the present existence of an established Church of England and with many others de jure established churches in Europe, not to speak of de facto established Churches. The second, closely connected, element of the definition is that there is an asymmetry between the majority and the minorities. The religion of the majority is free by definition, while minority religions are permitted by political fiat. Here lies the third element of the definition: the allowance is given out by the ruling power; it is a top-down concession that can be revoked whenever the ruling power decides so. And the ruling power can decide as well (fourth element) whether or not to impose limits to the allowance graciously granted.

There may be disagreement about the scope of toleration, but there is agreement as to its point. Toleration carves out a space between right and wrong beliefs. It is the space of tolerable wrong beliefs. In the Act of Toleration 1689, Anglican beliefs are held to be the right ones. Protestant beliefs are tolerable wrong beliefs; Catholic beliefs are plainly wrong and therefore unacceptable. In many European states, including the United Kingdom (UK), this implied that one religious faith is

recognised as official truth and the other faiths as wrong. Toleration thus defined is an act of establishment of right beliefs, and as such it is deeply problematic. The wrongness of religious (or secular) beliefs is only postulated but not argued for. Any imposition flowing from such a postulate is likely to be regarded as irrational and unfair.

Toleration is a political *ideal* allegedly imposed by natural reason that requires people to put up with a certain amount of wrong beliefs.[10] However, not all wrong beliefs are tolerated; some are considered intolerably wrong. In this context, it is certainly better to be tolerated than not, but it does not mean that being tolerated should be regarded as a privilege.[11] The key of toleration is that the state singles out morally right beliefs which become official truth. Other beliefs, despite being officially wrong, can be tolerated either out of principled respect or out of prudential calculation.

Liberals of different stripes disagree about toleration. More generally, they disagree as to how to create and maintain a cohesive society given the fact of pluralism. Two main strategies appear to characterise liberal attitudes towards religion: one is instrumental and the other is principled. The instrumental approach starts from the inevitability of conflicts among religious people or between religious and secular people. It is rooted in seventeenth-century Europe and its experience with religious conflicts. The instrumental approach can take two forms. The first calls for peaceful coexistence for the sake of a more secure and conflict-free society and despite major disagreement on issues of belief. If someone does not comply, then the sovereign authority is entitled to punish someone for intolerance. We can call it the coexistence conception of toleration (Hobbes). The second relies on the fact that the state cannot coerce people to revise their beliefs and that is why one has to accept them, however grudgingly. We can call it the permission conception of toleration. I have already mentioned that both the Act of Toleration 1689 and Locke's 'Letter of Toleration' are paradigmatic examples of the permission conception of toleration, which involves a moralising attitude that divides beliefs and behaviours into right, wrong and tolerated.

An illustration of the coexistence conception of toleration is the so-called ideal of modus vivendi.[12] This ideal can be met when competing groups in a society are roughly equal otherwise instability between the two is likely. Modus vivendi theories start from the conviction that it is impossible to reach consensus about few selected values, since disagreement about basic values penetrates decisions at every level. Given the fact of persistent disagreement, the only possible moral attitude to

avoid violent conflict is to call for a duty of coexistence. People live in the same space, but pass each other like ships in the night. They are requested to disregard each other's behaviour in order to guarantee peace and security within a society. This approach relies on the possibility of devising common institutions that exercise power fairly while maintaining pluralism of values and beliefs. The problem with this moralising attitude is that it is bound to be very unstable: what happens, for example, when political elites themselves call for unrestrained opposition towards religious minorities in order to ride and spread negative feelings vis-à-vis Muslim immigrants? In these cases, political institutions find themselves in a dilemma: either they uphold their commitment to free expression as a paramount value of democracy, accepting that this is likely to foment more social conflicts and fear; or they curtail some forms of expression on the basis that they are not respectful of minorities, thereby opening the debate of the real value and limitations of free expression. European societies face the double threat of extreme right-wing parties banking on fears and extreme religious groups becoming more popular and emboldened in the face of adversity.[13] A mere moral attitude of coexistence can hardly bridge the gap between those two constituencies.

Principled approaches attempt to show that there are some moral reasons that require us to take into account religious beliefs in terms of respect or even esteem. According to some authors, the American tradition of religious liberty relies on a principled attitude of respect towards religion, though there is disagreement as to what respect really means.[14] In any case, it is possible to suggest that one major strand of the American tradition of religious liberty relies on *rational consensus* theories, which argue that it is possible to devise well-crafted procedures with a view to obtaining agreement on a selected number of values that will constitute constitutional bedrock for everyone.[15] This theory relies on the hope that there will be convergence on a few universal moral truths.

Rational consensus theories often promote the moral attitude of respect rather than toleration. In Europe, republican France promotes respect towards individuals independently from their religious beliefs. This can be deemed formal respect and contrasted with substantive respect that seems to characterise the American experience.[16] The République represents the union of all the people within the territory. There is no mediation between the individual and the République: the values of one must correspond to the values of the other. There is no space for intermediate communities to represent individuals. Given

this outlook, every citizen is regarded as strictly equal in a formal way. Here lies the difference with the American conception of respect which postulates that everyone enjoys equal citizenship and freedom *of* religion. In France, everyone enjoys equal citizenship and freedom *from* religion. In France one has to accept *legal laïcité* as the precondition for participation in public life.[17] The République does not recognise cultural differences within its own territory. In public institutions everyone is formally equal and must be seen to be formally equal. Hence, for example, no conspicuous religious symbols are allowed in public schools.[18]

In other parts of Europe, coexistence is still the preferred basis for the moral attitude of toleration and informs multicultural practices in the north of Europe. British and Dutch multiculturalism are partial illustrations of such theories. Society in the UK and Holland is constituted by plural communities that do not overlap and live separately in the same territory. Each community has a limited power to regulate some aspects of the life in common within that smaller unit. Each community regards itself as culturally independent, while recognising the moral and political need of toleration in order for everyone to keep his own lifestyle. Conflicts within communities are in principle settled internally, but they may be dealt with by ordinary institutions if the community is incapable of finding a compromise. This poses various problems, as the standard applied by ordinary institutions will invariably be different from the standards applied within a community. All these models appear to face serious problems in practice. French republicanism is not able to solve a major tension between its commitment to formal equality and the lack of substantive equality. Muslim pupils in French schools often come from underprivileged backgrounds. If you exclude them on the basis that they breach formal equality, you will reinstate their economically disadvantaged status, thereby creating a vicious circle. Accepting them under the conditions that they remove their religious symbols is not a solution as this simply reinforces their belief that they are not equal to other people.[19] The central problem with this position is that the moralising attitude of respect of all is paid at the very high price of giving up one's beliefs in the public sphere.

Dutch and UK multiculturalism appear to be too thin and presently very strained.[20] Religious minorities may enjoy greater freedom, but they do not enjoy the same access to opportunities provided by the society. Moreover, their voices are not sufficiently represented and are often misportrayed. To live in a community bruised and battered is a good recipe for creating antagonist feelings that can only grow when left unaddressed. The existence of separate-but-equal communities

pushes them far apart one from another and creates less than optimal conditions for future coexistence.[21] It may be that these examples do not represent the full gamut of constitutional frameworks that aspire to maintain a cohesive society. Nevertheless, the weakness of these major models is demonstrated by a general trend in Europe where the relationship between religious and non-religious people is strained. These approaches require varying moral attitudes towards religion: permission, coexistence, respect, or esteem. Instead of opting for one or the other option, I argue that it is necessary to change fundamentally the viewpoint from which the issue is considered. A fresh start involves a better understanding of the psychology of tolerance and promotes a different role for the state in promoting tolerant behaviour that is not informed by moral requirements.[22] Before moving to that point, let me illustrate with an example how different approaches of toleration fall short of coping with religious conflicts.

7.3 The limits of moralising attitudes: *Lautsi* as an illustration

A recent landmark case of the European Court of Human Rights (ECHR) can serve as an illustration of the limits of moralising attitudes towards religion. The case is *Lautsi* and it is already amply known and discussed and does not require a lengthy presentation. The basic issue concerns the presence of crucifixes in Italian school classrooms. Mrs Lautsi argued that the presence of the crucifix infringed her secular conviction, whereas the Italian state claims that the crucifix stands for the values of secularism. Put this way, the disagreement is between two forms of secularism, but in reality the question is whether religious symbols and traditions have a place within the secular public sphere.

So far we have distinguished two main moralising attitudes towards religion: toleration as a basis for modus vivendi, and toleration as a principled position that is sometimes reinterpreted as respect. Regarded from the viewpoint of respect, the issue is not simple: Does the moral attitude of respect help to tip the balance one way or the other? The plaintiff is pointing out that the right to education includes the respect of parents' religious and philosophical convictions. But, of course, the court must also respect the existence of social and cultural traditions. The issue of respect from a moralising perspective is problematic because it is highly individualistic and insists only on the respect of individual convictions. But the whole society has an interest in having their cultural and social

traditions respected as well. The reasoning of the court does not take this into account but simply leans towards an individualistic morality of rights: principled approaches regard rights as individual entitlements to use against the state. The problem is that there is something missing from the picture, which cannot be accounted in terms of rights: it is the power of any nation state to define its symbols of cultural and political allegiance. On 18 March 2011, the Grand Chamber of the ECtHR reversed the decision reached by the second section of the same court. Italy is now regarded as having a wide margin of appreciation as to the religious symbols that it decides to affix in public places, including in the classroom. Interestingly, the key notion in the Grand chamber's decision is respect towards parents' convictions understood in a thick sense. Indeed, the court holds that the 'word "respect" in Article 2 of Protocol No. 1 means more than "acknowledge" or "take into account"'.[23] After singling out a strong notion of respect, however, the Court goes on to undermine it on the basis that the notion of respect varies according to context and local circumstances. Given this caveat, each state benefits from a wide margin of appreciation of local practices. Paradoxically, respect becomes the basis for the freedom of the state to decide which symbols to back rather than a principle to use against the endorsement of any religion by the state.

From the viewpoint of instrumental toleration, the issue is slightly different and focuses on the role of the symbol itself. Is the display of such a symbol conducive to an environment where all the pupils can coexist without feeling emotionally disturbed by an exclusive environment? Instrumental approaches regard rights as side constraints on the power of the state, but also on the rights of other people. From this viewpoint, they are more inclined to accept that there may be conflicts between two rights in given circumstances. Interests protected by rights can reasonably clash one against another. It is easier to see that the state can have interests at odds with those of the individual claimant. However, instrumental approaches do not offer a viable alternative to the vacuum they create. They may be powerful arguments against displaying one given symbol, but does that mean that no symbol can promote coexistence? Instrumental approaches of the multiculturalist stripe end up promoting the existence of various institutions which promote their own values separately. This is the system of multi-faith schools that pays lip service to diversity but does not do much to promote convergence.

Both toleration and respect involve the evaluation of the costs of having a plural society. The justification of such solutions differs.

For principled approaches, equal citizenship means that each individual should divest herself of any social or cultural attachment other than the republican one when living in a public space. It is not pleasant, but this is the price to pay for having a plural society in which everyone has equal voice. Instrumental approaches stress the difference between people rather than one identity. Minority groups have different needs compared to the majority. They therefore have to be accommodated so that their rights protect their needs even if this waters down important values in some instances.

Neither approach, however, is capable of fully coping with the conflict between secular and religious people. Either solution entails more polarisation rather than less. The republican position leaves no room for diversity, while the multicultural position leaves no room for convergence. Both approaches over-rely on rights as encapsulating liberal values that can potentially be accommodated either through ranking or through definitional balancing. Neither approach captures the day-to-day practice of living together (as opposed to the moralising attitudes of coexistence or respect) which is a much more reliable basis for an approach that attempts to cope with the existence of religious conflicts.

7.4 A fresh start: Tolerance distinguished from toleration

English is the only European language to draw a distinction between tolerance and toleration. In German (*Toleranz*), French (*tolérance*), Italian (*tolleranza*) and Spanish (tolerancia) there is only one name for those concepts. Not that the distinction in English is clear and easily applicable. Tolerance and Toleration are used as synonyms in the literature; often one finds the two used interchangeably. But I do believe that it is possible to draw a distinction between toleration as a moralising attitude and tolerance as a natural disposition. The former is a normative concept, while the latter is descriptive. A similar distinction is drawn by historian Benjamin Kaplan: '[This book] begins from the crucial premise that tolerance was an issue not just for intellectuals and ruling elites, but for all people who lived in religiously mixed communities. For them tolerance had a very concrete, mundane dimension. It was not just a concept or policy but a form of behaviour'.[24]

Here, I propose a *stipulative* definition of tolerance distinguished from toleration. I am not suggesting that the distinction mirrors ordinary language closely, although it has a link to it. However, I argue that this distinction illuminates both theory and practice. It puts the latter in

a better light by showing how people behave when confronted with difference; it improves the former by pointing out what should be the role for the state and for individuals in light of the practice. As we saw, conventional understandings of toleration as a general approach start from a political ideal of a peaceful society and draw from that ideal some conclusions as to the appropriate moral attitude towards religion. The alternative approach based on tolerance as a disposition starts from the emotional reaction towards diversity in order to build up some correctives where the practice shows weaknesses.

Tolerance, as I see it, focuses on the *disposition* of an individual or a group of individuals to put up with an external agent of disturbance. This notion is much more biological and psychological and does not depend on prior moral judgement although it forms a more solid basis for further moral deliberation. To illustrate the notion of tolerance I have in mind I will take few examples from the OED: 'The action or practice of enduring or sustaining pain or hardship; the power or capacity of enduring; endurance. More widely in *Biol.*, the ability of any organism to withstand some particular environmental condition. *Biol.* The ability of an organism to *survive* or to flourish despite infection with a parasite or an otherwise pathogenic organism'.[25]

Tolerance is the *disposition* of putting up with external agents of disturbance; it involves a psychological attitude that strikes a middle ground between wholehearted acceptance and unrestrained opposition.[26] In a fairly stable society, most people lean towards that attitude; tolerance as a disposition carves out a space for every individual to flourish according to one's own beliefs alone and relatively unencumbered by the multifarious emotional inputs that derive from other people's beliefs and behaviours. If one did respond to each external stimulus, then the ability to flourish independently would be seriously hampered. Life would boil down to an emotional rollercoaster whereby our beliefs and behaviour were always defined in opposition to, or in emulation of, other people beliefs and behaviours. Needless to say, this already is the case in many circumstances but it cannot possibly be the norm of our life otherwise we would be unable to develop and flourish autonomously. Tolerance thus defined is not about drawing a priori moral lines and imposing them on issues of conflicting beliefs, but it is about the ability to cope with them in a way that does not divert individuals from flourishing. Of course, tolerance is a matter of degree. It can only work when someone or a society is in a condition of mental and physical stability, rather than being embroiled in unproductive conflicts. The healthier the individual or the society, the greater its ability to cope with external agents of disturbance and vice versa.

7.5 Tolerance as a non-moralising approach

My approach starts from tolerance-as-a-disposition rather than moralising toleration. It is different and can be distinguished from both principled and instrumental approaches that promote toleration as a moralising attitude. There are three main differences between a moralising and a non-moralising approach.

First, tolerance is not a principle to be imposed by legislation or a virtue to be preached by elites, but a human disposition that needs to be understood. Tolerance thus conceived depends on bodily rather than mental processes. Tolerance is not a behaviour that is *imposed* either by a moral or political doctrine, but it is a behaviour that *emerges* as a natural human response to difference. It is not the moral or political means through which religious conflicts are solved and dispelled, but the innate response to the fact that each one of us experiences conflicting emotions when faced with diversity. When a society is stable and healthy, there is little talk of the practice of tolerance. It is when things go wrong that intolerance is on everyone's lips.

Second, tolerance as a disposition can only flourish in an environment where freedom of thought is protected above everything else. No thought is to be considered as right or wrong from the outset, as it is the case from a moralising viewpoint. Every person, be they secular or religious, should be free to advance their own ideas and beliefs and argue for them. Disagreement between people can only help to sharpen thought and allow truth to emerge. This is only possible, though, if no assumption or presupposition is considered to be dogma. A healthy polity will devise ways to cope with disagreement, but will never find a way to solve an issue once and for all.

Third, a non-moralising approach insists that negative emotions towards diversity are the result of lack of appropriate thinking. How can one possibly hate something or someone just because he or she is different? Negative emotions are more likely in the case of a moralising approach that states a priori which beliefs are right and which are wrong. Wrong beliefs can sometimes be tolerated, but others are firmly opposed as a matter of stipulation. For example, polygamy is widely considered in our societies as morally wrong and unacceptable, but I would argue that it is not necessarily morally wrong and unacceptable. Why would it be unacceptable to have a relationship between several people when this is the result of open and rational deliberation? The only reason why polygamy is perceived as intolerably wrong is because the institution of marriage as defined by Christian norms does not accept any other form of union beyond monogamy.[27]

Now that the three main differences have been set out, it is possible to elaborate a more articulated approach to cope with conflicts between religious and secular people. The starting point is the acknowledgement of clashes within each one of us. We all oscillate between wholehearted acceptance and unrestrained opposition when we are first exposed to people whose behaviour and symbols markedly differ from ours. If each individual simply followed those emotions unreflectively, we would constantly go through a rollercoaster that left no time for flourishing. Tolerance as a disposition is a naturally devised disposition that helps us to mediate between strong emotional reactions. As a matter of practice, each one of us is prepared to put up with a great deal of behaviour that may appear to be inconsistent with societal values or individually held beliefs. This is explainable in terms of the drive to survive that characterises our self-development.[28] We would not be able to concentrate on our own flourishing if we were constantly pulled in one or another direction.

Of course there are paradigmatic cases of acceptance and opposition. One does not tolerate a beloved one; one simply loves him and as such fully and unconditionally accepts him.[29] Equally, one does not tolerate murder. The emotional reaction to murder is of unrestrained opposition and there is no space for tolerance of such an action. Most relationships and actions, however, do not fall at the extremes of the spectrum. They provoke mixed reactions which pull in different directions. Through a process of reflection about those reactions individuals come to regard most of them as part of their world without fully accepting or rejecting them. Here begins the practice of tolerance: human beings qua reflective beings are able to form ideas about those emotions and as a result of this reflective process they tend towards a balance between opposite reactions, without which their lives would be an endless and meaningless series of confrontations.[30]

Each individual projects their internal clashes onto the external world and brings them to bear on the life of their groups. His family, his community, his city and his country – as long as they strive to be one – also experience a number of clashes vis-à-vis other people or actions. The root of any conflict of values is the original clash within understood as an emotional response to someone or something that is not fully well known. A non-moralising approach based on tolerance rejects the idea that conflicts of values can be solved in a way that the clash within is removed from the individual altogether. Those clashes within that attest to an emotional reaction towards unknown people or things are inevitable. In fact, those clashes within are necessary for cognitive

process as they stimulate the will to know the external world. Only negative feelings, such as fear, can constitute a limit to the knowledge of the external world insofar as they push individuals towards a defensive approach rather than a cognitive one.

A non-moralising approach based on tolerance does not rely on prior judgements as to what can be the object of toleration and what should be firmly opposed. This would assume that one has already made up one's mind about rightness or wrongness, often without properly getting to know the object of intolerance. Clashes within are more complicated than that and have various layers. First of all, one responds to the broader issue of a known or unknown phenomenon. If it is known appropriately, then the clash within will not be very hard to deal with. It is when the phenomenon is unknown that things are complicated. Individuals and societies tend to simplify those matters by applying ready-made values to the unknown phenomenon and by filing it away in the right or wrong boxes. A non-moralising approach based on tolerance resists that categorisation and pushes for more knowledge before taking a judgement.

Human beings have worked out a great number of collective responses to clashes within. Religion, for example, is a given response to a peculiar clash within. We feel that we are eternal, when we reflect about our soul, and yet we know that we are mortal. Religion assuages this clash by claiming the separation between the life of the soul and the life of the body. By privileging the former over the latter, religion offers consolation to a split individual. The spiritual clash within addresses the damning problem of the meaning of life – what are we doing in this world? This explains why religion is still so fundamental in the life of the great majority of people all over the world. It is because it does give an answer and allows people to get on with their lives in the meantime. Individuals and groups care a great deal about the precise answer they have been given. They care because they believe it is true. And as a consequence, they must believe that any other answer is false. How is it possible to tolerate a false claim about something that is so important to people's lives?

The spiritual clash within – mediated through institutional religion – is sometimes projected onto the external world. It becomes a social conflict between individuals, groups and even nations. Europe as a whole was devastated by such a conflict in the seventeenth century. The political response to it was to carve out religiously homogeneous regions within which people would not be requested to tolerate other religious views. Toleration as a political virtue applied to relationships between

nation states following the Treaty of Westphalia (1648). Homogeneity, however, is itself unstable because the natural freedom of thought with which we are endowed pushes us in different directions (as was the case for Luther, Zwingli and Calvin for example). Moreover, homogeneity has never been truly met among the people. Historical accounts of life in Europe show that different religious communities had to live side by side and the important news is that they generally found ways to do so.[31]

Tolerance as defined here supports a non-moralising attitude towards diversity rather than one that divides the world in right and wrong beliefs a priori. But unfortunately, there are instances in which tolerance cedes its place to unrestrained opposition and this entails a spiral of social polarisation and ultimately violence. In these cases, I don't believe that it is helpful at all to preach the attitude of toleration as a political ideal that would solve those conflicts. The most important thing to begin with is to reflect about the causes that led to intolerance. Political and economic considerations are obviously important. These undermine self-confidence and hope. When fears enter the scene, it is almost impossible to avoid the consequence that our clash within between acceptance and opposition will be resolved in favour of the former.

7.6 Knowledge of fear

Tolerance as a disposition informs the relationship between individuals belonging to different groups in a society. The mechanism of tolerance, however, can be hampered by the existence of entrenched prejudices and fears flowing from misunderstandings about other people. A racist, for example, is not able to tolerate because his conception of the other will be clouded by a set of prejudices formed a priori. Mutual knowledge that dispels prejudices is, therefore, absolutely necessary to promote and encourage a flourishing practice of tolerance. Unfortunately, it is often the case that prejudices are associated with fears; these two together make the possibility of mutual knowledge very difficult.

Knowledge of fear allows every individual to form reflective ideas about emotions; the process of subconscious enquiry is a good instrument for keeping emotional reactions under control. The smooth working, and development, of tolerance as a disposition depends on – among other things – the knowledge of one's own fears. But, of course, this investigation is a matter of individual choice and cannot be imposed on anyone. Individuals who oscillate between competing

emotions without being able to find a middle ground are in a difficult position and can hardly flourish under these conditions. If each one of us were able to inspect our subconscious and dig out the root causes of fear, then we would oscillate much less perilously between opposing emotions towards diversity. Of course, on a grand societal scale, it is impossible to promote this; so each one of us has to put up with a certain number of entrenched emotions that cannot be explained away rationally. Institutions can nevertheless nurture and protect the natural disposition to tolerate in many other ways and in particular through education.

Fear is not only negative. It performs a very valuable role in the life of human beings. It alerts the mind to an impendent danger and calls for a cautious attitude towards an unknown object or person. Fear warrants against immediate reaction or engagement. It generally nudges the individual towards further examination as to the actual danger faced. It also promotes a cognitive attitude geared towards the knowledge of the external world. When you know the object or person that is feared, you are able to apprehend it in a way that is not dangerous anymore. Perhaps our fear will disappear altogether as knowledge will have shown that there is no danger intrinsic to the external object or person triggering fear. So not only does fear protect us from danger, but it may also stimulate our knowledge of the external world which is yet unexplained.

Sometimes, however, fear overwhelms us and temporarily clouds our reason. We are frozen into inaction and we refuse to know the object of our fears. This is the case, for example, with Muslim minorities in Europe. Many consider them as a threat to Europe and depict them as such in the media. The mass reaction to those minorities is dictated by such fears and entails unrestrained opposition to some or all aspects of the behaviour of the minority. Most of the time, this reaction is not supported by actual knowledge but is simply based on a stereotypical description of the target of hatred. Fear can become phobia when left uncontrolled by reflective attitudes. Phobia is a systematic fear of persons or objects that has become entrenched and cannot be removed by the usual cognitive process that leads our minds to apprehend the external world. It is quite plain to see that today in Europe there is a widespread Islamophobia; that is, a systematic fear towards religious minorities that pits them against the secular Western society. The general reaction towards those minorities is unrestrained opposition and there does not seem to be an easy way out of this deadlock.

How can we break the spell of Islamophobia? Some say by effectively protecting minority rights. I think this is not the correct response.

I believe that the state should instead promote mutual knowledge. We can take Sharia law as an example. The conventional reaction is one of unrestrained opposition. Think of the emotional reaction faced by the Archbishop of Canterbury when he defended the possibility of having Muslim Arbitration Tribunals applying Sharia law to private disputes.[32] He was then supported by the now President of the UK Supreme Court, Lord Phillips.[33] Both genuinely hoped that by engaging with Sharia law, part of the mystery and fear that surrounds it would be dispelled. And when fear lifts its hold and enables further knowledge, then we can finally learn that Sharia law is not that different from legal codes of behaviour that are closer to the Western world's. Some elements of Sharia law will remain incompatible with ordinary law; in particular physical punishments will be at odds with our practices. But those punishments are not the core of Sharia law; they are perfectly detachable elements of a general system of rules that can be regarded as compatible with ordinary laws.

This is not to say that we are under an obligation to wholeheartedly accept Sharia law. After examination, we may still conclude that we disagree with its fundamental tenets, and we consider it as not fully acceptable. But this is not a ground for unrestrained opposition either. This is a case where tolerance is emotionally possible once the cognitive prerequisites have been fulfilled. It is important to be clear at this point: in a secular state, it is possible to be tolerant to people who follow Sharia law to guide their behaviour in certain domains. It is also possible that a conflict between two religious people can be solved by an arbitrator they both accept. But it is not permissible to have rules of behaviour that are incompatible with ordinary laws.

7.7 Law and tolerance (*Lautsi* again)

The best way to illustrate the practical difference of my approach is to use the *Lautsi* case again. There are three main aspects to take into account from my perspective: First, the conflict should be regarded as an opportunity for knowledge. Is the crucifix in Italy a symbol of secularism as the state claims? The Italian government, for example, 'attributed to the crucifix a neutral and secular meaning with reference to Italian history and tradition, which were closely bound up with Christianity'.[34] One may object that the crucifix is neutral, but it is hard to dismiss the role played by Christianity in Italy in shaping the social and political space in many ways. It is of course possible to suggest that secularism developed in opposition to religious values, but it would be churlish to claim that secular and religious values are mutually exclusive since their

history is one of exchange and dialogue rather than competition and denial. The role of reason in promoting knowledge is, however, limited and it cannot be held that deeper knowledge of conflicting interests leads to a better solution in practice. This leads us to the second element of my approach.

The limits of knowledge through reason give rise to the necessity for imagination as a way of finding a new solution in future. Can we really deal with this issue by applying old standards? Is it possible to solve the conundrum posed by *Lautsi* simply by applying a conception of secularism that does not take into account social and cultural traditions of one country? The presence of a symbol can be the starting point of a creative debate. Pupils may be asked whether they want to complement that symbol or whether they want to remove it. In either case, they should be asked to provide an explanation. Those who take the crucifix for granted would have to review their position, while those who oppose it or have never even thought about it would be encouraged to think about it from a completely free viewpoint. The crucifix could be considered as a starting point for reflection rather than an endpoint. This might truly put the students in a position where they could empathise with other students. This leads to my third point.

Knowledge and imagination must be supported by an ability to put oneself in other people's shoes. This was arguably very difficult some years ago in Italy when the vast majority of the population was Catholic. In such a context, it was difficult to appreciate the viewpoint of a diverse position. Immigration and further secularisation today have created a more diverse environment in the classroom and in the society. It is therefore more important than ever to engage in an empathic process that leads people to know their mutual starting points so that negative emotions and passions can be ruled out from the outset.

To sum up, law can promote tolerance and a healthy environment by providing three essential services: it can and should stimulate mutual knowledge by providing genuine platforms of cultural exchange, starting with primary education where one can learn about religious differences. Second, it can and should stimulate freedom of thought through creative and imaginative channels rather than imposing a ready-made set of values. Third, it can and should encourage each and every individual to put themselves in someone else's shoes so that negative emotions towards diversity can be effectively reined in.

Solon claimed that each society deserves the laws that it can bear.[35] Let me explain why this makes sense: a society that is ridden by conflict and hysteria will only be able to bear laws that do not upset the

majority. As a consequence, the minority will be silenced and suppressed. Vice versa, a society that is strong and stable will bear much more easily internal conflicts without breaking into pieces. Those conflicts will be regarded as opportunities to engage in further knowledge. They will also push us all to reinterpret creatively our traditions so as to fit as many diverging views as possible.

7.8 Conclusions

Religious conflicts will not be solved or explained away once and for all. They will keep coming back and present difficult decisions for all the European states, as well as for European institutions. The master narrative of toleration is not capable of dispelling all the issues that arise between secular majorities and religious minorities. It may well be that toleration was the right answer to religious conflicts in the sixteenth century. In a world that was little secularised, the major issue was to create a space for both religious minorities and majorities. Toleration presented a reason against aggression of religious minorities that held wrong beliefs from the viewpoint of the majority.

But the price to pay for toleration was high: the entrenchment of official truth about right beliefs, and the subsequent creation of a trichotomy between right, wrong and tolerable beliefs that is not easy for the state to police without major inconsistencies. Such a trichotomy could only come with a moralising attitude between majorities and minorities, and with an isolation of minorities and a huge limitation on the dissent about majority values. Social homogeneity achieved stability at the price of freedom of thought on the fundamental issues of society. Europe remained homogeneous for a long time and enjoyed periods of stability followed by instability until it broke down completely at the outbreak of the Second World War. In the last fifty years, Europe has enjoyed great stability, but social homogeneity has been replaced by great social and religious pluralism. Religious pluralism poses great challenges for secular authorities.

Europe is today largely secular. Religious beliefs have been banned from the public sphere and cannot constitute a source of an official truth supported by the state. Instead, the state has embraced conceptions of power and truth that do not depend on religious beliefs. The separation of theology and philosophy put reason on a pedestal and religious beliefs were relegated to the private sphere. Power and truth have been secularised, but this does not mean that they now enjoy strong foundations. Secularism no doubt achieved much, but it can

itself fall prey to criticism. In particular, secularism can be established as the new official truth of the state and this is not necessarily desirable as it entrenches and imposes a rigid interpretation of what is right and what is wrong, whereby religion is classified as being on the wrong side if it aims to speak its voice in public.

A non-moralising approach requires from each individual that no official truth be taken as written in stone (including the truth of *laïcité*). It also requires the state to create the preconditions for mutual knowledge, which is the most important goal in order to nurture the natural disposition of individuals and groups to cope with difference. Such an approach is sceptical about conceptions of secularism that rule out altogether the possibility of a public role for religion. Not that religion should enjoy unlimited access to the public sphere or special protection as it speaks up. It nevertheless cannot be excluded from participation in political affairs as a matter of principle because it may capture some important messages that should be taken into account. Secularism should be regarded as a default framework, a worldview or worldviews, within which disagreement about the best political regime as well as about the best life are widely protected. Developing this conception of secularism will be the object of future work.

Notes

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1. *Case of Lautsi v Italy* (application no 30814/06), 3 November 2009. The Grand Chamber of the ECtHR has reversed the decision of the Chamber on 18 March 2011. *Lautsi v Italy,* (application no. 30814/06), 18 March 2011.
2. According to the principle devised in the Treaty of Westphalia: *Ejus Regio, Cujus Religio*.
3. See Ratzinger (2004). The Archbishop of Canterbury would also welcome more theology in public debates: see the conclusion to his lecture 'Archbishop's Lecture: Civil and Religious Laws in England: A Religious Perspective', available at: http://www.archbishopofcanterbury.org/1575, last accessed 4 October 2010.

4. Andorra, Armenia, Denmark, UK Church of England (since Toleration Act, 1689, ch.13) and Church of Scotland (CoS Act, 1921), Finland, Georgia, Greece, Iceland, Liechtenstein, Malta, Monaco, Norway.
5. See Martha Nussbaum (2008).
6. The subtitle reads: 'An Act for Exempting their Majestyes Protestant Subjects dissenting from the Church of England from the Penalties of certaine Lawes'.
7. See John Locke (2010).
8. See Kaplan (2007).
9. OED Online, definition 4a, available at: http://dictionary.oed.com/cgi/entry/50253991?single=1&query_type=word&queryword=toleration&first=1&max_to_show=10, accessed 30 September 2010.
10. Here an important caveat is 'a certain amount'. Not all wrong beliefs can be tolerated according to this version of toleration. There are beliefs that are considered to be intolerably wrong. The state differentiates between right beliefs, wrong beliefs and intolerably wrong beliefs.
11. A very promising criticism of toleration is offered by Leslie Green (2009).
12. See Gray (2000).
13. See, e.g., *Le Pen v. France* (application no. 18788/09).
14. See the exchange between Martha Nussbaum and Brian Leiter. See Martha Nussbaum (2008). Brian Leiter (2010) argues with that view. Both authors define toleration and respect as mutually exclusive. By taking this position, one narrows down toleration to a notion of coexistence at best. Here I suggest that there are at least four conceptions of toleration following from Rainer Forst, 'Toleration,' *Stanford Encyclopaedia of Philosophy*, available at: http://plato.stanford.edu/entries/toleration/ last accessed 29April 2011. Forst distinguishes between four types of toleration: permission, coexistence, respect and esteem.
15. See Rawls (1999). Even if it were possible to come up with such a list, it would still be unclear whether that agreement at the abstract level prevented disagreement at the level of implementation of those values.
16. See Nussbaum (2008). Nussbaum defends the idea of thick respect which requires a positive attitude of esteem towards religion: not only do we recognise each other as equal members of the community, but we regard each other's position as likely to bring something to all of us.
17. See Laborde (2007). See also Olivier Roy (2007).
18. See Laborde (2007).
19. See Laborde (2007).
20. See Buruma (2006).
21. Behavioural economics shows that radicalisation of individuals happens when they are segregated. Separate groups tend to think more radically rather than more moderately. See Cass Sunstein (2009).
22. Spinoza's *Tractatus Theologico-Politicus* provides a great inspiration for this endeavour. See Spinoza (2002b), in particular Chapter 20.
23. *Lautsi v Italy,* 18 March 2011 (application no. 30814/06).
24. See Kaplan (2007, p. 8).
25. OED Online, definitions 1 a, b, c, d, available at: http://dictionary.oed.com/cgi/entry/50253982?query_type=word&queryword=tolerance&first=1&

max_to_show=10&sort_type=alpha&result_place=1&search_id=SXRt-jMaiTJ-7777&hilite=50253982, accessed on 30 September 2010.

26. See Scanlon (2003, p. 201). Scanlon also calls it a middle way between wholehearted acceptance and unrestrained opposition.
27. Divorce may be said to have introduced diachronic polygamy: it is permitted to have more than one wife/husband provided there is only one at a time.
28. Spinoza calls it conatus: the striving for individual empowerment and development. See Spinoza (2002a, passim).
29. Even though it can be said that one tolerates some actions of a beloved one. Overall, when we love someone we accept him or her in toto, even if some of his or her actions may be wrong. In this case, we either tolerate or oppose those actions, but this does not necessarily constitute a ground for not loving that person (although it may be).
30. This is what biologists call homeostasis; that is, the natural tendency to regulate one's body so that it adapts to environing circumstances. See, e.g., Damasio (2003).
31. See Kaplan (2007).
32. Archbishop's Lecture: 'Civil and Religious Laws in England: A Religious Perspective,' available at: http://www.archbishopofcanterbury.org/1575, accessed on 4 October 2010.
33. Lord Phillips, Lord Chief Justice, 'Equality before the Law,' Speech at the East London Muslim Centre, available at: http://www.matribunal.com/downloads/LCJ_speech.pdf, accessed on 4 October 2010.
34. *Case of Lautsi v Italy* (application no 30814/06), 3 November 2009.
35. See Montesquieu (1995).

References

Buruma, I. (2006). *Murder in Amsterdam. The Death of Theo Van Gogh and the Limits of Tolerance* (London: Penguin Press).

Damasio, A. (2003). *Looking for Spinoza. Joy, Sorrow and the Feeling Brain* (Boston: Mariner Books).

Forst, R. (2007). 'Toleration', Stanford Encyclopaedia of Philosophy, available at http://plato.stanford.edu/entries/toleration/

Gray, J. (2000). *Two Faces of Liberalism* (London: Polity).

Green, L. (2009). 'On Being Tolerated', in Kramer et al., *The Legacy of HLA Hart* (Oxford: Oxford University Press), 277–98.

Kaplan, B. J. (2007). *Divided by Faith- Religious Conflict and the Practice of Toleration in Early Modern Europe* (Cambridge, Mass: Harvard University Press).

Laborde, C. (2007). *Critical Republicanism. The Hijab Controversy and Political Philosophy*, (Oxford: Oxford University Press).

Leiter, B. (2010) 'Foundations of Religious Liberty: Toleration or Respect?,' *San Diego Law Review*, 935–59.

Locke, J. (2010) *An Essay Concerning Toleration and Other Writings on Law and Politics, 1667–1683*, edited by J. R. Milton and P. Milton, (Oxford: Oxford University Press).

Montesquieu, C. Baron de (1995). *L'Esprit des Lois*, (Paris: Flammarion).

Nussbaum, M. (2008). *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books).
Rawls, J. (1999). *Political Liberalism,* (New York: Columbia University Press).
Ratzinger, J. (2004). *Truth and Tolerance. Christian Belief and World Religions* (San Francisco: Ignatius Press).
Roy, O. (2007). *Secularism Meets Islam*, (New York: Columbia University Press).
Scanlon, T. M. (2003). 'The Difficulty of Tolerance', in T. M. Scanlon, *The Difficulty of Tolerance* (Cambridge: Cambridge University Press).
Spinoza, B. (2002a). *Ethics* in Spinoza, *Complete Works* (Indianapolis/Cambridge: Hackett Publishing).
Spinoza, B. (2002b). *Tractatus Theologico-Politicus* in Spinoza, *Complete Works* (Indianapolis/Cambridge: Hackett Publishing).
Sunstein, C. (2009). *Going to Extremes*. *How like Minds Unite and Divide*, (New York: Oxford University Press).

Part IV
Institutions and the Social Life

8

The Social Epistemology of Public Institutions

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8.1 Introduction

This article is about how to understand the reasons public institutions give to justify their decisions. I seek to identify what must be true of public institutions as collective agents for them to be able to give something like 'their reasons' for making decisions which are binding for citizens. What must be the relationship between having reasons and giving reasons for a given decision for statements about institutions' practice of giving reasons to be true? The idea of what it is for an individual person to have a reason to believe, to do or to decide something is fundamental to epistemology, but also to moral philosophy and to all practical concerns, law in particular. In this article, I attempt to further our understanding of the idea of having a reason to make a decision in the law.

I am interested in the relation between three aspects of institutional reason giving, namely, the relation between: (1) there being a reason for deciding in a certain way; (2) the competent decisionmaker(s) having it as their reason; and (3) their giving it publicly as their justifying reason for the decision. In other words, I ask what the relationship is between something being a reason for a given decision, you having it as a reason for your decision and you giving it as your reason to justify your decision.

I am concerned with reasons in their justificatory or normative role, not in their motivating or explanatory role. In their normative role, reasons are considerations that justify. To justify something is, roughly, to show that it is just or good in the sense that it conforms to a norm of correctness. A justificatory reason for a decision is not just a consideration on which you decide in fact, but one on which you are

supposed to decide; it is not just a motive, but also rather a normative claim. Justificatory reasons are considerations in light of which an 'action would make sense to the agent', as David Velleman puts it.[1] For the sake of this present argument, what matters are not institutional decisionmakers' motives for reaching particular decisions, but rather the reasons that justify the way in which they have decided. The focus will be on the conditions under which one or several decisionmakers 'have' something as a normative or justifying reason for a decision, not on the biographical or historical circumstances that explain why they acted the way they did.

This line of enquiry is associated with recent developments in epistemology and ethics, which suggest that there are complex relationships between the reasons one has for one's beliefs or actions and the reasons one gives for one's beliefs or actions. What interests me is the extent to which these discussions apply to the very specific case of public institutions.

My suspicion is that what is true about individuals in a private context may not be true about collectives in a public or institutional context. I believe that the relationship between the normative reasons one has for a decision and the reasons one gives for that decision becomes more complicated as one moves from individual believers or actors to such specific collective entities as public institutions. Most public decisions – such as judicial decisions, administrative rulings, statutes, international resolutions and so on – are made by collective institutional bodies, composed of two or more members. The institutions studied in this article are collective entities of a very special kind. They are formal organisations by nature in that they are created and governed by rules. They include organisations that have a specific function to discharge, such as courts, hospitals or administrative agencies, as well as more episodic entities such as juries or temporary committees created within other public institutions. They are bodies that operate in the name of the state: they usually enjoy a certain coercive authority over the citizens.

As a matter of fact, we routinely ascribe reasons to institutions – e.g., when we talk of Congress's 'reason' for enacting a new immigration statute or of the Department of State's 'reason' for normalising relations with North Korea – but it is unclear whether they really 'have' reasons in any meaningful sense. What is it for a collectivity to form and have shared reasons for its decision? This article asks under what conditions public institutions may be said to 'have' reasons for their decisions.

In analytic epistemology, the dominant understanding of what it is for a person to have a reason for a belief is that it consists in being in some sort of state, be it cognitive, psychological, conceptual or else, which is prior to – and independent from – the activity of giving one's reason.[2] Adam Leite has called this view the 'spectatorial conception',[3] in the context of epistemic justification, because it separates the activity of justifying a belief from the state of being justified in holding that belief. On this traditional account, being justified is something one finds out rather than brings about. The spectatorial conception holds that considerations relevant to a subject's justificatory status as to his beliefs obtain independently of that subject's attempt to justify his beliefs, and are not affected by this attempt.

Likewise, applied to reasons, the spectatorial conception suggests that a subject is in the position of a spectator with respect to his own reasons. One must first 'see' that one has certain reasons for a given belief before being able to state those reasons.[4] According to a much more recent, rival conception, however, one's ability to give a reason for one's belief is a precondition for a subject to have a reason for her belief. In this view, a subject cannot be said to 'have' a reason for her decision unless she is able to give that reason.

Both the spectatorial conception and its contenders imply that there is a hierarchical order between two stages, that of having a reason and that of giving a reason. According to the spectatorial conception, having certain reasons for believing or acting is a more fundamental step than giving those reasons. The latter derives from the former. By contrast, for the rival conception, the ability to give reasons for one's beliefs or actions is more basic than the state of having such reasons.

My position is that either conception, taken alone, fails to account for situations in which we ascribe reasons to groups and, therefore, for public institutions' reason giving. I argue that the spectatorial conception correctly describes the individual, private situation, but not the collective, institutionalised one. In public decision-making contexts, neither having a reason nor giving a reason for a decision takes precedence over the other. If there are certainly cases in which the state of having reasons for a decision is prior to the giving of reasons for that decision, the converse is also true. In other instances, the ascription of reasons to a subject – be it individual or collective – may be dependent upon that subject's capacity to give his reasons for the decision. The most promising way to accommodate both individual reason giving and collective reason giving within a common theoretical framework is, I think, to allow for the hierarchical sequence to go both

ways: from having reasons to giving reasons and from giving reasons to having reasons. In short, I argue for a no-priority thesis, according to which either stage, whether it is having a reason or giving a reason for a decision, may be more fundamental than the other, depending on context.

The argument will proceed in the following way. I begin, in Section 8.2, by spelling out the dominant view according to which having reasons is prior, epistemically as well as metaphysically, to giving reasons. I then examine different versions of the converse thesis according to which having reasons for believing or acting is dependent on the activity of giving reasons. In Section 8.3, I consider the question from the angle of institutionalised collectives. Lastly, in Section 8.4, I elaborate and defend my proposal that the best approach consists in what I call a 'no-priority' view and argue that it exceeds its rivals in accounting for collective and institutional decision making.

8.2 The spectatorial conception and its challenger

8.2.1 The spectatorial conception

If you ask non-philosophers what they think the relationship is between having a reason and giving a reason for a belief or an action, they will most likely answer: 'Well, you first form reasons and then you give them because you cannot possibly give reasons you do not have'. We take it for granted that having reasons for believing or acting is the first step. We embrace reasons for performing *A* or for believing that *p*. Only later do we give those reasons to others or ourselves. Having reasons for holding a belief or performing an action is pictured as being in a pre-existing state of mind. There is an assumption of chronological as well as epistemological priority. People first have reasons, which are some sort of internal states guiding their reasoning. The fact that they later give their reasons – or not – has no bearing whatsoever on whether they have reasons or not. But what counts as 'having' a reason under these assumptions?

Current orthodoxy in epistemology takes the distinction between having a reason for belief and giving a reason for belief to mean that having reasons belongs to a first-order, more fundamental level.[5] On this view, the activity of giving reasons has no role to play in most accounts of the nature of what it is to have a reason for believing or doing something. Reason giving is analysed as an enterprise of a second order, both logically and chronologically. Giving reasons for a belief or an action is always conditioned upon the pre-existing stipulation of

having reasons for that belief or action. In short, the state of having reasons for believing or acting is thought of as a necessary and independent condition for the (derivative) practice of giving reasons. This is a metaphysical – not merely an epistemological – thesis. It is about what is needed for the truth of giving – and having – reasons statements rather than about what is needed for someone to justifiably believe something or to act justifiably.

8.2.2 Challenging spectatorial accounts

Adam Leite has recently challenged this type of account by developing a rival conception of the relationship between having and giving reasons for one's beliefs. He contends that giving reasons is the primitive concept. Having a reason to believe or to do something presupposes that one can (at least) describe that reason. Leite goes even further by defending a radical version of this view, according to which possessing reasons for beliefs is a state which is brought about by the very activity of giving reasons for these beliefs.[6] According to him, the criterion for correctly saying that I have a reason for believing or acting in a given way lies in my capacity to show that I have such a reason. My having a reason for a given belief or action consists in my having given it as a reason for that belief or action. The giving constitutes the having of the reason. To put it differently, the capacity to give reasons is the first-order, more basic element of the relation.

From this perspective, reasons are considerations you could offer, when challenged, in support of your action or of your belief. Suppose you think you have a reason to believe that *p* or to perform action *A*. I ask you what your reason is. If you are able to give a reason, then it means that you have a reason. It is unclear, however, whether having a reason implies that I have explicitly rehearsed the reason in question to others or to myself. Would it be sufficient that the reason be available to me if others challenged my beliefs or actions? In other words, to be said to have a reason, is it necessary that a person has explicitly rehearsed the justificatory argument in question to others or himself or is it enough that the inference be available to him if the belief/decision/action is called into question by others or by himself?[7]

The problem with the anti-spectatorial view is that the priority accorded to the giving of reasons over the having of reasons implies that before I could (actually or potentially) give my reasons I did not have (normative) reasons. When I give my reasons for acting or believing, I somehow acquire reasons that did not exist (for me) prior to my giving them. The trouble is that, leaving aside the case of intentionally

fabricated reasons for the purpose of deceiving one's interlocutors, I cannot think of a plausible example of a situation where I could bring into existence a (normative) reason I have simply by giving it. What sets these two situations apart is that according to the anti-spectatorial view, I would be capable, thanks to the reason-giving process, of creating reasons which I did not have before but which I now sincerely believe are my reasons. Quite the opposite, usually when we talk of 'invented' or 'made-up' reasons, we refer to considerations that the subject gives as her reasons while believing that she actually has other, different reasons.

I can understand the claim that by being required to present my reasons, I may come to the realisation that I have certain reasons, but only in the sense that these reasons were there all along, independently of my having to account for them. The requirement to give reasons in this case merely triggers the realisation that I have such and such reasons for my decision; it cannot create ex nihilo new reasons. The anti-spectatorial response is unsatisfactory, I believe, if it implies that one could somehow create (retrospectively so to say) reasons we have in the process of formulating one's reasons.

I will now discuss in more details the limits of both the spectatorial conception and its rival from the point of view of public institutions.

8.3 Can public institutions have reasons for their decisions?

Until now, I have paid little attention to the fact that most public decisions are the product of multi-member institutions rather than individual decisionmakers; for example, most judicial decisions (starting from the appellate level), administrative rulings, statutes enacted by legislatures, international resolutions ratified by assemblies, and so on, are produced by multi-member organisations.[8] Roughly speaking, both the spectatorial model and its challenger focus on individual believers in a non-institutional setting. In these two models, the issue at stake consists in determining what it means for an individual person to have reasons for holding a particular belief, not in considering whether a group could have shared reasons for its collective belief – supposing groups can have beliefs. Both approaches are individualistic in the sense that they take reasons as features of individual believers or reasoners.

Indeed it is an open question whether collective bodies are the kind of entities that can 'have' reasons for decisions in the first place. Collectives are curious epistemic subjects. They lack many of the attributes that are

considered important for individual human beings having and giving reasons for their decisions. For instance, they do not have their own faculties of perception or memory, at least not in the same sense as individuals have them. The question of whether we should attribute mental or mental-like states, including beliefs, to collectivities is an ongoing one in contemporary social epistemology.[9] We need not settle the issue of whether or not collectives are legitimate bearers of states such as that of having reasons for believing or acting, but we should at least ask ourselves whether the conditions under which an individual person 'has' a reason for acting or deciding in a certain way are identical to those under which collective entities have reasons for actions or decisions. This section purports to determine the extent to which either view, be it the spectatorial or its contender, applies to cases of collective institutional decision making. The argument proceeds by comparing private and public reason giving, while pointing out the specific features of collective decisions that set them apart from individual decisions.

8.3.1 Comparing individual and collective decision making

Collective decision-making problems occur every time a collective choice has to be made by several individuals who have conflicting interests or preferences. Social-choice theorists have traditionally described collective decisions as the combination of individual judgements on logically interconnected propositions or 'judgement aggregation'.[10]

An immediate objection to the idea of judgement aggregation is that it does not account for real-life institutional decision making. The notion of judgement aggregation presupposes that an institution's decision is a combination of individual decisions. Yet we routinely consider some decisions as 'the institution's decision', despite the fact that they are, in reality, decisions made by one person, habitually the nominal leader of the institution, without consultation with other group members. We call these decisions collective decisions, but they are really unilateral decisions.

At this point in the discussion, however, we need not concern ourselves with these failures of judgement aggregation. For the sake of the present argument, let us assume that collective decisions are really the result of combining the individual beliefs or judgements held by the group members into collective beliefs or judgements endorsed by the group as a whole. Supposing, then, that an institution has reached a decision through judgement aggregation, I want to ask a further question: how do group members aggregate their reasons for and against that decision?

Members may disagree on outcomes, but also on the reasons supporting those outcomes. Should these underlying reasons remain undecided? Or should reasons be also the object of a new collective decision? In the latter case, not only would the institution's decision result from judgement aggregation, but the institution's reason(s) would also need to result from another judgement aggregation. Literature in social choice and political theory has focused on the difficulties of determining a group's reasons.[11] It might be useful to revisit the issue using the distinction between having reasons and giving reasons.

There are many differences between individual and collective decision making. One such difference is that collective decisionmakers typically need to satisfy demands for collegiality and majority building, while individuals do not. Multi-member institutions, which are required to give reasons for their decisions, may find themselves in situations in which not all members agree on the reasons for or against a certain outcome, but are nevertheless duty-bound to reach an agreement. This is often the case, for example, in civil law jurisdictions in which judges must decide as a single unit, since separate opinions are usually prohibited.[12] In those jurisdictions, the general decision rule is one of unanimity and anonymity. Courts deliver single opinions, signed – or unsigned – for the entire court in which disagreements are obliterated and residual differences are concealed. That said, even in legal systems which permit dissents and concurrences, a majority of members must still reach an agreement on – at least – the outcome of the case. And even when judges concur on the outcome, they may still differ on multiple aspects of the resolution of the case, such as the appropriate mode of reasoning, the applicable legal rule, the state of the court's doctrine, the construction of the facts, and so on.[13]

In case of a persistent disagreement among members, the justification ultimately endorsed by the institution as a whole is likely to result from negotiations, compromises and trade-offs, rather than rational agreement. In other words, multi-member institutions may adopt a common set of reasons not because they aim at truth, but based on certain non-epistemic goals, such as pleasing their colleagues, advancing their careers, or simply wishing to end the discussion. The resulting 'common' reasons rarely reflect faithfully any individual member's actual reasons for or against the decision. Even where dissents and concurrences are allowed, the desire to avoid the excessive multiplication of separate justifications may act as a motive to set aside the requirement to give sincere reasons. In light of these differences between individual and collective decisions, which of the epistemological views discussed

thus far is the most appropriate to account for both individual and collective decision making, be it in a private or a public context?

My suspicion is that the spectatorial conception is more adequate to understand what it is for an individual person to have a reason, while the anti-spectatorial theory provides a better account of collective institutions' reason having. The thought that having a reason for a belief or an action enjoys a logical and chronological priority over the activity of spelling out those reasons is plausible as applied to individuals. However, this insight loses its appeal as we move to collective institutions, for traditional social ontology suggests that collective bodies are not entities capable of having reasons. This incapacity would result from the fact that such entities are not distinct from their individual members in the sense of being capable of existing in the absence of their members.

Supposing that this last point is true – which I will deny below – it looks as if collectives cannot have reasons independently of the individual members who comprise them. Part of the problem stems from the fact that the reasons an institution publicly discloses may come apart from the reasons its members hold individually. Various members may have very different (justificatory) reasons for deciding *D*. For example, an agency made up of several administrators may agree on a particular decision, but individual officers may have reached that decision for very different reasons.[14] This results from the fact that we are talking about distinct agents: the collective entity is one agent; each member is another agent. In other words, members of an institution that has officially given the reason *r* for deciding *D* need not themselves endorse the reason *r*. They do not even need to act as if they personally hold *r*. The collective activity of justifying is distinct from each member taking *r* or *not-r* as a reason for the decision, even though the former can affect the latter and vice versa.

In light of this possibility, the anti-spectatorial conception seems more appropriate than the spectatorial view in describing collective decision making. According to the anti-spectatorial conception, just as individuals should not be said to have a reason for believing something before they (actually or potentially) undertake to describe this reason to others or to themselves, so too members of a collective institution end up 'having' a certain set of reasons qua collective through the process of presenting their reasons to the public or, at the very least, to each other. This anti-spectatorial account has the advantage of capturing the intuition that many public institutions would rarely take the trouble to formally decide on their reasons for this or that decision unless they

were bound to give those reasons publicly. Instead, institutions would usually decide solely on the outcome, and would not propose justifications for that outcome. In short, according to this view, the so-called state of a multi-member institution 'having reasons' for a given decision is the consequence of the reason-giving requirement rather than a pre-existing mental state waiting to be reported.

There is something appealing in this analysis, but I am not convinced by the claim that collective entities are incapable of having reasons for their decisions as long as they do not collectively decide on those reasons and state them explicitly. This way of seeing things oversimplifies the problem by disregarding important collective agency issues raised by collective decision making. I have little positive to say about these complications, but in the next sections I hope to show that public institutions raise distinctive sets of problems for social ontology.

8.3.2 The fictional account of collective reasons

In what follows, I discuss the sense(s) in which institutions can be said to have reasons for their decisions from the point of view of social ontology. It may help to begin by examining a sceptical view, according to which collective entities are unable to have reasons in the same way as individual human beings can. Critics of the practice of ascribing reasons to collectives typically argue that these ascriptions are mere fictions.[15] When we say 'The Supreme Court has decided that the right to privacy protects abortion because the foetus does not become viable before twenty-four weeks', we do not mean that the Supreme Court literally has a reason, qua entity, for protecting abortion. Rather, we are speaking figuratively. According to this instrumental account, our ascriptions of reasons, though useful, are false. Collective decisions provide an example of decision making where there might be reason giving without reason having. The fact that the Court formulates reasons justifying the decision does not imply that as an entity it has these reasons in the same sense as individual human beings are said to have reasons for their decisions. This fictional understanding of reasons' ascriptions thus seems to support the anti-spectatorial conception according to which reason giving is more fundamental than reason having. Under the fictional account, which I criticise below, an institution's reasons cannot be 'its' reasons qua institution unless the institution's members have endorsed these reasons by explicitly giving them. Strictly speaking, collective decisionmakers 'have' no reasons unless they are constrained to give reasons by a procedure designed to this effect.

The debate on legislative intent provides a paradigmatic example. Legislatures are traditionally not required to give reasons to justify their decisions.[16] This explains why, when interpreting statutes, judges, administrators or other officials cannot refer to the legislature's (justificatory) 'reasons' for such and such provision since those reasons were never formally given. There is an ongoing debate among legal scholars about whether these reasons are somewhere to be found.[17] Surely, individual congressmen had some (motivating) reason(s) for voting for or against a particular statute. Yet is a given statute aimed merely at furthering the particular preferences (or judgements) of individual legislators, who happened to hold power at the time, aggregated in some way? Are the relevant (justificatory) reasons those the current legislature puts forward? It is very difficult, if not impossible, to ascertain what are 'Congress's (justificatory) reasons' as an entity. According to the fictional analysis taken in its strictest terms, Congress does not 'have' any (justificatory) reason because it never formally gave its justificatory reasons. It remains to be determined what is required to make it the case that congressmen have a (justificatory) reason as a collective entity.

On the fictional account, reasons that have not been the object of an explicit collective decision are not reasons that a collective entity may have. Each person composing the collective might have one or more reasons for the collective decision. In all likelihood, these reasons will vary among the members. The sum of the reasons held by members of a group does not constitute that group's reasons until the group has officially adopted them. Reasons themselves must be collectively decided. The having of reasons is dependent on the 'collectivization of reason', to use an expression introduced by Philip Pettit.[18] The existence of a specific procedure – be it voting, deliberation, consensus, the throwing of dice and so on – for determining the reasons that the group will give is a necessary condition for the institution to have reasons.

I find the fictional view counter-intuitive. To illustrate this, let me turn to the case of lay juries. Juries are generally prohibited from giving reasons to justify their determinations. They operate like a black box. Their modus operandi is entirely secret. Neither juries as a whole nor individual jurors disclose reasons for or against the verdict. There is no officially established means of knowing what a jury is thinking until it reaches its decision. Even after, in many jurisdictions, evidentiary rules prohibit jurors from testifying about anything that occurred in the jury room (with limited exceptions, such as extraneous influence), and local rules place restrictions on interviewing jurors post verdict about their deliberations. The verdict itself provides little information as it is

usually stated in no more than two words (at least in criminal cases): 'guilty' or 'not guilty'. This raises the question of whether juries can be said to have reasons for their decisions. According to the fictional view, they cannot. Secrecy prevents disclosure of how their decision is arrived at. We cannot say: 'the jury's reason for returning a guilty verdict is …' because the lack of any argument or mention of the facts found makes it impossible to know what has grounded the decision.

According to this view, then, juries do not have reasons for their decision. But this suggestion seems absurd, all the more so if it is generalised to all cases of decision making in which institutions do not give reasons, be it in virtue of an explicit prohibition or of an established practice. If correct, this proposition would imply that whenever institutions make decisions based on undisclosed grounds, they could not be properly ascribed reasons. Surely it cannot be the case that, other things being equal, the same institution has reasons for a decision in one case and lacks reasons in the other, just because in the latter case it is prohibited from stating its reasons. Is there a way to account for the fact a collective institution may sometimes have a certain set of reasons for its decision, despite the fact that it does not state them? In what follows, I discuss 'summative' theories of collective agencies, which offer such an account.

8.3.3 Summative accounts of collective reasons

The idea that institutions do not have reasons whenever they do not record their reasons is appealing in its all-or-nothing quality, but it is too strong. It confuses the metaphysical and the epistemic level. Epistemically, it might be true that groups do not have reasons unless they decide on their reasons and publicise them, simply because we cannot know for sure that they have a reason (and which one) unless they state it. But this would only show that we do not know their reasons, not that they do not have them. Metaphysically, a group may well have reasons without giving any. Consider an institution in which all members individually and independently have the same reason *r* for believing or doing something. By virtue of chance or by some sort of pre-established harmony they have the same exact reason though neither one influences the other. Imagine situations in which decision-makers are faced with such clear-cut fact patterns that each member forms the same judgement before even having had the opportunity to confer with his or her colleagues.

Suppose, for instance, that a panel of immigration officers were presented with the asylum petition of Burmese pro-democracy

activist Aung San Suu Kyi. The legitimacy of her claim would presumably appear so clearly that in all likelihood each officer would form the judgement that it should be granted.[19] In this kind of case, we would be warranted, I submit, to declare: 'The panel has a reason to grant the petition' notwithstanding the fact that members have not yet discussed their reasons with one another and that each is unaware of the fact that other members have the same reason as he does. The panel, as a collective entity, 'has' reasons for granting the petition despite not having given or recorded its reasons in any way.

There are at least two ways of understanding the claim that institutions have (justificatory) reasons for their decisions in spite of the fact that they do not give their reasons. According to a demanding interpretation, this can only occur when members of the collective are unanimous. In other words, a collective entity has reasons qua entity if and only if each of its members, taken individually, has the reason(s) ascribed to the entity. On a more lenient reading, a lesser standard than unanimity sometimes suffices for collectives to have reasons. This more liberal view accounts for the fact that we are often tempted to ascribe reasons to collectives when we suppose that *almost* all members individually have the same reason. Both readings, however, have been labelled 'summative' and criticised by Margaret Gilbert because they analyse group attitude ascriptions in terms of the sum of individual attitudes with the same content as that ascribed to the group.[20] On summative accounts, a collective entity has a reason only when group members are (almost) all of one mind:

> Group *G* has the reason *r* if and only if all or most of the members have the reason that *r*.

Suppose I happen to know that all members of *G* have the reason *r* because I have discussed with each person individually. I will certainly be tempted to claim '*G* has the reason *r*.' The group's reason is a sum of individual reasons: 'Member 1's reason is *r* + Member 2's reason is *r*, and so on.' But is this ascription correct considering that individuals are unaware of each other's reasons? Critics of the summative view like Gilbert argue that a genuinely collective reason cannot be reduced to a sum of independent reasons. Instead, it should have the form: 'we have reason *r*' or 'the group has reason *r*.' According to these critics, an epistemic constraint bears on groups. On Gilbert's proposed account, some form of epistemic cooperation is necessary for a group to have reasons. In the absence of an explicit agreement or at least some sort of

common knowledge or common belief concerning the reasons held by other group members, there cannot be truly shared reasons.

I find Gilbert's idea unconvincing in several respects. One problem is that this proposal does not account for everyday situations in which there does not seem to be anything amounting to epistemic cooperation among agents. Suppose you and I go for a walk together, so that it is not mere coincidence that we make the same turns, walk at the same pace, stop at the same groves to admire flowers, etc. In such a scenario, we act together, and nothing here depends, I think, on anything like epistemic cooperation.[21] Another difficulty with the idea of epistemic cooperation is that it does not specify who is the bearer of the group's reasons. The summative view has the merit of being clear on this issue: according to it, the bearers of the reasons are unambiguously the individual members of a collective entity. When the epistemic constraint of agreement or common knowledge is added, it becomes doubtful whether, to use an expression introduced by Gilbert, collective reasons are the reasons of the 'plural subject' or of the 'individual subjects'.

In truth, both solutions, the summative account as well as the epistemic cooperation approach, appear problematic. On the one hand, embracing ontological individualism, according to which collective reasons are reducible to a sum of discrete reasons, may lead one to overlook the fact that there is a meaningful difference between individual and collective reasons because on summative accounts collective reasons can be reduced to a sum of individual reasons. On the other hand, if one admits that collective reasons are not just a collection of individual reasons, one is led to accept the further proposition that collective reasons supervene in some way on the reasons possessed by group members. And one runs into the further problem of determining how reasons supervene. These questions raise very complex and controversial issues about collective intentionality that go far beyond the scope of this article. Something, however, can be said about institutions having reasons without attempting to settle the ontological connection between collective and individual reasons.

We should now recall the thought with which we began this section, namely, that distinguishing the metaphysical and the epistemic may be helpful to clarify the extent to which the spectatorial conception and its contender apply to public institutions. The fact that we lack epistemic access to an institution's reasons does not mean that the institution does not have reasons. The distinction highlights the existence of contexts where a collective entity may have reasons for a decision without having given or being able to give its reasons. That these reasons are

epistemically unavailable does not undermine their status as reasons. Suppose my reason for doing *A* or believing that *p* is the same as your reason even though I know nothing about yours and you know nothing about mine. We still share a reason. Your epistemic situation does not affect my reason and vice versa. It would certainly make sense to describe this case by the phrase: 'You and I have the reason *r*', but not by 'Our reason is *r*'. These are two different propositions. Claiming that two people each have a reason is not – even if they have the same reason – the same as saying that together, as a single collective agent, they have a reason.

To move from 'You and I have the reason *r*' to 'Our reason is *r*', something more must take place. The first proposition denotes the fact that you and I happen to have the same reason in the sense that we have not done anything specific to bring about this state of affairs. The second proposition implies that we have made it the case that we have the same reason by way of some conscious process. To move from the former to the latter, what is additionally needed may be some form of reason giving, but not only. There are other possible ways for group members to commit, *qua* group, to a certain set of reasons, such as voting, reaching a consensus, the flipping of a coin, and so on. Reason giving, taken on its own, enjoys no special superiority over other methods designed to produce collective reasons. However, in the context of public institutions, reason giving has acquired a privileged status in virtue of its epistemic consequences, as we will see in more detail below. But first, I will offer an account of reason giving that could apply equally in two contexts: that of individual persons justifying their actions or beliefs in a private capacity and that of institutions whose members must agree on a common set of reasons for the group's decisions to be delivered publicly.

8.4 The no-priority conception

8.4.1 Taking responsibility for one's reasons

For the rest of this chapter, I argue for a conception of the relationship between having reasons and giving reasons which departs both from the spectatorial and the anti-spectatorial approaches and aims at reconciling public and private justifications, individuals and groups. I will refer to this conception as the 'no-priority' thesis. Both the spectatorial conception and its rival, taken alone, fail to capture the complexity of our relationship to the reasons we have. The fundamental problem with the spectatorial conception is that it shields us from responsibility for

the reasons we have, while its rival claims too much control over them. The former holds that we simply find ourselves with certain reasons without being able to choose among them or to modify them, whereas the latter implies that the reasons we have are fully under our voluntary control. The fact that John has a given set of considerations as his (justificatory) reasons for acting is independent from John's judgement about or reactions to them.

The trouble with this view is that it precludes moral as well as epistemic criticism of our reasons. If I have no control over the reasons I have, I cannot be held responsible for them. This is an unacceptable consequence, both for individual and collective agents. At the individual level, it means that I could find myself having (justificatory) reasons without being able to criticise them or to change them. It would be pointless for others to try to convince me that I made a bad decision because I acted on the wrong reasons. At the collective level, this would entail that decisionmakers are not liable for criticism of their decisions and reasoning. Public officials could therefore impose decisions on citizens while depriving them of any means of contestation. This possibility would compromise the democratic character of the legal system.

In short, the spectatorial conception, by diminishing the possibility of criticism and evaluation, fails to recognise reasons' normative role. To make criticism possible, reasons must be attributable to the persons themselves. If reasons are merely things that 'happen' to them, in the sense that reasons are not the result of conscious responses, it becomes pointless to assess their soundness. We need a conception of what it is to have a reason that makes it possible for us to be accountable for our reasons. Reasons need to be under a sufficient degree of voluntary control to render such concepts as obligation and blame applicable to them.

On the contrary, the anti-spectatorial model considers reasons to be under our voluntary control in the sense of the word I have just criticised as too strong. The model assumes that reasons can be chosen, abandoned and modified at will. As a result, there is a risk that this conception also results in excessively minimising the normative role of reasons. The reasons one has for believing or acting, according to proponents of the anti-spectatorial conception, are determined through a person's explicit evaluation of his situation. This is the case, the argument goes, because we take on reasons in the course of a deliberative and justificatory activity. We have the capacity to effectively decide or choose what we are to take as our (justificatory) reasons for acting

or believing. This voluntarist approach certainly has the advantage of allowing for the criticism and the contestation of reasons. It is unclear, however, whether the anti-spectatorial model explains what it is to have voluntary control over our reasons, that is, how much control we have over our reasons. Does this model maintain that an individual can adopt at will whatever reason he chooses? This ambiguity raises questions similar to those that have been discussed in epistemology concerning the problem of the voluntarism of beliefs.[22] This line of enquiry can be illustrated by the following question: Can you at this very moment start to have as your (justifying) reason for applying to law school the fact that in our societies being an attorney puts you in useful position to fight against injustices just by deciding to do so? It seems dubious that we have such power. Yet, to be amenable to criticism, we need some form of voluntary control, be it indirect or long range, over at least some of our reasons.

There is yet another problem with the non-spectatorial analysis of the notion of control over one's reasons: it may lead to a problem of regress. If the reasons we have are under our voluntary control, then it means that there must be reasons for the reasons I have. I need reasons for choosing the considerations I decide to regard as my reasons. The reasons for the reasons I have are other reasons I have and so on, *ad infinitum*. Any reason whatsoever I have can be endlessly questioned and traced back to a further reason.

Given these difficulties, my position, once again, is to steer a middle course between the spectatorial and the anti-spectatorial theses. I propose that the reasons we have are to some extent – and to some extent only – our own doing. I agree with the spectatorial account that we often find ourselves with certain reasons, but I submit that in the course of deliberating and justifying our decisions, we are able to act on those reasons in the sense that we can commit ourselves to a subset of the reasons we have while rejecting others. In other words, I do not believe that people are able to acquire reasons voluntarily, ex nihilo, but I do think that they can choose among the reasons they have. If we might not be able to 'choose' the reasons we have in the strong sense of the verb choosing, we are still responsible for them. Reasons are things we can be 'held responsible for' in the sense that they can be accurately attributed to us and we can legitimately be asked to defend them. It is our responsibility to act on some reasons and not on others, to deem important some but not other reasons we have. It may well be true that in many circumstances of life we find ourselves with a certain set of reasons. However, among the reasons we have, we choose to

endorse some and reject others. In this (limited) sense, we do choose the reasons we have. Of course, most of the time, we just take our reasons for granted. We uncritically endorse the reasons we happen to have. This is why the spectatorial conception is a correct description of our ordinary way of reasoning. However, it does not account for cases in which we do stop and pause to assess our reasons. In those circumstances, having a reason consists in making up one's mind about the reasons one will take into account.

If this proposal is correct, people's reasons can be the subject of legitimate evaluation. When asked what are our (justificatory) reasons for performing certain actions or making certain decisions, we do not consult our own psychology as if it were a given set of data, independent of us. Instead, we consider what there is to be said in favour of the action or the decision in question, whether and why one should choose it. Initially, we might cite a certain reason as our justification for a given decision. We might later reconsider the question and commit to what we think is a better reason for the same decision. In short, we do not merely think of ourselves as reporting pre-existing reasons over which we have no power whatsoever, but rather as committing to particular reasons for acting or deciding in a certain way.

To sum up, the no-priority thesis I defend makes it possible to understand how people can be held responsible for their reasons. By the same token, as I will now argue, the no-priority thesis explains why legal systems have sought – and are increasingly seeking – to impose (and extend) reason-giving requirements upon public institutions.

8.4.2 Epistemological reasons for requiring reasons

My discussion of the spectatorial conception and its contender illustrates that there may be reciprocal relationships wherein the state of having reasons for a decision gives rise to that of giving those reasons and vice versa. This potential for two-sided influences is really what informs the legal reason-giving requirement. The legal duty to give reasons is best understood as a duty to give certain kinds of (good) reasons rather than the duty to sincerely report one's pre-existing and independent reasons. In other words, my claim is that the law is interested in the potential for influencing the reasons governmental agents have, rather than in merely learning what reasons they happen to have.

Indeed, it is unclear why legal systems would go to the trouble of imposing a reason-giving requirement on public institutions if reason giving were merely a second-order, derivative activity which consists at

best in faithfully reporting a decider's pre-existing reasons. Certainly, citizens are curious – and perhaps entitled – to know the reasons for which officials act. But there are other – and more direct – means of ensuring that citizens have effective access to these reasons. These other means include various publicity mechanisms, such as opening government meetings, legislative debates, judicial hearings, and other decision-making fora to the press and to the public; monitoring public budgets (e.g., by making financial statements available and auditable), or by promoting citizens' effective access to government information through freedom of information statutes and requests, and so forth. Taken alone, popular goals such as transparency or access to information do not explain why reason giving is accorded such a fundamental normative status in current liberal political theory.

Reason-giving requirements have become such a widely popular check on public institutions precisely because of the peculiar epistemic consequences they produce. Requiring institutions to give reasons is not only requiring them to investigate and to report the reasons they independently have. The duty to give reasons is enforced because it also acts as a constraint on the reasons they are allowed to take into account. In strictly defined roles like that of an administrator, a judge or a policeman, only a very restricted set of considerations is supposed to bear on what one decides, while other considerations are ruled out.[23] The reason-giving requirement serves as a method for monitoring the reasons decisionmakers choose to act on rather than as a mere disclosure strategy. In other words, the duty to give reason works as a selection device on reasons that were there all along independently of decisionmakers' giving them or not.

As an anthropological matter, when people know that they will be called to account for their action, they presumably tend to be more careful – they think twice before they reach a conclusion.[24] When decisionmakers are held accountable for their reasons, their propensity to succumb to psychological biases is altered, for the better or the worse.[25] The prospect of having to show one's justification has the epistemic effect of influencing the reasons one has and, hence, it is hoped, the decision one makes. I am not claiming that the duty to give reasons has the power of modifying public officials' reasons. It is not part of my argument to suggest that some reasons I did not have I now have as a result of the requirement, or the other way around. The duty does not purport to make a difference by way of creating new reasons. The reasons I end up acting on and stating publicly existed all along. Rather, because of the requirement to give reasons, I wind up acting on

some – but not on others – of the reasons I independently have for a decision. The requirement acts by drawing attention to a reason that is already there. In other words, I choose, among the (motivating) reasons I have, to act on some and not on others.

I suppose that the promotion of 'public reason', which has become ubiquitous in contemporary political discourse and liberal political theory, implicitly relies on this assumption that giving reasons to justify our decisions is a way of influencing reasons we have.[26] Political liberals argue, roughly, that the exercise of political power is legitimate only when it can be justified from every citizen's point of view. This is best achieved, it is thought, by imposing upon public institutions the duty to justify their decisions according to 'public reasons' that others can reasonably accept. As a matter of fact, most contemporary democratic societies have introduced in their legal system requirements to give reasons bearing on public officials such as administrators or judges.[27] We demand that decisionmakers give their reasons because we have, I suppose, relatively precise views about what reasons representatives of the state ought to have in a democracy. We do not want welfare benefits to be distributed on the ground of racial bias, or environmental regulations setting pollution quotas to be based on pseudo-science. We think that the legal duty to state reasons protects citizens against arbitrary decision making by virtue of its epistemic effect on reasons. Requiring that deciders give their reasons arguably results in more carefully thought-through decisions. Social workers who must substantiate their allocation decisions are more likely, we assume, to make unbiased determinations.

8.5 Conclusion

I began this article by asking what must be the relationship between having reasons and giving reasons for statements about institutions' practice of giving reasons to be true. I have answered this query by showing some of the ways in which contemporary epistemological theories can help us understand how public institutions reason. The lesson I draw is that giving reasons is never a purely descriptive activity in the sense that it would consist in merely reporting pre-existing states of minds. Following from this lesson, it becomes possible to understand how the legal requirement to give reasons can be an effective oversight mechanism designed to prevent arbitrary decision making and to increase the contestability of public decisions.

Notes

1. See Velleman (2000, p. 26).
2. This is a view defended by Bill Brewer, among others. See Brewer (2005, pp. 217–30).
3. See Leite (2004).
4. Recently, Jennifer Church has gone so far as to argue that just as we can have perceptual knowledge of a state of affairs, so too we can have perceptual knowledge of the reason for that state of affairs – we can 'see' reasons, as she puts it. See Church (2010).
5. Alston (1989), BonJour (1985), Brewer (1999), Kornblith (2002) and Pryor (2005) endorse this view, among others.
6. See Leite (2004). See also Schroeder (2008), who criticizes this way of thinking about having reasons, which he labels the 'factoring account'.
7. Similar difficulties emerge in the rule-following debate. To follow a rule, is it enough if upon being questioned by others, I would justify my action on the basis of the rule? Philip Pettit seems to think so. See Pettit (1990).
8. Collective public institutions can be roughly defined, for the purposes of the argument, as associations of more than one member which are entrusted with the task of making decisions based on rules affecting their co-citizens in terms of rights, allocation of resources and benefits, and so on. They are groups that exist as units and not simply as aggregations of individuals in virtue of the law.
9. This debate roughly opposes partisans and opponents of the so-called summative account of group beliefs. On the classical summative account, a group believes *p* if all – or at least most – of the group members believe *p*. See Quinton (1976, p. 17). Under non-summative accounts, it is sometimes possible for a group to have beliefs that are not the mere sum of the beliefs held by its members. See Gilbert (1989, pp. 257–60), who emphasises that there are situations in which a group does not believe *p* even though most of the members of the group believe *p*. Similarly, Tuomela (1995, pp. 314–16) argues that a group believes *p* if certain 'operative members' (that is, those members entrusted with the task of determining the views of the group) adopt *p* as the view of the group.
10. See Dryzek and List (2003) as well as Dietrich (2005).
11. The topic is often associated with the 'discursive dilemma'. See, e.g., Kornhauser and Sager (1993) as well as Pettit (2001a).
12. See, e.g., Stone Sweet (2000) and Merryman (2007, p. 122).
13. See Sunstein (1995).
14. A classical illustration of such disagreement on reasons can be found in the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).
15. For example, Anthony Quinton maintains that ascriptions of judgements, intentions, beliefs, desires and the like to social groups really comes down to ascribing them, in a summative way, to individual members of these groups. He stresses that 'these ways of speaking are plainly metaphorical. To ascribe mental predicates to a group is always an indirect way of ascribing such predicates to its members' (see Quinton 1976, p. 17).

16. For example, the rule in American constitutional law is that Congress is not required to 'articulate reasons for enacting a statute'. See, e.g., *U.S.R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).
17. The debate conventionally focuses on legislative intent, rather than reasons.
18. See Pettit (2001b).
19. Of course, I am making strong assumptions here. I am aware that certain immigration officers may very well consider that their country has no business in granting asylum to a Burmese dissident.
20. See Gilbert (1989).
21. Of course this depends on how one reads Gilbert's notion of joint commitment. Prior to the formation of joint commitment, Gilbert requires there to be expressions of 'readiness for joint commitment', which she points out 'may take various forms'. These do not have to be explicit, but unlike the cases I have in mind here, there is always an element that does seem to be doing some epistemic work in her examples, e.g., a conversation, a reference to 'us', etc. See Gilbert (2006, pp. 139–40).
22. For a critical discussion of the idea that we have control over our propositional attitudes, see Alston (1988). For a defence of doxastic voluntarism, see Feldman (2000).
23. The idea that public officials should act on certain reasons and not on others has become a commonplace in political theory and philosophy, particularly since John Rawls' discussion of the concept of 'public reason'. See Rawls (1993; 1999).
24. There is a vast psychological literature on the effect on accountability and, more specifically, on the psychological effects of oversight mechanisms. For a review of this literature and its application to the context of public institutions, in particular courts and administrative agencies, see Seidenfeld (2001).
25. See Lerner and Tetlock (1999, p. 256).
26. See Rawls (1993).
27. In France, courts have been subjected to the requirement to give reasons ever since the Revolution: the 16–24 August 1790 statute, Title V, Art. 15 provides that a judicial opinion must have four parts, the third of which must consist of 'the reasons that determined the judge' (*les motifs qui auront déterminé le juge*). Nearly two centuries later, the 11 July 1979 statute (partially) extended the duty to give reasons to administrative agencies. In common law countries, even though most scholars agree that there is no formal reason-giving requirement, they argue that there is often an informal requirement bearing on courts, manifested by the well-entrenched custom of writing opinions, except in cases regarded as routine by judges. There are also many local exceptions; for instance, in the US, the California Constitution (Art. 6, § 14) imposes a reasons requirement on judicial decisions. Administrative agencies are increasingly required to provide reasons: in the United States, the Administrative Procedures Act requires reasons for certain administrative decisions (5 U.S.C. § 553 (c) (1988)). In England, the Tribunal and Inquiries Act 1958 created an obligation to give reasons for tribunals (now s.10(1) Tribunal and Inquiries Act 1992). In the EU, Article 253 of the EC Treaty now states: 'Regulations, directives and decisions adopted jointly by the European

Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.'

References

Alston, W. P. (1988). 'The Deontological Conception of Epistemic Justification', *Philosophical Perspectives*, 2, 257–99.

Alston, W. P. (1989). *Epistemic Justification: Essays in the Theory of Knowledge* (Ithaca, NY: Cornell).

BonJour, L. (1985). *The Structure of Empirical Knowledge* (Cambridge, Mass.: Harvard University Press).

Brewer, B. (1999). *Perception and Reason* (Oxford: Clarendon Press).

Brewer, B. (2005). 'Does Perceptual Experience Have Conceptual Content?' in E. Sosa and M. Steup (eds). *Contemporary Debates in Epistemology* (Oxford: Blackwell), 217–30.

Church, J. (2010). 'Seeing Reasons', *Philosophy and Phenomenological Research*, 80, 638–70.

Dietrich, F. (2005). 'Judgment Aggregation: (Im)possibility Theorems', *Journal of Economic Theory*, 126, 286–98.

Dryzek, J. and C. List. (2003). 'Social Choice Theory and Deliberative Democracy: A Reconciliation', *British Journal of Political Science*, 33, 1–28.

Feldman, R. (2000). 'The Ethics of Belief', *Philosophy and Phenomenological Research*, 60, 667–95.

Gilbert, M. (1989). *On Social Facts* (London: Routledge).

Gilbert, M. (2006). *A Theory of Political Obligation* (Oxford: Oxford University Press).

Kornblith, H. (2002). *Knowledge and its Place in Nature* (New York: Oxford University Press).

Kornhauser, L. A. and L. G. Sager (1993). 'The One and the Many: Adjudication in Collegial Courts', *California Law Review*, 81, 1–51.

Leite, A. (2004). 'On Justifying and Being Justified', *Philosophical Issues*, 14, 219–53.

Lerner, J. S. and P. E. Tetlock (1999). 'Accounting for the Effects of Accountability', *Psychological Bulletin*, 125, 255–75.

Merryman, J. H. (2007). *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Palo Alto, CA: Stanford University Press).

Pettit, P. (1990). 'The Reality of Rule-Following', *Mind*, 99, 1–21.

Pettit, P. (2001a). 'Deliberative Democracy and the Discursive Dilemma', *Philosophical Issues*, 11, 268–99.

Pettit, P. (2001b). *A Theory of Freedom* (New York: Oxford University Press).

Pryor, J. (2005). 'There is Immediate Justification', in E. Sosa and M. Steup (eds). *Contemporary Debates in Epistemology* (Oxford: Blackwell), 181–202.

Quinton, A. (1976). 'Social Objects', *Proceedings of the Aristotelian Society*, 76, 1–27.

Rawls, J. (1993). 'The Idea of Public Reason', in *Political Liberalism* (New York: Columbia University Press), 212–54.

Rawls, J. (1999). 'The Idea of Public Reason Revisited', in S. Freeman (ed.). *Collected Papers* (Cambridge: Harvard University Press), 573–615.
Schroeder, M. (2008). 'Having Reasons', *Philosophical Studies*, 139, 57–71.
Seidenfeld, M. (2001). 'The Psychology of Accountability and Political Review of Agency Rules', *Duke Law Journal*, 5, 1059–95.
Stone Sweet, A. (2000). *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press).
Sunstein, C. R. (1995). 'Incompletely Theorized Agreements', *Harvard Law Review*, 108 1733–72.
Tuomela, R. (1995). *The Importance of Us* (Stanford: Stanford University Press).
Velleman, D. J. (2000). *The Possibility of Practical Reason* (Oxford: Clarendon Press).

9

Two Perspectives on the Requirements of a Practice

Stefan Sciaraffa

Whereas the non-positivist theory of legal content holds that evaluative considerations are fundamental determinants of a legal system's laws, the positivist theory of legal content holds that they are not and that social facts are the only fundamental determinants of a legal system's laws. Here, I offer a defence of a non-positivist theory of legal content that relies upon a Hartian theory of a legal system. As such, this theory of legal content brings to the fore and denies the tempting thesis that the Hartian theory of a legal system directly implies a positivist theory of legal content. In the first section below, I explicate the distinction between a theory of a legal system and a theory of legal content, and I explain why a Hartian theory of a legal system does not imply a positivist theory of legal content.

The present defence of non-positivism rests on an analogy to social roles. Because Hart's theory of a legal system depicts the secondary rules that determine a legal system's law as practices highly similar to the practices that constitute social roles, we can learn about the nature of the requirements of a legal system's secondary rules and, hence, about the nature of its laws, from arguments about the nature of the requirements of social roles. In Section 9.2, I argue that from a perspective that all participants in a rational social role should emulate, the requirements of the social role are fundamentally determined by evaluative considerations. This conclusion contrasts with the practice positive tenet that agents qua participants in a role must adopt the perspective of the role; from this perspective, the requirements of the role are those standards that the role's participants convergently accept. In Section 9.3, I argue that given the similarity between a legal system's secondary rules and social roles, the conclusion that I argue for with respect to the requirements of social roles also applies to the requirements of a legal

system's secondary rules. That is, from a perspective that all participants in a rational legal system's secondary rules should emulate, the requirements of a legal system's secondary rules are fundamentally determined by evaluative considerations and, hence, the laws that such secondary rules determine are also fundamentally determined by evaluative considerations.

9.1 Theories of legal systems and theories of legal content

Hartian legal theory comprises two parts that should not be conflated. The first is a theory of a legal system. The second is a positivist theory of legal content. In this section, I explicate this distinction in the hope of bringing to the fore the illicit thesis noted above that holds that the Hartian theory of a legal system directly implies a positivist theory of legal content.[1] As we shall see, the former does not imply the latter; rather, the positivist must introduce further argument to defend her theory of legal content.

9.1.1 Hart's theory of a legal system

The main building block of the Hartian theory of a legal system is the concept of a social rule. A social rule is a pattern of group conduct. Moreover, it is a pattern that the group's members follow from the internal point of view.[2] To participate in a pattern of conduct from the internal point of view is to treat the pattern as a standard of behaviour that oneself and others ought to follow. The hallmarks of this form of participation in a pattern of conduct are that: the members generally conform to the pattern; they criticise others for deviating from the pattern; and they take deviation from such pattern to be a ground that justifies such criticism.

According to the Hartian, a distinctive complex of social rules lies at the heart of a legal system. This complex entails three different kinds of social rules that a legal system's officials follow: a rule of recognition; a rule of change; and a rule of adjudication.[3] The rule of recognition is a convergent pattern among a legal system's officials of recognising certain kinds of norms as valid laws of the system; for example, norms enacted by the legislature or upheld by the system's courts. A legal system's rule of change is a convergent pattern of acceptance among a legal system's officials of certain procedures for changing the system's laws. A rule of adjudication is a convergent pattern among the legal system's officials of treating certain bodies – e.g., courts – as empowered to police and apply the laws of the system to decide cases. Hart refers to these

three kinds of rules as secondary rules. In sum, to say that a set of secondary rules exists within a legal system is to say that its legal officials take the internal point of view with respect to the following patterns of behaviour: (a) recognising particular kinds of norms as laws of the legal system; (b) treating certain bodies as having the power to modify the legal system's laws; and (c) treating certain bodies as having the power to apply the legal system's laws to decide cases.

The Hartian distinguishes between primary and secondary rules. The primary rules of a legal system are the laws regulated by the system's secondary rules, the rules of recognition, adjudication, and change. For the most part, primary rules are not secondary rules of recognition, change or adjudication. For example, typical primary rules include rules specifying crimes, torts, property relations, and various legal facilities, such as those for contract, marriage, wills, and so on. However, some secondary rules are also primary rules.[4] That is, some secondary rules might be recognised, changed or adjudicated in accordance with yet other rules of recognition, adjudication or change. In sum, the Hartian theory of a legal system holds that a legal system is a union of primary and secondary rules.[5]

9.1.2 The Hartian theory of legal content

A theory of a legal system should not be confused with a theory of legal content. A theory of a legal system tells us the existence conditions of a legal system. As we have seen, on the Hartian view, the core existence condition of a legal system is that there is a convergent practice (followed from the internal point of view) among the system's officials of treating certain kinds of norms as law, recognising certain procedures for changing such laws, and recognising certain bodies as having the authority to apply such laws to decide cases. By contrast, a theory of legal content is a theory of the determinants of the laws of a legal system. One such theory, held by Hart and all positivists, is the social facts thesis.

The social facts thesis holds that social facts are the ultimate determinants of law. The term 'determinants' in this thesis should be taken in a metaphysical sense: laws are composed of social facts, such as the commands of the sovereign or the norms promulgated by particular sources, or they are specified by some social fact, such as the law-specifying standards convergently accepted by the participants in a legal system's rule of recognition. An implication of the social facts thesis is that evaluative considerations, including moral considerations, do not play a fundamental role in determining what is and is not law in a legal system.

To explain what it would mean for an evaluative consideration to play a *fundamental* role in determining the law, it helps to begin with an account of how evaluative considerations might play a *non-fundamental* role in determining a legal system's laws. Imagine that the legal officials of a system converge from the internal point of view on a practice of subjecting norms to a moral test before recognising them as law. For example, they might follow a practice of recognising only sufficiently just enactments of the legislature as law. In such a case, the system's legal officials treat an evaluative consideration, the aforementioned moral test, as a criterion of legal validity.

According to inclusive legal positivism, an evaluative consideration convergently treated by a legal system's officials as a criterion of legal validity is thereby a criterion of legal validity for that system. As such, the inclusive legal positivist countenances the possibility that evaluative considerations may be determinants of the legal system's laws. However, on the inclusive legal positivist account, evaluative considerations only enjoy the status as determinants of law if endorsed as such by social practice. Thus, for inclusive legal positivists, evaluative considerations can only be non-fundamental determinants of law. By contrast, an evaluative consideration is a fundamental determinant of law if it is a criterion of legal validity irrespective of the practice of the relevant legal officials. For example, if minimal justice were a condition of a norm's legal validity irrespective of whether the legal system's officials convergently treated such a consideration as a determinant of law, then it would be a fundamental determinant of law.

A major fault-line within positivism separates exclusive legal (hard) positivists from inclusive legal (soft) positivists. Whereas the ecumenically minded soft positivist holds that evaluative considerations play a role in determining a system's laws so long as the relevant social practices endorse their so doing, the hard positivist holds that in no case do evaluative considerations play such a role.[6] Whether hard or soft, all contemporary positivists who follow Hart hold that the content of the legal system can be read off a social practice, the rule of recognition. On this view, only the members of the classes of norms that the officials converge in treating as laws (from the internal point of view) are the system's laws.

One might be tempted to think that the Hartian theory of a legal system implies a positivist theory of legal content: if a legal system is constituted by its officials' convergent practice of treating certain norms as the laws of the system, then the system's laws just are the norms convergently recognised as such. However, the foregoing consequent does

not follow directly from its antecedent. Even if we accept the Hartian theory of a legal system, the positivist must supply further arguments for the positivist theory of legal content. In this respect, the non-positivist is no differently positioned than the positivist. The non-positivist holds that evaluative considerations necessarily are determinants of the laws of a legal system. Like the positivist, the non-positivist who assumes the truth of the Hartian theory of a legal system must supply further arguments for a non-positivist theory of legal content – that is, a theory that holds that evaluative considerations play a fundamental role in determining the laws of a legal system. In the next two sections of this chapter, I hazard such further argument on behalf of the non-positivist. This argument proceeds by way of analogy to social roles. In Section 9.2, I argue that the requirements of social roles are fundamentally determined by evaluative considerations. In Section 9.3, I argue that given the similarity between social roles and Hartian secondary rules, the reasons for holding that the requirements of social roles are fundamentally determined by evaluative considerations are also reasons for holding that the requirements of the secondary rules of a legal system are fundamentally determined by evaluative considerations.

9.2 Theories of social roles and of the content of social roles

We are all familiar with a variety of social roles, such as mother, father, professor, club football coach, citizen, and so on. We are also familiar with the duties that largely constitute such roles. Mothers and fathers generally feel duty-bound to care for their children, club football coaches to coach, citizens to vote and follow the law, and professors to teach and research, and these feelings are generally mirrored by insistent social pressure that we be faithful to these duties.

We typically inhabit a number of roles – e.g., parent, husband, citizen and professor – and we typically spend the bulk of our days fulfilling their various demands. In light of the demandingness and pervasiveness of social roles, an important question queries the determinants of the duties that constitute them.[7] That is, with respect to social role S and duty D, what makes it the case that D is a duty of S? Below I consider two answers to this question: the natural role view and practice positivism. Practice positivism holds that the duties of any given role are matters of social fact. By contrast, the natural role view holds that evaluative considerations are fundamental determinants of the duties of a role. As I argue below, from a certain ideal perspective that

role-participants should and sometimes do assume, both social facts and evaluative considerations are fundamental determinants of the duties that constitute the relevant social role. As a necessary preface to this argument, I must sketch a theory of a social role.

9.2.1 A theory of social roles

A social role is a complex practice among a group that comprises two main features: convergent acceptance by the group's members of: (a) complexes of Hohfeldian incidents; and (b) application conditions.[8] Duties are one example of a Hohfeldian element. As we have seen above, a core constituent of a social role is a convergent practice of treating occupants of the role as if they were bound by a particular set of duties. Here, I need not specify what is meant by duty other than the general idea of a requirement to act in a certain way. Social roles are also constituted by claim-rights, liberties, powers and immunities. For example, a mother is treated as having not only the duty to care for her children; she is also treated as having a claim-right. That is, persons in society generally convergently accept and conform to the view that mothers have a right to care for their children corresponding to a duty binding on others that they not interfere with their doing so. Similarly, occupants of roles tend to be treated as if they have characteristic powers to alter other persons' Hohfeldian elements. For example, a parent is treated as if she has a power to alter the profile of her children's liberties and to authorise others – i.e. confer upon them certain rights – to care for her children. Application conditions are also a constitutive feature of roles. One of the existence conditions of a social role is that the relevant group convergently treats only those agents meeting certain application conditions as entitled and bound by the complement of Hohfeldian elements associated with a particular role. For instance, we only treat biological parents (who have not forfeited their parental rights) or adoptive parents as persons entitled and bound by the parental complex of Hohfeldian elements.

Note that the group practice of observing the Hohfeldian elements and application conditions that constitute a social role is a complex Hartian social rule. Recall that a social rule is a convergent pattern among the relevant group of treating certain kinds of actions as standards that must be followed and that justify criticism of failures to abide by the standard. For example, to treat a mother as having a claim-right to care for a child is to hold oneself and all other role-participants to a standard that must be followed; that is, a duty not to interfere with the mother's care of the child. Note further that role-occupants are not

the only persons whose attitudes and behaviour constitute the relevant role; rather, a social role is constituted by the attitudes and behaviour of role-occupants and persons who interact with the occupants. Let us refer to role-occupants and all role-constituting persons who interact with the role-occupants as role-participants.

9.2.2 A theory of the content of a role

With the sketch of a theory of a social role in place, we can now refine the question posed above and answer it. We are not only interested in what makes it the case that some duty D is a duty of role S, we are more broadly concerned with the determinants of a role's requirements. What are the determinants of a role's application conditions and Hohfeldian elements (i.e. duties, powers, claim-rights, liabilities and so on)?

The foregoing question is analogous to the question posed above with respect to the content of a legal system. Whereas much has been written about the relationship between evaluative considerations and the laws of a legal system, very little has been written with respect to the relationship between the requirements of social roles and evaluative considerations. The seeming lone exception is Arthur Applbaum's careful and compelling – but, in my view, ultimately mistaken – analysis of social roles and their requirements.[9] Applbaum describes two ways of thinking about the requirements of a role that parallel the debate between legal positivists and legal non-positivists. He refers to these two approaches as practice positivism and the natural role view. He rejects the latter in favour of the former.

As Applbaum puts it, practice positivism holds that 'the rules of practices, roles, and institutions do not have any necessary moral content – they simply are what they are, not what they morally ought to be'.[10] On Applbaum's view, the existence and content of no rule of a role depends on its meeting an evaluative standard; rather, the rules of a social role just are those standards that are as a matter of social practice convergently treated as its rules. Thus, the application conditions, duties, claim-rights, powers and liabilities that constitute any role just are those standards that are conventionally treated as such by the role's participants.

Applbaum's description of the natural role view is less clear than his account of practice positivism. On this view, 'the standard role obligations of [any role] follow from some truths about the kind of creatures we are'.[11] Here, Applbaum seems to be drawing a parallel to natural law theory.[12] On this view, the core case of a law is an authoritative norm that serves certain fundamental human goods. A norm that fails

to serve such goods is only law in a degenerate sense. For my purposes here, I describe the opposing view to practice positivism more broadly than Applbaum does. Like the natural role view, practice non-positivism holds that evaluative considerations are necessary determinants of the rules of a role but, unlike Applbaum's natural role view, practice non-positivism is silent about the nature of such evaluative considerations.

As a practice positivist, Applbaum provides an account of the relationship between evaluative considerations and roles that is compelling in its tidiness. The rules of a role just are those rules that are treated as such. The duties of a doctor, mother, lawyer, and so on, just are those standards that we convergently hold to be binding on those who occupy these respective roles. On this account, a separate question queries whether role-participants are normatively bound to comply with the rules of the role. Applbaum enumerates two means by which a role's participants may become so bound.

First, participants may become bound to the requirements of a role via a kind of special transaction. When the role occupant engages in some sort of duty-imposing transaction with others, such as a promise that she will abide by her role or by raising justified expectations in others that she will, she becomes bound to the duties of her role. One interesting shortcoming of this normative ground of a role's requirements is that though it explains the occupants' normative bond to her duties, it does not account very well for the normative force of many of the other Hohfeldian elements that constitute a role, such as the claim-right the role-occupant holds against others and their corresponding duties. Perhaps, these other role-participants must similarly be engaged in some sort of binding special transaction.

For Applbaum, a second way that participants may become normatively bound to their role has to do with the notion of a reasonable role construction.[13] On Applbaum's view, sometimes the various Hohfeldian elements and application conditions that make up the role admit of justification on the basis of the underlying values of such practices. In his terms, sometimes, the requirements of a role admit of a reasonable construction. For example, we might think the underlying values of the role of mother include a form of relationship between the child and a unique care-giver and the well-being of the child. These underlying valuable points are realised by a role that charges certain persons with the claim-right against others and the duty that she care for a particular child. By virtue of these underlying valuable points, the conventional duties of this and other Hohfeldian elements of the 'mother' role are normatively binding on those to whom they apply. Note, however,

that for Applbaum, there is only a fortuitous connection between the Hohfeldian elements of the 'mother' role and their normative bindingness. If a role happens to have a set of underlying valuable points, then its constitutive application conditions and Hohfeldian elements are normatively binding. Many other roles, say that of eighteenth- century executioner[14] or court torturer, are morally egregious roles that have no underlying valuable points that justify their constitutive duties and other Hohfeldian elements.

Though the foregoing account of the duties and other Hohfeldian elements of a role is compellingly clear, I outline a non-positivist position below that I argue is more plausible than Applbaum's view. The non-positivist approach puts front and centre the underlying values of a role that Applbaum discusses. Contra Applbaum, the non-positivist holds that the underlying values of a role are not external grounds of the role's normative force, but rather that such values are fundamental determinants of the role's application conditions and Hohfeldian elements.

Allow me to illustrate the distinction between the positivist and non-positivist approaches to the requirements of social roles by way of an example. Consider the question currently live in the United States of whether a homosexual couple can marry. For the moment, let us abstract away from the fora, courts and legislatures, in which this issue is playing out. We will reintroduce this complexity below when our discussion moves to the nature of legal systems. For now, imagine a society in which the role of a married partner is fully determined by primary rules in the society without the aid of authoritative bodies such as courts and legislatures. Thus, imagine that the social role of a married partner is determined by, as Hart would put it, a primitive system of primary social rules. Imagine, further, a practice in which certain persons, married persons, are treated as having certain duties and rights by virtue of meeting a certain description. For example, by virtue of announcing vows of marriage in public in the customary manner, persons are treated as having certain duties to their partner, such as duties of fidelity and mutual support, and certain rights good against those outside the marriage, such as rights of inheritance and status as next of kin entitled to make medical and financial decisions for the partner when he is incapacitated.

The question about whether homosexual couples can marry is a question about the application conditions of the role of a married person. The practice positivist holds that the way to answer this question is to look to the practice. As a matter of fact, do the members of the relevant

society convergently treat such persons as married? If they do, the matter is settled; homosexuals who meet the application conditions of marriage are accordingly empowered and duty-bound. If they convergently and affirmatively reject such a possibility, then the matter is also settled. A homosexual couple does not meet the application conditions of marriage, and hence, are not so entitled and bound by the trappings of marriage even if they meet all the other application conditions of marriage. If the members of the society simply have not noticed or spoken to the possibility of homosexual marriage, or if they have noticed but disagree about this possibility, then it is simply indeterminate whether homosexuals can become entitled and bound in accordance with the rules of marriage. In this latter case, any determination that married partners may or may not be homosexual constitutes a development or modification of the existing role's content.

Practice non-positivism takes a different approach to determining the application conditions and Hohfeldian elements of a social role. This approach involves three main steps: first, it is necessary to specify the standards that the relevant role-participants, as a matter of convergent social practice, treat as the application conditions and Hohfeldian elements of a role; second, it requires determining the underlying valuable points of this convergent practice; and third, the specific Hohfeldian elements and application conditions of the role are determined by the role's underlying values; that is, the features of the role that make pursuing and supporting it normatively compelling.

Note that for the practice non-positivist, social facts do play a role in determining its content. To find the valuable points underlying the role, one must find a cluster of values that bears a threshold measure of fit to the Hohfeldian complex and application conditions that are commonly recognised as characteristic of the role. However, the fit need not be perfect. All that is necessary is a loose reflective equilibrium between the underlying values and the widely accepted complex of application conditions and Hohfeldian elements of the relevant role. The ascribed set of values must justify the pursuit of enough of the various practised application conditions and Hohfeldian elements constitutive of the role. A set of values that does not meet this threshold of fit may be worth following, but then to follow them is not to follow the requirements of the role; it is to modify the role or to introduce a new one.[15]

Note further that with respect to many roles, there are likely many sets of values that meet this requisite threshold of fit. The underlying values of a role are those that make up the most normatively

compelling complex of values that meets the threshold of fit with the practised role.[16]

On the non-positivist view, the underlying values of the role dictate the application conditions and the Hohfeldian elements that the role's participants must observe. Moreover, on this view, insofar as these dictates meet the requisite threshold of fit with the role's practised Hohfeldian elements and application conditions, they are the requirements of the role. Note that, so understood, a role's requirements may deviate from or be more determinate than the practised convergent understanding of such requirements.

Let us return to the example of homosexual marriage to complete our initial explication of practice non-positivism. Someone might hold that the underlying values of marriage include a kind of special relationship that produces a psychological safe harbour for the marriage partners. From this perspective, the underlying valuable points of the role require persons not to treat difference in sex as an application condition of the role of married partner. By contrast, an opposing account of the role's underlying values holds that a valuable point of the role is a unique form of relationship that is only possible between a man and a woman. On this view, difference in sex would be an application condition of the role. Presumably, both the culturally conservative and progressive accounts of the underlying value of the role of married partner meet the threshold of fit with the role as practised. On the non-positivist view, the progressive and conservative make conflicting claims about the role's application conditions. How, then, do we determine who is correct on this score? The answer is that the application conditions (and requirements) of the role are those that flow from the most normatively compelling account of the underlying values of the role.

9.2.3 The core argument for practice non-positivism

We now have in view two distinct understandings of a role's requirements. The practice positivist holds that the application conditions and Hohfeldian elements of a role are those standards that the role's participants treat as such. By contrast, the practice non-positivist holds that a role's application conditions and Hohfeldian are those standards that are justified by the role's underlying complex of values. In what follows, I provide an argument for adopting the non-positivist understanding. This argument begins with Hart's discussion of the myriad motives that participants in a social rule might have for taking the internal point of view with respect to the standards that constitute the rule.

> [T]heir allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.
>
> (Hart 1994, p. 203)

Though Hart here is discussing a particular kind of social rule – a legal system's social rule – this point applies to social rules generally. Hart's point is that the participants in any social rule, including the complex social rules that social roles comprise, may take the internal point of view with respect to the rule out of a number of motives, including prudential self-concern, moral other-concern, traditional-mindedness, and the need to fit in.

It is important to note that the object of these variously motivated participants' allegiance need not be identical. Recall that on the Hartian account, a social rule exists insofar as the rule's participants convergently accept and follow from the internal point of view a set of standards that constitute the rule. This formulation does not imply or require that each member of the relevant group take the internal point of view with respect to the very same standards. This is one way that things might work with respect to some social rules, but it need not work this way with respect to all social rules. Another possibility is that the various participants in a social rule adhere to standards that vary somewhat from one another, yet there is sufficient convergence among these standards to constitute a more or less unified social rule. In this latter case, we must understand the group's allegiance to a social rule as an aggregate of individual allegiances to a set of slightly varying standards that overlap sufficiently to constitute a more or less unified social rule. In sum, we can distinguish between a strictly convergent rule and a more unruly sufficiently convergent social rule.

Two points suggest that many social rules are the unruly rather than the strictly convergent sort. First, in a social rule of any significant complexity spanning a large number of people, such as a social role, it seems highly unlikely that its participants will strictly converge with respect to the rule-defining standards that they accept. Second, if we accept the plausible claim that an agent's motive for accepting some set of standards shapes the content of the standards she accepts, then Hart's account of a social rule accepted for a variety of motives suggests an unruly sufficiently convergent rule rather than the strictly convergent rule. Hart's prudentially minded role-participant might accept one set of standards that best serves his self-interest, the traditionally minded

participant will accept a slightly different set of standards that he takes to be the traditionally accepted, the other-interested might accept yet another slightly different set of standards that best serves moral ends, and the participant who wants to fit in will accept that set of standards that quietly meshes with the standards his fellows accept.

At the heart of the present argument for practice non-positivism is a modified version of Hart's moral role-participant described above. Rather than limiting the basis of this kind of participant's allegiance to moral considerations, we should broaden our understanding of this participant's motivating considerations to include evaluative considerations more generally. This agent is the rational role-participant described above; she accepts those standards that she takes to be justified by the underlying values of her role, which may include moral considerations.

Note that the rational role-participant's allegiance is not to application conditions and Hohfeldian elements of the role under the description 'the convergently practised application conditions and Hohfeldian elements of the role'. Rather, she maintains allegiance to the application conditions and Hohfeldian elements that are justified by the role's underlying valuable points. Thus, the rational role-participants follow the standards that are justified by the underlying value of the role, and they hold all other participants in the role to these standards. So understood, the standards that command the rational role-participant's allegiance may deviate from the standards that the role-participants convergently follow, for the underlying values of a role may very well justify standards that deviate somewhat from the convergently accepted standard, they may justify standards accepted by some yet rejected by other role-participants, or they must justify standards that are neither rejected nor affirmatively accepted by the role's participants.

A second step in the argument for practice non-positivism holds that the requirements of a role must be understood perspectivally. They are the requirements that, from some perspective, the participants in the role must, qua participants in the role, follow. The practice positivist holds that the proper perspective is not the perspective of a particular individual within the role; rather, the practice positivist holds that the proper perspective is the point of view of the role. From this point of view, the standards that the participants in the role must follow qua participants in the role are the standards that are convergently accepted by the role's participants.[17] By contrast, from the perspective of the rational role-participants, the requirements of a role are those standards that are justified by the role's underlying values, for, as we have just seen, the

rational role-participant holds that that she, as a participant in the role, and all other role-participants ought to follow such standards.

A third step of the argument for practice non-positivism asserts that all participants in rational roles should adopt the perspective of the rational role-participant. The rationale behind this assertion is simple. It is better to participate in a practice such as a social role insofar as so doing can be justified by the underlying values of the practised role than it is to participate in the practised social role solely on the basis of other motivations, such as a need to do as others do, traditional-mindedness or prudential self-concern. That is, it is better to adhere and apply standards out of appreciation of their justification than to adhere to them out of brute traditional-mindedness, a need to fit in or the pursuit of prudential self-concern. Moreover, for the same reason, it is better to assume the perspective of the rational role-participant than the perspective of the role – that is, the perspective from which the requirements of the role just are the standards that the role's participants convergently accept. Another way of putting this latter assertion is as a standing challenge to the proponent of practice positivism: explain why a role-participant ought to hold that she and her fellow role-participants qua participants in the role are bound by the standards convergently accepted by the role's participants rather than the standards that are justified by the underlying values of the role.

Note one major limiting condition of the foregoing argument. The rational role-participant is an ideal worthy of emulation only insofar as a valuable underlying set of points fits the relevant social role in the sense that the valuable points justify enough of the role's complex of application conditions and Hohfeldian elements for it to count as the underlying value of the role rather than some alternative role or activity. In other words, the role must be sufficiently rational. We can distinguish between a Hegelian and a Marxist possibility. The Marxist holds that no extant social role has underlying valuable points that fit the role. On this view, the ideal agent must be a revisionist or subversive of such extant roles, for there are no values that justify and sufficiently fit any of them (though many mistakenly believe that there are). By contrast, the Hegelian holds that with respect to the major social roles in society, there are underlying values that fit and justify them. Insofar as the Hegelian is right, role-participants have reason to understand the requirements of their roles in terms of their underlying values. Insofar as the Marxist is right, role-participants have reason to abandon their allegiance to their roles.

9.3 Lessons for legal theory

I submit that the foregoing argument with respect to the nature of the requirements of social roles applies in the context of a legal system. Recall the Hartian idea that a central constituent of a legal system is the system of secondary rules that fix the system's laws. Recall further that these secondary rules comprise rules of recognition, rules of adjudication and rules of change. These rules are constituted by the attitudes and behaviour of the system's legal officials. That is, these rules exist insofar as legal officials take the internal point of view with respect to the following patterns of behaviour: (a) recognising particular kinds of norms as laws of the legal system; (b) treating certain bodies as having the power to modify the legal system's norms; and (c) treating certain bodies as having the power to apply the legal system's norms to decide cases. This practice looks very much like a social role. Like the participants in a role, legal officials treat actors meeting certain application conditions as having certain sets of powers, duties and rights. Moreover, parallel to the case of social roles, it is an open question whether we should take the application conditions, powers, duties and rights of a secondary rule to be all and only the standards that the members convergently treat as such.

Above, I argued that in the case of rational roles, role-participants ought to emulate the rational role-participants who understand the standards that define the role in terms of the role's underlying valuable points. Given the similarity between social roles and a system of secondary rules, the same argument seems to apply to participants in a legal system's practised secondary rules. Insofar as a legal system's practised secondary rules are rational, the system's legal officials should follow and hold others to the standards in the same way as the rational legal official would. That is, they should accept standards that follow from the underlying valuable points that justify the practised system of secondary rules. More specifically, they should treat those standards that are justified by the underlying valuable points of practised rule of recognition as the criterion for legal validity. Note that the criterion that a rational legal official would employ for recognising a system's laws would likely deviate from the convergently accepted standards to some degree. That is, they would likely directly conflict to some degree with the convergently accepted standards, and they would likely be more fine-grained and less indeterminate than the convergently accepted set of standards. Allow me to illustrate how this would work with the example of homosexual marriage considered above.

Above, we assumed that marriage and the role of marriage partner is constituted fully by a system of primitive primary rules. However, this is not the case in contemporary societies. We can distinguish between two kinds of requirements that constitute a role. The first kind is a general role-requirement.[18] These are the requirements that are determined directly by the practice of the role-participants. A second is a subtype of the general role requirement. This is the duty to conform to the requirements of a relevant authority. Let us call this an authority-requirement. One source of authority requirements is the state.[19] The state defines many detailed aspects of all social roles. Germane to our example of homosexual marriage, family law specifies many of the requirements of marriage. That is, many of the requirements of marriage, like the requirements of many social roles, are partly juridified. Like many social roles, the role of a married partner comprises an uneasy mix of juridified and non-juridified requirements.

In the United States today, courts and legislature are attending to one strand of the application conditions of the role of marriage. Specifically, courts and legislatures are considering whether homosexuals meet the application conditions of the role. Some legislatures have enacted legislation that posits that homosexual couples meet such application conditions, and others have held that they do not. The legislatively settled family law of yet other jurisdiction does not settle this issue one way or the other. Courts too have weighed in on this issue. Some have affirmed the constitutionality of a system of family law that does not recognise the right of homosexual couples to marry. Others have denied such constitutionality, overturning legislation that purports to deny the right of homosexual couples or interpreting broadly family law statutes that do not explicitly speak to this issue.

As we saw above, practice non-positivism holds that the rules of a role are determined by the underlying values of the practice of primitive primary rules that constitute the role. However, matters are more complicated when some of the relevant role's requirements are juridified. In this case, a second complex social rule in addition to the practice of primitive primary rules is also relevant to determining the role's requirements – namely, the secondary rules that determine laws pertaining to the social role.

Legal non-positivism holds that, like the requirements of social roles constituted by a primitive system of primary rules, the requirements of a rational system of secondary rules are determined by the values underlying this system of rules. In the context of the present example, consider the secondary rule constituted by the practice among legal

officials of treating the democratic enactments of the system's legislatures as law. According to legal non-positivism, the secondary rules of the legal system are those that flow from the underlying values of the system's practised secondary rules. One candidate underlying value of the practised secondary rule of treating the enactments of a democratic legislature as law is the value of democratic rule. There are many understandings of the precise nature of this value. For the sake of illustration of legal non-positivism, let us assume that Thomas Christiano's account of the value of democratic rule is the most normatively compelling account of the value underlying the practised secondary rule of treating democratic enactments as law.[20]

Christiano holds that the value at the heart of democracy is the public and equal advancement of the interests of the democratic citizenry. Christiano notes that this account of democracy's value implies limits to the authority of the democracy. He holds that if the value of democracy is the public and equal advancement of its citizens' interests, then democratic rule's value is not realised insofar as the democracy enacts rules that manifestly fail to advance the interests of its citizens equally. From the non-positivist perspective, insofar as Christiano is correct about the value of democracy and the limits of this value, there is at least a prima facie case that an enactment that manifestly fails to advance the interests of each equally should not be treated as law.

Consider again, then, laws that deny homosexuals the right to marry. One might argue that an enactment withholding the extension of the rights of marriage to homosexuals would constitute a manifest failure to advance the interests of all equally. Insofar as this is true, and insofar as it is true that the underlying value of treating democratic enactments as law is to publicly advance the interests of all equally, non-positivism holds that there is at least a prima facie case that legal officials should not treat such an enactment as law, and legal officials should criticise those who do treat such an enactment as law.[21]

The point behind the foregoing discussion is not to defend a particular judicial outcome or application of Christiano's view. Rather, it is to illustrate how the non-positivist framework I propose would apply to legal officials' reasoning about the requirements of their legal system's secondary rules, and, hence, their reasoning about what counts as law in their legal system. A different conception of the value of democracy or, more generally, of the value of the legal system's secondary rules might be correct and might dictate a different result. Moreover, a more careful and detailed treatment of the implications of Christiano's view for this issue might yield a different result than I've suggested above.

Nonetheless, the point remains that on the non-positivist account, whatever the proper conception of the underlying value of the system's secondary rules, the law is fundamentally determined by evaluative considerations; that is, considerations that speak to the values underlying the system of secondary rules and that justify allegiance to them.

The question, then, is whether a legal official should adopt the non-positivist perspective described above. An official participating in a practised set of secondary rules may orient herself to this practice in a number of ways. She may participate in the role out of sense of tradition or of prudential self-concern for her career. She may participate in a way calculated to fit in quietly with the practice. Or she may participate in it insofar as it is grounded in its underlying values. The former approaches generally recommend doing whatever it is that all other legal officials do, with some variation based on the imperatives of fitting in, advancing one's career, or traditional-mindedness. Similarly, the rational role official would generally follow the convergently followed standards that constitute her system's secondary rules, for realising the secondary rules' underlying values would generally require such convergence. However, realising the secondary rules' underlying value would not always require conforming to the convergent practice, and in those cases she should deviate. For such an official, the requirements that bind her and other participants in the secondary rules are not the convergent standards that constitute the system of secondary rules, but rather those that the secondary rules' underlying values require.

I submit that insofar as a system of secondary rules is rational, it is better to participate in it out of appreciation of the system's underlying value rather than brute traditional-mindedness, prudential concern or a desire to fit in. From this perspective, the requirements that legal officials qua legal officials must follow are those grounded in the system of secondary rules' underlying values. That is, from this perspective, evaluative considerations play a fundamental role in determining what norms legal officials must treat as law. In sum, from the perspective that legal participants should emulate insofar as their legal system is rational, legal non-positivism is correct.

9.4 Conclusion

Here, I have taken the first cut at a defence of a non-positivist theory of legal content that rests on a Hartian account of a legal system. This defence opens with the observation that a Hartian account of a legal system does not directly imply a positivist theory of legal content.

The legal positivist who seeks to equate the system's laws with the determinations of the legal officials' convergent understanding of the system's secondary rules must provide further argument for doing so. I have argued that, pace the legal positivist, we should understand the requirements of a legal system's secondary rules from the perspective of a particular kind of participant in the system's secondary rules. Namely, I have argued that insofar as a legal system's secondary rules are rational, we have reason to emulate the perspective of the ideally rational legal official who understands the secondary rules' requirements in terms of the underlying valuable points of the practised secondary rules.

The foregoing argument sets the stage for fruitful engagement between positivist and non-positivist. The positivist's burden is to explain why we should not understand the requirements of a legal system's secondary rules, and hence its laws, from the perspective of the ideally rational legal official who takes such requirements to be fundamentally shaped by evaluative considerations that speak to the secondary rules' underlying value. Hard positivist legal theorists offer such an argument. Joseph Raz, Andrei Marmor and Scott Shapiro respectively offer different grounds for why the official that I describe as a rational legal official is actually conceptually confused.[22] Though each of these theorists would readily agree that a system of secondary rules typically realises underlying values, they nonetheless argue that, on pain of conceptual confusion, participants in a system of secondary rules must not, qua legal officials, act on such underlying values, but rather they must, qua legal officials, take the requirements of the system to be those standards that the secondary rules' participants convergently treat as the system's requirements. A full defence of the non-positivist view I have sketched here must respond to such hard positivist arguments.

Notes

1. As I will suggest below, Hart seems committed to this thesis in Hart (1994).
2. See ibid., pp. 55–8 for Hart's seminal discussion of social rules.
3. See ibid., pp. 94–9 for Hart's discussion of primary and secondary rules. Most contemporary positivists accept some version of Hart's idea that the rule of recognition is a fundamental constituent of a legal system. See, e.g., Waluchow (1994) and Raz (1979). Refinements of and alternatives to Hart's rule of recognition can be found in Culver and Giudice (2010) (legal orders); Shapiro (2010) (plans and quasi-plans); and Marmor (2001; 2009) (constitutive conventions).
4. This modifies Hart's original way of distinguishing between primary and secondary rules. See Hart (1994, p. 81).

5. Hart includes further conditions on the existence of a legal system, such as that the system wins general compliance from the population at large. I do not think anything in my present argument requires that I enumerate and consider these further conditions.
6. Raz (1979, pp. 46–7). See also Shapiro (2010) and Marmor (2001).
7. Another equally pressing question queries the normative grounds of our roles. In Sciaraffa (2011), I address this question. However, there I assume that practice positivism about roles is correct. Here, I reject that assumption. However, I think that my arguments about the normative grounds of our role duties are compatible with both practice positivism and practice non-positivism.
8. See Hohfeld (1964).
9. Applbaum (1999)
10. Ibid., p. 10.
11. Ibid., p. 48.
12. Cf. Finnis (1980).
13. Ibid., pp. 54–5.
14. Applbaum makes frequent use of this example.
15. This marks one difference with Dworkin's interpretive approach to social phenomena. Dworkin suggests that the dimensions of 'fit' and 'justification' must be balanced when determining the underlying point of the value of some social practice (see Dworkin 1986). By contrast, here 'fit' is a threshold notion. Determining the underlying values of a role does not involve balancing the 'fit' and 'justificatory' weight of a proposed complex of values; rather, it requires only comparing the justificatory weight of different candidate complexes of values that meet the threshold of fit with the role.
16. Note that though one might think that this feature of non-positivism commits the non-positivist to a meta-ethical cognitivism, it does not. For example, if expressivism is correct, then we should read the non-positivist claim that the requirements of the role are whatever the most normatively compelling account of the role's underlying values dictate in terms of the expressivist's construal of the terms 'normatively compelling' and 'underlying value'.
17. Cf. Raz (1979, pp. 153–7). Here, Raz asserts that we must understand the requirements of a legal system from the perspective of the legal point of view. From this perspective, the requirements of a legal system are the standards convergently accepted by the system's legal officials.
18. See Tuomela (2002, pp. 164ff) for further discussion of this distinction.
19. There are at least two other kinds of authority-requirements. The first is tied directly to the social institution of which the role is a component part. For example, a professor has a duty to conform to the directives and rules laid down by her department or associated university, and a family member has a duty to conform similarly to the decisions of the family taken as a whole or, in patriarchal societies, the directives of the patriarch. A second relates to professional organisations. For example, an American doctor may have a duty to conform to various standards established by the American Medical Association.
20. See Christiano (2008).

21. There may be other considerations that weigh in favour of treating manifestly unjust legislative enactments as law. For example, Christiano entertains the idea that because of the risk that the judiciary might stymie the public advancement of interests by striking down democratic enactments that are not manifestly unjust, the judiciary should defer to the legislature as a matter of policy.
22. See Note 5 above.

References

Applbaum, A. (1999). *Ethics for Adversaries* (Princeton: NJ, Princeton University Press).
Christiano, T. (2008). *The Constitution of Equality* (New York: Oxford University Press).
Culver, K. and M. Giudice (2010). *Legality's Borders* (New York: Oxford University Press).
Dworkin, R. (1986). *Law's Empire* (Cambridge MA: Harvard University Press).
Finnis, J. (1980). *Natural Law and Natural Rights* (Oxford: Oxford University Press).
Hart, H. L. A. (1994). *The Concept of Law*, 2nd edn (Oxford: Oxford University Press).
Hohfeld, W. (1964). 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', in W. W. Cook (ed.). *Fundamental Legal Conceptions and Other Essays* (Westport, CT: Greenwood Press).
Marmor, A. (2001). *Positive Law and Objective Value* (Oxford: Oxford University Press).
Marmor, A. (2009). *Social Conventions* (Princeton: Princeton University Press).
Raz, J. (1979). *The Authority of Law* (Oxford: Oxford University Press).
Sciaraffa, S. (2011). 'Identification, Meaning, and the Normativity of Social Roles', *European Journal of Philosophy*, 19 (1), 107–128.
Shapiro, S. (2010). *Legality* (Cambridge: Harvard University Press).
Tuomela, R. (2002). *The Philosophy of Social Practice: A Collective Acceptance View* (Cambridge: Cambridge University Press).
Waluchow, W. (1994). *Inclusive Legal Positivism* (Oxford: Oxford University Press).

Part V
The International and Global Dimension

10
Legitimacy and Multi-Level Governance

Bas van der Vossen

Philosophical work on the topic of legitimacy often proceeds as if we are facing a choice between either endorsing the legitimacy of states or accepting anarchy. Reality, however, is different. If existing states are under pressure, this is because of developments in the direction of what sociologists call multi-level governance. We may loosely define multi-level governance as the exercise of political power by institutions that do not conform to a simple model of territorial sovereignty. Standard examples of such forms of governance are various global networks of national officials, such as those which aim at regulating the global financial economy, fighting international terrorism or addressing various environmental issues. Judicial bodies too increasingly operate in ways that defy the traditional model of strict sovereignty, for example by claiming extraterritorial jurisdiction. There is considerable variety here. Some forms of multi-level governance exist within single states, others span the borders of two or more states. Sometimes such governance is the product of lasting and stable institutions (e.g., the North American Free Trade Agreement or the European Union), sometimes of more amorphous 'global policy networks' and so on.

An extensive and expanding literature now exists documenting and exploring the current and future role of such forms of governance and the threats and opportunities they bring along. Proponents of these developments advocate the further extension and development of forms of multi-level governance. There is also variation in the proposed ways of bringing about such developments. Some argue that different states should be encouraged to seek further integration of their services, but retain ultimate authority themselves. Others argue that states should give up their sovereign powers. Still others go even further and argue in favour of dismantling the state as the centralised locus of

political power, or 'disaggregating sovereignty'. The most radical examples explore possibilities of polycentric law, where multiple governing institutions engage in similar, competing legal and political activities within a territory.[1]

The promise of such forms of governance should be clear: the problems authorities are supposed to address refuse to stick to the neat geographical lines drawn on maps indicating separate jurisdictions of sovereign states. Different types of problems can affect different, often partially overlapping, areas (aptly called 'problem-jurisdictions' by sociologists). Consider cases of environmental pollution, for example of rivers, which often affect multiple countries. In such cases, those (negatively) affected by the actions of parties subject to one state's authority include those subject to others, resulting in various familiar problems of coordination and assurance. Institutions with partially overlapping jurisdictions may be better equipped for dealing with this because their jurisdictions can be shaped in ways that reduce the occurrence of such externalities.

Little sustained philosophical reflection is available on the topic of multi-level governance. However, laments about the *lack* of legitimacy of these forms of governance are widespread. At times, such complaints may be reducible simply to the claim that governance networks are *perceived* to be illegitimate by a population, or to calls for greater accountability and transparency. Yet many also clearly adopt an understanding of legitimacy as a normative or moral concept. On such a view, legitimacy indicates that an institution passes some relevant moral test. Thus it is often said that a legitimate political institution has the moral right to rule. It is this understanding of legitimacy that I shall adopt throughout this piece.

The most popular charge holds that forms of multi-level governance are illegitimate because they constitute a move away from, or replace, the existing legitimate form of governance: the 'sovereign' state. That is, critics argue that multi-level governance erodes the sovereignty of states, and that such erosion is morally regrettable because it runs contrary to the rights enjoyed by such states. Consequently, these critics contend, if multi-level governance is to enjoy legitimacy, this must be conferred upon it by the consent of state representatives.

In this chapter I will ask whether such critical responses are warranted. I will accept for the sake of argument the (potentially problematic) starting point of these criticisms that existing states are indeed legitimate, and ask whether this poses a barrier to the legitimacy of multi-level governance. That is, I will ask whether legitimate states

indeed have rights to be either the sole authority in a territory or, failing that, at least the sole authority carrying out the particular governing activities in which they are engaged. The former kind I label a *unique* right to rule, the latter an *exclusive* right. (Strictly speaking, showing that legitimate states have no unique right is sufficient for refuting the critics' case. However, since some proponents of multi-level governance advocate institutions engaging in similar or competing activities, I also ask about exclusivity.)

Below, two possible versions of the critique are identified. Section 10.2 asks whether legitimate states must have a unique or exclusive right to rule. I will argue that their legitimacy does not confer upon states these rights. That is, the grounds of a state's right to rule fail to support for it those additional rights traditionally associated with the doctrine of sovereignty. Section 10.3 inspects a weaker interpretation of the critique. This is the claim that *if* a state is legitimate *and* has the attributes of sovereignty, then it will also have rights to be a unique or exclusive authority within its territory. Both these questions are addressed by testing whether such rights can be derived from two broad justificatory strategies for showing that a given state has the right to rule. I identify these two strategies, as well as the supposed rights of states that are at stake here in Section 10.1. Section 10.4 concludes.

10.1 Two kinds of justification

The view that legitimate states can insist on various rights traditionally associated with the doctrine of sovereignty is widespread. This perceived equivalence between legitimacy and sovereignty is no doubt encouraged by the rights enjoyed by states under international law. International law accords to states various rights of sovereignty, such as rights to territorial integrity, non-interference, powers of treaty, and so on.[2] It is common to label states that enjoy these rights legitimate.

There is surely also a historical dimension to this. The distinguishing feature of the modern, sovereign state was that it defined itself as legally self-contained, against competing claims from the papacy or the Holy Roman Empire. A sovereign state is competent to legislate for itself, and reigns supreme over other jurisdictions within its boundaries. Theories of legitimacy are typically concerned with offering justifications for this position: how political rule can be rightful on its own terms, independent of religious justification or historical inheritance. Not coincidentally, perhaps, philosophical reflection on legitimacy took prominence with the development of social contract theory, arising around the same time

as the rise of the sovereign state (Levy 2009). The most explicit combination of these views is still to be found in Hobbes. But others too hold that legitimacy must adopt the basic features of sovereignty, depending on nothing externally, leaving no space internally for others.

Another reason this view might seem attractive is that it may be seen to give content to the distinction between the moral justification for a state's governing activities and a state's legitimacy. It is one thing, one might say, to show that a state does no wrong in exercising political power, quite another to establish that it has the right to rule. Only the latter entails showing a state is legitimate, and this entails rights over subjects, as well as rights against other states and other groups and institutions. Among these rights may figure the traditional rights of sovereignty.[3]

For present purposes we need to focus only on those rights associated with the concept of sovereignty that potentially stand in the way of legitimate multi-level governance. These we may call a state's territorial rights. They are rights that, it is claimed, award states a certain privileged position with regard to the exercise of political power within a particular area: its territory. States not only claim the right to impose (alter, remove) certain obligations on subjects through law and enforce them. They also claim to have the exclusive or unique right to do so within their territory.

It is important to distinguish here between claiming a right to be an exclusive political authority and a right to be the unique political authority within a jurisdiction. A political institution is a territorially *exclusive* authority when it is the sole authority within its territory for any particular function it performs. With such an authority there are no competing authorities engaged in similar activities within its territory. Thus it is possible for there to exist side by side in one territory two different but each exclusive political authorities, as long as they are engaged in separate activities. This is not possible with a territorially *unique* political institution. Such an institution will be the sole political authority within an area. With such an authority, there are no other, independent political institutions within its territory. Unique rule thus presents a strong version of exclusive rule: it expresses a claim of exclusivity concerning all possible governing functions in an area.[4]

Below I will ask whether these rights can be derived from some of the more popular and plausible justifications for the legitimacy of states. But first I will distinguish between two broad justificatory strategies that such theories might adopt. This distinction is between theories

that consider the right to rule to be grounded in various *incurred political obligations* on the part of a state's subjects and those that do not. According to the former kind of theory, a state's legitimacy depends on some fact or feature in the shared history of the state and its subjects. This may be a particular event such as the subjects' consent to be governed, their receiving certain benefits, or it may refer to characteristics of the community that is living under common political rule. In any case, however, this fact or feature made its subjects incur political obligations, and it is on the basis of these obligations that the state has the right to rule. Consequently, such views regard the nature and content of the right to rule enjoyed by legitimate states to depend on the nature and content of the political obligations of its subjects.

Theories that do not fall within this family of views need not deny that a state's legitimacy means that its subjects have certain obligations, such as obligations to obey the law. But they do not view those obligations as incurred, contingent upon state or subjects acting or being a certain way. Typically, these views approach the issue of legitimacy in a *teleological* fashion, arguing that a state can have the right to rule if it achieves the right sorts of results. Here we may group consequentialist approaches, theories that consider a state's right to rule to be grounded in a natural duty of justice, as well as Raz's conception of legitimate authority.[5]

Let me emphasise here that I do not mean to suggest that this taxonomy exhausts the field of available views. Nor is this way of grouping theories intended to ignore or belittle the many important and subtle differences between approaches here grouped together. Each of these groups contains various substantive theories, with various substantive commitments. The purpose of this distinction is strictly analytical. The theories grouped together all share a structural similarity in terms of the justification they provide for a state having the right to rule, and grouping them together in this way will allow us to address our general question in a more straightforward manner.

10.2 Is the right to rule exclusive or unique?

I now turn to the two ways of justifying a state's legitimacy to see if these support a unique or exclusive right to rule for legitimate states. Here, as in the next section, my argumentative strategy is to assume that these theories are fully successful in their own terms, and then ask whether we can derive the required rights for states.

10.2.1 Incurred obligation theories

Theories that consider a state's legitimacy to be grounded in the incurred obligations of its subjects come in two broad versions. The difference between these two versions concerns the conditions they identify for subjects to be said to have incurred the relevant obligations. Some, call these *voluntaristic* theories, hold that subjects can only be said to have incurred political obligations if the act or event involved relevantly engages these subjects' wills. Such views will insist, for example, that a subject's consent must be given freely, or that the benefits of government must not only be received but willingly accepted. *Non-voluntaristic* theories argue that the subjects of a state can incur political obligations even under conditions where such voluntarism on their part is absent.

Let us start with voluntaristic theories. Voluntaristic theories hold that a state is legitimate only if all its subjects have voluntarily incurred political obligations. Consequently, those persons who refuse to incur political obligations remain morally free from such obligations. Imagine a state for which it is true that all subjects consented to its rule: such a state would be perfectly legitimate. But while this state will obviously have the right to rule over its subjects, it cannot be said to have a right to exclusive or even unique authority within a territory.

The reason is that this state's right to rule is justified by reference to the relation in which it stands to the individuals over whom it will govern. All theories of incurred political obligation consider legitimacy a bilateral concept, expressing the morally significant relation in which a subject stands to a state. A state's purported exclusive and unique right to rule, by contrast, is territorially defined. These are purported rights of territorial jurisdiction, rights to be the exclusive or unique ruler within a geographical area. Such territorial rights presume that a state's authority prohibits or precludes those in its territory from erecting their own, rival authorities or obeying others. What this means is that all who are in a legitimate state's territory must, thereby, have at least something like a political obligation – for the state has at least so much authority over them so as to rule out their setting up or following another authority. Unique or exclusive rights to rule, therefore, presume that a state has (some) authority over all who are in its territory. And they presume it has that authority over them just because they are in its territory; that presence in a legitimate state's territory is sufficient for being subject to its authority.

This idea is directly contrary to the central thesis of voluntaristic theories. These hold that no one can be rightfully subjected to the authority of a state unless they voluntarily choose to be.[6] It follows,

then, that if those individuals who consented were to decide to move away from their present location, the state's authority over them may remain perfectly intact. More important for present purposes, however, is the converse implication. New persons who come into the area (whether they be born there or arrive by travel) will not be subject to the state's authority until they voluntarily give their consent. As a result, such individuals remain morally free to go their own way, which must include, for voluntarists, the freedom to set up or pledge allegiance to alternative political institutions. In the words of arch-voluntarist John Locke:

> MEN being … by nature all free, equal, and independent, no one can be … subjected to the political power of another without his own consent … This any number of men may do, because it injures not the freedom of the rest; they are left, as they were, in the liberty of the state of Nature.
>
> (Locke 1988 [1690], Second Treatise, sect. 95)

It follows also, then, that they may do this concerning any potential governing activity, whether the already existing state is engaged in them or not.

What might convey the impression of a territorial right to rule is only that in our imagined example the group of persons with political obligations happened to be, now, located in the area designated as its territory. But it is unclear how a voluntaristic theory could see the choices of some people present in a territory to confer upon a state the right to restrict the choices of newcomers of whether to accept the state's authority. After all, the starting point of voluntaristic theories is that no one is subject to authority unless they voluntarily choose to be. We can conclude then that theories that hold a state's legitimacy to be based on the voluntarily incurred political obligations of its subjects fail to support a unique or exclusive right to rule. Hence, they are compatible with the legitimacy of multi-level governance.

The same conclusion holds, for different reasons, for theories that allow for the legitimacy of states when their subjects have incurred political obligations that are not voluntarily accepted. Such obligations can be incurred, it is said, through being a member of a community or by receiving certain benefits provided by the state. Here, it will be clear, the territorial nature of a unique or exclusive right to rule no longer poses an insurmountable problem. For since the conditions of incurring obligations are no longer voluntaristic in nature, it is possible for those

conditions to be tied to a person's presence in a territory. The question we are facing, then, is whether non-voluntaristic justifications for a state's right to rule show this right to be unique or exclusive in nature.

The answer is negative. We saw that incurred obligation theories conceive of legitimacy as a bilateral affair between state and subject(s). The distinctive feature of non-voluntaristic theories of incurred obligation is that they hold that subjects can incur political obligations just because of something a state does *to* them, or some other fact about them that is independent of their will. And while this allows such theories to escape the more radical implications of voluntaristic theories, this comes at the price of allowing for the possibility of multiple legitimate authorities. For if one authority can affect a group of people in a certain area, or be relevantly connected to them, so that they incur political obligations, so too can another. Non-voluntaristic theories, therefore, fail to support a unique or exclusive right to rule. And hence, they must allow for the legitimacy of multi-level governance.

To illustrate this, let us focus first on whether a state, if legitimate, must be the only (unique) such entity in its territory. Consider a theory that holds states to be legitimate if they provide subjects with certain benefits (Klosko 1992). Such a view considers subjects to be under political obligations just because certain goods have been made available to them. Now imagine that some alternative provider, say a neighbouring state, started making different benefits available there as well. Say, it organises general medical services in addition to the first state's provision of national defence and police protection. It would seem, then, that by the non-voluntaristic argument the people in this area become subject to both authorities. But if neighbouring states can also impose obligation-generating benefits on the subjects of a legitimate state, the present argument must fail to establish that a state can have a right to territorially unique rule.

Alternatively, consider the view that political obligations are due to membership of a community. Such 'associative obligations' require subjects to cooperate to achieve the effective governing of the polity. But this leaves entirely open what kind of institutional arrangement will be in place. Thus, instead of offering particular states privileging rights for governing over a territory, theories of associative obligation too will allow that other ways of governing the polity (other than by territorial states, that is) may be legitimate.[7]

No right to unique rule will thus be forthcoming on a theory that grounds legitimacy in non-voluntaristic incurred political obligations of subjects. How about a right to exclusive authority? Can legitimate

states at least insist on a right to be the sole institution carrying out whatever governing activities in which they are engaged? Given the institutionally open-ended nature of associativist theories, the best way to approach this issue is to look at benefit-based views. Will subjects' obligations to obey and support a political institution providing them with a benefit be an obligation of exclusive allegiance? Again, there is no reason to think so. If it were to happen that two or more authorities undertake similar activities in an area – say they build and maintain roads or provide police protection services – the logic of a benefit-based theory again suggests that these authorities would be legitimate.[8]

One potential objection to this argument is worth discussing at some length. This is the objection that political obligations are in fact necessarily owed uniquely or exclusively to a single political institution. If true, this would mean that whenever a person has a political obligation to obey a certain political institution (A), she cannot also have a political obligation to obey another (B). Showing that all subjects in A's territory have political obligations to A would therefore entail A's unique or exclusive authority. Often such claims are motivated by the observation that if someone is subject to multiple authorities, there is a possibility of conflicting demands. And such conflicts are thought to be intolerable.

Note that this cannot be a conceptual point about obligations in general. For many obligations it is true that if someone owes an obligation to A, she can have a similar one to B. If I promise A to mow her lawn, I am entirely at liberty to promise B to mow her lawn as well. Nor do instances of conflicting demands defeat the authority of institutions. Let us imagine that authority A demands something of Suzie, while B demands some practically incompatible course of action of her. Such situations are clearly possible and compatible with the enduring authority of both A and B over Suzie. So what would be the upshot of such a situation? Perhaps it means that Suzie will find herself subject to two conflicting obligations. In such situations, there may be no straightforward answer about what to do, but then again that may just be part of the fabric of morality: perhaps moral dilemmas do exist. More likely, though, is a scenario where A and B will have set up rules and procedures for dealing with or adjudicating cases of conflicting demands on subjects. (A and B's respective authority will also probably be clearly and carefully delineated, thereby avoiding most such situations.) Such solutions are consistently found in practice, such as in conflict of law cases. In any case, however, the conclusion that (political) obligations must be exclusively or uniquely owed to a single state does not follow. If I have two jobs and both my bosses want me to come in on Monday

morning, we will need to work something out. We do not conclude that I do not have two bosses.

Another way of defending unique or exclusive political obligations argues that these characteristics follow from their *content*. It may be part and parcel, that is, of becoming subject to a legitimate state that one must confine allegiance to this single authority. This might seem attractive: despite the existence of dual citizenship, some states indeed conceive of allegiance this way. But aside from states' desire to see things like this, what grounds do we have for accepting the idea? Allegiance, we have seen, is not unique or exclusive in nature. Nor, as I will argue in more detail below, does this follow from the nature of government activities. If the conclusion is to stand, then, the exclusive content of political obligations must follow from the nature of their justification.

But we have already seen that this argument fails. Voluntaristic views will not support this, since their very starting point is that people can become subject to the legitimate authority of a state only if they choose to be so. And this is directly contrary to any territorially based rights states might wish to claim. Nor do non-voluntaristic theories provide much support. Associative theories are neutral with regard to the institutional implications of political obligations. And assuming, for now, that the argument below is correct that political authority is not exclusive or unique in nature, the provision of benefits to subjects too will fail to support the uniqueness or exclusivity of their obligations.

10.2.2 Teleological theories

The second approach to consider consists of theories that hold that a state can achieve legitimacy by bringing about certain outcomes. Here we can group consequentialist theories, theories that ground legitimacy in a natural duty of justice, as well as Razian views.[9] We can classify these together because they all value states, and their legitimacy, in strictly instrumental terms – as tools, say, for achieving some further goal or good (their *telos*). Thus, for example, a justice-based view regards the purpose of states as the protection of moral rights, and will qualify as legitimate only those states that make a sufficient contribution to the achievement of that goal (Buchanan 2004). In this section I will focus primarily on this version of the teleological approach.

The instrumental view of states and their legitimacy that lies at the heart of teleological theories may seem straightforwardly at odds with the idea that legitimate states must have unique or exclusive authority in a territory. Teleological views are explicitly open to the possibility of other institutional arrangements serving the theory's purposes. When

they do, those arrangements too will be deemed legitimate. But while this point is in essence correct, we should be careful not to move too quickly. One reason is that defenders of such a view often assert that the theory supports the rights of sovereignty for legitimate states. Another reason is that an argument for a state's authority over an entire territory is easily imagined: if a state's being able to govern over all who are in its geographical jurisdiction is instrumental for it bringing about the correct outcomes, a teleological theory will endorse such rights for legitimate states.

Can such reasoning be extended to demonstrate that legitimate states will also be exclusive or unique authorities? That is, can the argument be convincingly made that unique or exclusive authority within a single territory is instrumental to the achievement of the right outcomes? It might be thought here that this question simply reduces to whether in a particular place, at a particular time, justice is best served by a unique, an exclusive, or some other kind of authority. And since chances are that this will at least sometimes, somewhere be the case, teleological theories may thus justify rights to unique and exclusive authority. However, this would be to misunderstand what is at stake. We are considering not just the thought that a state might at times be an exclusively or uniquely justified authority in an area. What we are asking about here is a much stronger view: that legitimate states will, as such, have a unique or exclusive right to rule. Our question therefore is whether there are grounds for insisting on the unique or exclusive right to rule for a legitimate state regardless of whether organising the exercise of political power in such ways yields the desired results here and now.

If such is to be the case, it must be true that justice is most reliably served by uniquely or exclusively governing states as compared to possible alternative forms of governance. Perhaps more than one political institution in a territory is bound to have negative consequences on the quality of its governance? That is, the presence of other authorities, perhaps especially competing other authorities, may be said to necessarily lead to disturbances of justice. Let us start with the idea that unique authorities will clearly perform better than non-unique ones. One reason may be that multiple institutions within one territory will likely come into conflict with one another, leading to detrimental results. But this Hobbesian worry lacks solid grounds, at least in those cases where institutions are engaged in functionally separate activities – say, one provides public order, the other education. There, it is far from clear that institutions will come into conflict (or, at least, that they will

come into conflict more than the separate branches of government within a single state). In fact, the experience of existing forms of multi-level governance suggests that this is not the case. Nor is there reason to think that multi-level governance will typically be less effective than sovereign states. The very reason we are inquiring about its potential legitimacy is its potentially superior problem-solving capacity compared to sovereign states. Teleological views are therefore compatible with the legitimacy of non-unique authority.

Next, consider an exclusive right to rule for legitimate states. Such a right would enable such states to be the sole institution in a territory engaged in those types of activities in which they are engaged. Such a right may seem more plausible, for multiple governing agencies engaged in similar tasks are more likely to get into conflict. Those who defend the position typically refer here to the case of law and its enforcement. Surely having multiple police forces in an area is a recipe for chaos. If so, a teleological theory may grant legitimate states an exclusive right to rule.

However, there are some problems with this argument. Perhaps the point of legal rules for social conduct is that they provide a single, uniform set of rules for regulating practically inevitable interaction in public space. And perhaps this means that having multiple bodies of rules in one area is highly suboptimal. But this argument slides illicitly from an observation about different bodies of rules, to a conclusion about different institutions. Yet it is perfectly possible for authorities with overlapping jurisdictions to issue and enforce sets of legal rules that are harmonious or contain provisions for conflicts of law. That is, even if such a situation would be one of different but overlapping legal codes, it is by no means certain that these will be incompatible in any serious sense.[10]

Second, even if it is true that non-exclusive legal authority will be harmful, there is no reason to extend that point to all state activities. What likely damage will be forthcoming from having competing educational systems? Such competing systems already exist in many places. The most obvious case comprises those instances where private parties compete with states, but there also already exist instances of different governments providing educational services within the same area.[11] And it is far from accurate to say that their performance is significantly worse than those where the state has a monopoly. Indeed, with regards to virtually all other goods and services, it is uncontroversial that competition leads to efficiency gains, improving the quality of goods and services while lowering their cost. Why would government activities be inherently different?[12]

It is difficult to see, then, how providing legitimate states guarantees of various monopolies, or one big monopoly, will be conducive to the achievement of the correct outcomes. Thus, in the end, the observation with which we started was close enough to the truth: the instrumental role teleological theories see states playing stands in the way of their supporting the view that the right to rule of all legitimate states must be unique or exclusive.

10.3 Institutional change and the rights of legitimate states

The argument above shows that some of the most popular and plausible justifications for the right to rule of legitimate states are compatible with the legitimacy of forms of multi-level governance. However, the critic of such forms of governance might insist that her objection was not that forms of multi-level governance cannot be legitimate in principle, but that they can only be so if they *come about* in a certain way. In particular, critics object to multi-level governance arising without the consent of existing states.

No doubt many have this in mind. It is a common observation that legitimate states have rights of non-interference. And such rights may mean that legitimate states may resist any non-consensual changes to their positions of authority. Such a right is nearly universally listed by theorists of legitimacy. And it is invoked, for example, by those who object to attempts to extend the jurisdiction of the International Criminal Court to states that refuse to ratify its founding treaty.[13] Here I will focus on only a subset of the actions that may be ruled out by such rights: the undertaking of governing activities within the territory of a legitimate state. Let us turn to whether such rights can be derived from the justifications of legitimacy.

10.3.1 Incurred obligation theories

Consider again theories that hold legitimacy to be grounded in the incurred obligations of subjects. As we have seen, these views regard the rights of states as a product of their subjects' (voluntarily or not) incurred political obligations. Thus, if legitimate states have rights to non-interference when they are ruling uniquely or exclusively, these rights must also be grounded in the duties of subjects. This means that incurred obligation theories must conceive of rights of non-interference in an unexpected manner: these are not rights on which the state can insist vis-à-vis other states; they are rights on which a legitimate state

can insist vis-à-vis its subjects. Whatever right to non-interference it has is a right based in its subjects' obligations to show it exclusive or unique allegiance.

It follows, then, that these theories fail to support rights to non-interference for legitimate states.[14] For one, the conclusions reached in the previous section about voluntaristic theories apply here as well. Since such theories fail to grant states rights over land, instead of rights over people, legitimate states cannot have rights that no other institutions undertake governing activities within that area. Non-voluntaristic justifications, however, do allow for territorially based jurisdiction. Will subjects of a state who have non-voluntarily incurred the relevant obligations be required to not obey or support other institutions? That is, is such a requirement part of the content of subjects' political obligation?

Again, while it might seem attractive to say that exclusivity or uniqueness is part of becoming obligated to a political institution, we lack good reason for endorsing this view. Above, I identified two non-voluntaristic contenders: associative and benefit-based theories. Associative theories, we saw, have no attachment to any particular political institutions. If they support rights to non-interference, it will be because such rights make for institutions that are best suited for governing the polity. As such, their position on this matter will be similar to that of teleological theories. I will discuss this below.

Benefit-based arguments, by contrast, hold that persons can incur obligations based on conditions that have to do with the particular nature of the good provided, instead of their acceptance. For example, because certain goods have a public good structure, their provision can generate obligations for those receiving them. Again, this means these theories, as such, fail to justify rights for legitimate states against other institutions deploying governing activities in their territories. If institutions provide the relevant goods, those who receive them will become obligated. Indeed, allowing such benefits to generate exclusive or unique obligations might end up causing serious difficulties for benefit-based theories. Consider someone living in some remote place. The area may be nominally part of a legitimate state's territory, but its climate or geography so far has made it impossible for the state to extend its benefits here. Fortunately, however, the area is not extremely unsafe or violent: neighbourhood associations and local charities have kept things going relatively well. What if the state becomes successful in extending its authority to these parts? If benefit-based obligations have an exclusive or unique character, these people would no longer be able

to become legitimate subjects of this state. But such an implication, it seems, is radically against the spirit of non-voluntaristic theories. For it defeats part of the practical purpose of preferring a non-voluntaristic to a (theoretically more elegant) voluntaristic approach.

We can conclude, then, that these theories of incurred obligations fail to support rights for legitimate states that other institutions not deploy governing activities in their territories. Only associative theories have the potential for such a conclusion. Whether they endorse such rights depends on the same considerations relevant to teleological arguments.

10.3.2 Teleological arguments

Will teleological accounts justify such rights? I will here focus again on justice-based theories of legitimacy. In contrast to many of the issues in this chapter, there has been some discussion of the rights of legitimate states against interference by theorists defending justice-based views on legitimacy. Unfortunately, no clear consensus exists on the justifiability of such rights. Some critique the traditional rights of sovereignty, arguing that international law and international institutions can have legitimate authority in the absence of the consent of states. Others hold that fewer states should be considered legitimate than is often thought, but that those states can call upon rights of sovereignty. Still others hold that the vagaries of international relations imply that only awarding the full rights of sovereignty to all existing states is compatible with justice.[15]

The fact that the latter position is defended may show that teleological views will at least support some kind of protected rights to rule. And the thought seems plausible: non-consensual attempts by one political institution at extending its authority into the territory of another seem a recipe for violent conflict and strife, things hardly conducive to the achievement of justice. Note, however, that the upshot of this conclusion is not to be exaggerated. For it is not clear that this point indicts such forms of multi-level governance to a lasting illegitimacy. For that to follow, two things must be the case. First, it must be a necessary condition of an institution's legitimacy that it not come about in a way that involves the violation of the rights of an existing legitimate institution. And second, it must be the case that legitimate institutions have rights against the development of forms of multi-level governance.

Neither of these points is unproblematic. The first principle surely is too strong. One reason is that it threatens the starting assumption that (virtually) all existing states are legitimate. The beginnings of many

states involved violence against other states, the legitimacy of some of which seems at least as likely as theirs. Another reason is that this principle is at odds with the rationale or spirit of teleological theories. These are views that regard legitimacy as based on forward-looking considerations (e.g., the prospect of this institution achieving justice), instead of backward-looking ones (e.g., consent given). They insist that a state's legitimacy is not a matter of entitlement, the source of which may lie in the past, but depends on the results a state brings about for its citizens. Condemning to enduring illegitimacy any institution the creation of which involved the extension of its governing activities into a legitimate state's territory (even if peacefully) thus seems contrary to what teleological views are all about.[16]

The second idea may be problematic too. That is, legitimate institutions do not have rights against just anything that may diminish their ability to govern. For example, while large-scale emigration of a population might harm the institution's ability to function by eroding its tax-base, this does not show that it has a right that its subjects not emigrate. Spelling out, in other words, what does, and what does not, count as wrongful interference with a legitimate institution is a complex issue. And at least under certain conditions, say of peaceful and cooperative conduct by the rival institution, it is not clear that the setting up of forms of multi-level governance would count as such.[17]

Most likely, then, whether teleological views will allow for such developments of forms of multi-level governance will depend on various empirical matters, such as the likelihood of these developments harming the overall quality of governance, the dangers of violence, the conduct of officials and subjects of both old and new institutions, and so on.

10.4 Conclusion

I have focused on the issue whether forms of multi-level governance are in principle capable of achieving legitimacy. I have tried to evaluate a common critique of such forms of governance by investigating whether legitimate states have a unique or exclusive right to rule. This conclusion draws out some implications and indicates some possible avenues for further research. To begin, we can draw the following two conclusions: (a) since none of the arguments discussed above support the supposed unique or exclusive right to rule of legitimate states, the legitimacy of multi-level governance seems perfectly possible; and (b) only a teleological justification of legitimacy can, given certain

factual assumptions, support rights for legitimate states against the creation of such forms of governance without their consent.

I will not here commit to whether it would be a good thing for forms of multi-level governance to proliferate, or for states' supposed rights of sovereignty to be rejected. Such an argument would require a sustained defence of its own. Similarly, it may be thought that the failure of incurred obligation theories to support rights for legitimate states against interference counts as a significant drawback on their part. Again, that issue deserves full treatment elsewhere. What my arguments show is that much of the standard way both philosophers and other commentators understand the concept of legitimacy fails to stand up to scrutiny. Hence, insofar as such rights are deemed important, philosophers need to do better in providing a defence. Then again, it is safe to say that philosophers have not thought hard enough about whether such rights really are as important as we commonly think.

Such reflection will have important consequences. For one, it may turn out that most theories of legitimacy presuppose an understanding of legitimacy that is partially misconceived. This is consistent with another context in which the concept of legitimacy is discussed. When authors write about the legitimacy of *international* institutions, talk of establishing exclusivity or unique authority is readily dropped. In light of the above, that seems appropriate.[18]

More generally, a conclusion that justifications of the right to rule fail to support rights of sovereignty can undercut at least some of the grounds on which states are often thought to occupy a morally favoured status. Unfortunately, too much writing in legal and political philosophy regards states and sovereignty as somehow special or morally desirable. This is perhaps most clearly true of some so-called liberal nationalist theories – in which demonstrating that national groups have rights to sovereignty can seem like a holy grail.[19]

Similarly, the possibility of legitimate multi-level governance may point to some deficiencies in the conceptual understandings of law adopted by certain legal theorists. That is, some might object that, conceptually, the rules of such institutions cannot qualify as law because they can lack some of the traditional characteristics of legality, such as reliable enforceability, a habitually obeyed sovereign, or a claim to supremacy within its jurisdiction. The existence and functioning of multi-level authorities puts significant pressure on such understandings of law and authority. Our thinking about these concepts may well have to become more flexible so as to allow for cases of non-sovereign

authority and law. Nicole Roughan's chapter in this volume pursues these issues further.

One thing, I believe, can be safely said. Legal and political theorists ought to maintain an open mind about the institutional forms that actually serve human purposes best. This is a familiar (though often overlooked) truth in the old debate about small versus big government. But it also applies to the issue of more versus less centralised government. An important task of legal and political theory is to investigate what really works. Centralised systems of governance may have advantages in terms of coordination and uniformity of rules. But a system of fragmented authority will have its strengths too. It allows power to be checked by other power: subjects having the option to play off one authority against another may render us safer. It may make exit from dysfunctional authorities easier. It offers new possibilities for innovation and learning by having different institutions wrestling with related problems in similar contexts. It will encourage more locally informed and fine-tuned solutions, instead of blunt top-down attempts. And so on. What forms of governance will be more useful may change with changes in social facts about economics, demographics and so on. And what will be the right way to go must therefore partially depend on fundamentally empirical questions. Yet such may be the genuine core of the debate about the legitimacy of existing political institutions.

Notes

1. See for but a few examples, respectively: Chisholm (1992), Bache and Flinders (2004), Rosenau and Czempiel (1992), Sassen (2006), Slaughter (2004), Pogge (1992) Barnett (2000).
2. Exceptions are diplomats, *ius cogens*, and other principles of jurisdiction like nationality, objective territory, or universal jurisdiction. However, these do not affect the main argument of this piece.
3. Some examples of philosophers who take legitimate states to have such rights are Buchanan (1999) (but see Note 18 below), Green (1988), Klosko (1992), Stilz (2009), Wellman and Simmons (2005) (especially pp. 167–8). Christopher Morris (1998) rightly complains that contemporary thinking takes the claims of states too serious, but never follows up on this remark.
4. Those uncomfortable with the use of rights-speak here may re-describe these claims in terms of claims about the scope of authority, or the scope of the right to rule, which a legitimate enjoys.
5. I defend this grouping-together of theories in Note 9 below.
6. See, e.g., Simmons (1993), Beran (1987). It is worth noting that Simmons (2001) has attempted to give an argument for how a voluntaristic (consent) argument may give rise to territorial rights. He argues that the consent of subjects may include the transfer of part of subjects' rights over their

property. If so, a state may gain rights to rule over that property, potentially piecing together an entire territory. Non-subjects would then always find themselves on property that has attached to it the state's right to rule, and their entering such property would entail their accepting this authority. However, this argument fails because it likely is not within people's powers to grant such lasting authority to a sovereign over property. Courts, at least, have in the past refused to uphold attempts by owners to include provisos in the terms of sale of land that it would never come into the hands of, say, Jews or black people. Such rights, the courts argued, are not part of our property rights. The reasoning may apply to the enduring submission of property to one sovereign. Indeed, it seems likely that whatever motivates the adoption of a voluntaristic theory of legitimacy will also motivate the rejection of the possibility of durably submitting land to authority.

7. Leading theorist of associative obligations John Horton is explicit on this (2007, p. 2).
8. One might consider this, plausibly in my view, a seriously problematic implication of such theories.
9. A theory being teleological only means it makes legitimacy conditional upon a certain outcome being achieved. This leaves room for certain *ways* of achieving the relevant outcome being precluded. Thus, a state's legitimacy may depend on its achieving a degree of human rights protection in its territory, without thereby violating people's rights.
10. See the chapter by Nicole Roughan in this volume.
11. One example is Wix Primary School, the first bilingual school in London opened in 2005 by the French embassy.
12. Philosophers likely exaggerate the problems of competing legal orders. Hume (1987 [1752]) reminds us that the Roman Empire was governed for about 150 years by two supreme legislative bodies with overlapping authority. This period, Hume argues, was among the most stable and prosperous in the history of Rome. For important historical studies see Berman (1983), Spruyt (1994). For a contemporary argument see Barnett (2000).
13. For an overview, see Wilmshurst (1999).
14. Note that insofar as interference with a state's governing is wrong, it is a wrong perpetrated by the state's subjects (who owe it unique or exclusive allegiance), not the interfering party.
15. See, respectively, Pogge (1992), Teson (1998), Buchanan (2004), Kukathas (2006).
16. Better, perhaps, to say that any institution can gain legitimacy after a period of displaying peaceful and just conduct. Or (additionally) to insist on international institutions approving the new entity after the fact. Leading teleological theorist Allen Buchanan (2004) admittedly accepts a non-usurpation condition for state legitimacy. But note that this is in direct conflict with his denial that state-consent is a necessary condition for the legitimacy of international law and international institutions.
17. Indeed, the proponent of multi-level governance might argue that setting up rival governing institutions need not lead to violent conflict. States will only regard such activities as 'interference', she may argue, if they take for granted that they have a right to be the unique or exclusive authority. But this right is precisely being questioned here. Absent such a right, interferences might

be perceived as less threatening (e.g., when approved by international institutions).

18. See, e.g., Buchanan and Keohane (2006). See also Buchanan (2010).
19. Perhaps the most explicit example is Meisels (2005). Other examples are Miller (1995), Moore (2001). See also Note 3 above. For an interesting exception, see Gans (2003).

References

Bache, I. and M. Flinders (2004). *Multi-Level Governance* (Oxford: Oxford University Press).

Barnett, R. (2000). *The Structure of Liberty* (New York: Oxford University Press).

Beran, H. (1987). *The Consent Theory of Political Obligation* (New York: Croom Helm).

Berman, H. J. (1983). *Law and Revolution: the Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press).

Buchanan, A. (1999). 'Recognitional Legitimacy and the State System', *Philosophy & Public Affairs*, 28, 46–78.

Buchanan, A. (2004). *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press).

Buchanan, A. and R. O. Keohane (2006). 'The Legitimacy of Global Governance Institutions', *Ethics and International Affairs*, 20, 405–37.

Buchanan, A. (2010). 'The Legitimacy of International Law', S. Besson and J. Tasioulas (eds). *The Philosophy of International Law* (Oxford: Oxford University Press), 79–96.

Chisholm, D. (1992). *Coordination without Hierarchy: Informal Structures in Multiorganizational Systems* (Berkeley: University of California Press).

Gans, C. (2003). *The Limits of Nationalism* (Cambridge: Cambridge University Press).

Green, L. (1988). *The Authority of the State* (Oxford: Clarendon Press).

Horton, J. (2007). 'In Defence of Associative Political Obligations: Part Two', *Political Studies*, 55, 1–19.

Hume, D. (1987). 'Of Some Remarkable Customs', E. Millar (ed.). *Essays: Moral, Political, and Literary* (Indiana: Liberty Fund), 366–76

Klosko, G. (1992). *The Principle of Fairness and Political Obligation* (Lanham: Rowman & Littlefield).

Kukathas, C. (2006). 'The Mirage of Global Justice', *Social Philosophy and Policy*, 23, 1–28.

Levy, J. (2009). 'Not so *Novus* an *Ordo:* Constitutions without Social Contracts', *Political Theory*, 37, 191–217.

Locke, J. (1988). *Two Treatises of Government*, P. Laslett (ed.) (Cambridge University Press).

Meisels, T. (2005). *Territorial Rights* (Dordrecht: Springer).

Miller, D. (1995). *On Nationality* (Oxford: Oxford University Press).

Moore, M. (2001). *The Ethics of Nationalism* (Oxford: Oxford University Press).

Morris, C. (1998). *An Essay on the Modern State* (Cambridge: Cambridge University Press).

Pogge, T. (1992). 'Cosmopolitanism and Sovereignty', *Ethics*, 103, 48–75.

Rosenau, J. and E-O. Czempiel (1992). *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press).
Sassen, S. (2006). *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press).
Simmons, A. J. (1993). *On the Edge of Anarchy* (Princeton, Princeton University Press).
Simmons, A. J. (2001). 'On the Territorial Rights of States', *Philosophical Issues*, 11, 300–26.
Slaughter, A. M. (2004). *A New World Order* (Princeton: Princeton University Press).
Spruyt, H. (1994). *The Sovereign State and its Competitors* (Princeton: Princeton University Press).
Stilz, A. (2009). 'Why Do States Have Territorial Rights?' *International Theory*, 1, 185–213.
Teson, F. (1998). *A Philosophy of International Law* (Boulder, CO: Westview Press).
Wellman, C. H. and A. J. Simmons (2005). *Is There a Duty to Obey the Law?* (Cambridge: Cambridge University Press).
Wilmshurst, E. (1999). 'Jurisdiction of the Court', R. S. Lee (ed.). *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International), 127–42.

11

The Relative Authority of Law: A Contribution to 'Pluralist Jurisprudence'

Nicole Roughan

11.1 Introduction

Philosophers of law typically analyse law and legal systems in isolation from one another, where the identity of legal systems is understood by distinguishing between norms that belong to different systems, and concepts of law are built by identifying features of those systems that are universal or near-universal, or truistic and seemingly important (e.g., Raz 2009a; Shapiro 2010). In contrast, what I am calling 'pluralist jurisprudence' examines the implications of overlapping and sometimes conflicting levels of state, supra-state, inter-state and sub-state law.

My aim here is to present a contribution to a pluralist theory of law; a theory that does not simply leave room for legal pluralism, but explains what law is like by addressing the facts and features of overlapping and interactive legal systems. Such a theory must address a number of different analytical puzzles, including the puzzles of legality and systemic identity: Are all these overlapping norms legal norms? (How) are they integrated or fragmented? What happens at the boundaries of legal systems? On the normative front, it might also address the quality and legitimacy of governance at each level, including concerns about accountability, transparency, justness or effectiveness of multiple legal institutions and duplication of official functions. These problems of legality and governance/legitimacy are at the forefront of much recent work in legal pluralism, and they are important problems,[1] but my target here is a third basic puzzle: the question of whether, and if so under what conditions, all these levels of law can have legitimate authority.[2] I argue that, given all this plurality of legal institutions, rules, jurisdictions and officials, analytical jurisprudence must revisit prevailing accounts of the authority of law in order to engage in pluralist jurisprudence.

There are two obstacles to a pluralist theory of law. The first is to show that a plurality of legal orders is conceptually coherent and is therefore within the realm of philosophy of law. The second is to show that if plurality of law is relevant to legal philosophy, it is also at least interesting and perhaps even important. To help clear both obstacles, I offer an account of 'relative authority' in which legitimate authority – the justified normative power to change the reasons that apply to subjects – can be conditioned by interaction between multiple and sometimes conflicting authorities. There are two parts to the account. The first is a conception of authority as non-exclusive and non-supreme. This chapter will not say much about the conceptual plausibility of relative authority, because much of that that work is presented, I think persuasively, in Bas van der Vossen's chapter in this collection which shows that on both instrumental and substantive theories of legitimate authority, authority need not be exclusive or supreme. This concept of 'relative authority' can overcome the first obstacle by showing the possibility of interacting and overlapping, yet still authoritative, legal systems. To that work I add the second part of the account, which meets the second obstacle by offering a theory of legitimate authority in circumstances of such multiplicity, in which the relationship between the overlapping or interacting authorities is a condition of their legitimacy. This 'relativity condition' on the justification of authority suggests that plurality of authoritative legal orders is important for philosophy of law, and not just a matter of sociological curiosity. If my account of relative authority is plausible, it has implications for understanding the concept of law and the features of legal systems.

One caveat is needed. The full explanation and defence of the concept and the theory of relative authority must engage with the prevailing accounts of authority to a degree that cannot be presented in a single chapter. I will limit my discussion here to an engagement with Raz's leading 'service conception' of authority, which makes authority central to the explanation of law; however, in places, even that engagement is rendered in shorthand rather than presenting a full account of the impact of plurality upon Raz's theory.[3] This chapter should therefore be treated as a sketch of a path towards a pluralist theory of law with a pluralist account of authority at its centre, not the fully worked-out theory.

11.2 An opening for 'pluralist' jurisprudence

Theorists of legal pluralism have spent much energy trying to convince general jurisprudes that analytical and normative analyses of law should

include attention to law other than official state law (Michaels 2009). At its peak, the direct exchange included debates over whether different normative systems were 'legal'; analyses of the respective merits of different loci of law; and rich conceptual debates about the necessary features of law and legal systems. Both Hart and Kelsen directly considered the legality of non-state normative systems as part of their general theories of law.[4] Subsequent developments, however, have brought an intensification of debates within and between schools of jurisprudence which have largely squeezed plurality towards the margins of jurisprudential interest, or even into what Joseph Raz describes as 'sociological' enquiry which is outside the proper realm of jurisprudence (Raz 2009, pp. 104–5). Theories drawing upon sociology of law (e.g., Tamanaha 2001; 2008), legal anthropology (e.g., von Benda-Beckman; von Benda-Beckman and Griffiths 2009), and autopoiesis or systems theory (e.g., Teubner 1993) offer explanations of law that capture legal pluralism, but these are at the margins of the current anglophone jurisprudential canon, whose centre treats the facts of plurality of law to be jurisprudentially unimportant; and theories of legal pluralism to be either jurisprudentially incoherent, irrelevant or simply uninteresting (Twining 2007).[5]

Recent changes in practice and in theoretical interests suggest the end of that marginalisation. International law (both public and private) and regional legal systems (of which Europe is the most developed but not the only example) are now the low-hanging fruits of legal pluralism, and the need to make sense of their content, to give them concrete application and/or to challenge their normativity, places plurality back within the crossfires of doctrinal legal argument.

In turn, core questions in analytical jurisprudence have been reignited in a way which opens the door for pluralist jurisprudence. The most significant developments can be linked to three different themes. The first is a reinvigorated interest in the 'what is law' question, and why it matters (e.g., Shapiro 2010). The second change is a new set of questions about how we do jurisprudence, which inject methodological awareness into a field which had seemingly left such discipline behind (e.g., Halpin 2006). In particular, methodologies that advocate a naturalistic exploration of actual legal phenomena open the path to analysing the multiplicity and interaction of systems that exist in practice (e.g., Twining 2009, pp. 55–6). Third, projects to rethink jurisprudence are isolating what is really important and interesting about the subject, through reassessments of the often clichéd exchanges between key theorists or between traditions of natural law and positivism (and species

thereof) (e.g., Coleman 2007). These suggest a new structure to the subject which is no longer concerned with defending positions within jurisprudence, but in making sense of the practices which they explain and the concepts they use to explain them (Coleman 2010).

Although none of these changes aim at producing pluralist jurisprudence, they leave an opening for it to proceed. There is no reason to exclude the fact of plural legal systems – and, importantly, their interaction – from debates about the metaphysics of law; indeed, plurality must be acknowledged by those debates. Plurality of law challenges key features of law: its institutionality, the identity of legal systems, their relationships to other normative systems, and law's claim to authority. Yet these shifts which have made plurality relevant, and even fashionable, are also responsible for the second obstacle facing pluralist jurisprudence. If it is too obvious or uncontroversial to conceptualise multiple and interacting legal orders if we are all pluralists now; the risk is that 'pluralism ceases to be an interesting theory' (Barber 2006, p. 306). This second obstacle arises because legal pluralism has not taken shape as a fully worked-out theory of law; rather, it is presented as an ethos, a perspective, a narrative or particular experience of the way the legal world is (Koskenniemi 2007). Legal pluralism has thus been caught between poles: either it is a theory that is so thin as to be uninteresting, or it is a political project thinly disguised as an ontology.

That status is just beginning to change, with several recent works in general jurisprudence taking seriously the possibility that theories about the plurality of law might actually be interesting or even important within that field. Some make modest claims designed to show that plural legal orders are consistent with conventional approaches to jurisprudence and can be explained using existing tools from legal positivism (e.g., Barber 2006; Dickson 2008). Other works engage in detailed philosophical analyses of specific types of non-state law, including: international law (e.g., Besson 2009; Besson and Tasioulas 2010); European law (e.g., MacCormick 1999; Walker 2003); and customary law (e.g., Postema 2007). More broadly, William Twining insists upon the need to rethink general jurisprudence 'from a global perspective', in light of different levels of legal order (2009, p. 117). He challenges scholars of legal pluralism to produce better analytic and normative theories, and general jurisprudes to pay attention to the analytic and normative implications of legal pluralism. To date, the most substantial response to this challenge focuses upon the concept of legality (Culver and Giudice 2010). My own work takes up Twining's challenge but applies it to the concept of authority.

11.3 Relative authority

I argue that two central puzzles posed by plurality of law are to explain plurality of legitimate authority and the legitimacy of inter-authority relationships. Specifically, I focus on the plurality of authority that exists where there are two or more authorities in the same domain ('same-domain plurality'), or where two or more authorities with separate domains interact with one another ('interactive-domain plurality'). Same-domain plurality exists when more than one authority can issue binding directives for the same subjects in relation to the same field of activity. Examples include instances of concurrent jurisdictions between national and supranational judicial institutions. Interactive-domain plurality, in contrast, exists where the domains of the purported authorities are separate but come into contact, either through the interaction of their respective subjects or the interconnectedness of the activities they seek to regulate. For example, subjects engaged in cross-border commercial activities may require the interaction of authorities in order to pursue their plans or resolve cross-jurisdictional disputes that arise between them and subjects of another authority. Similarly, states that work together to combat transboundary problems have interactive domains with respect to such activities.

These phenomena cannot be explained by conventional jurisprudential wisdom, because even if we can conceptualise cross-border jurisdictions and decentralised legality, we have not explained how all this dispersal and fragmentation is consistent with law's authority. Furthermore, although we might look to constitutional rules to organise relationships between authorities integrated under common constitutions, accounts of legal authority have not adequately explained multiplicity and interactivity between legal orders that are not integrated or regulated by overarching rules or rulers.[6] The biggest problem is that, under conventional accounts of legitimate authority, and in particular Joseph Raz's 'normal justification' in which authority is legitimate when it can better help subjects conform to the reasons that apply to them, 'to exist, authorities must be knowable,' and their legitimacy must be able to be determined by a subject's reasonable enquiry (2009b, p. 148). The risk is that overlap and multiplicity between non-integrated authorities can create confusion over who has authority – confusion which can collapse authority altogether by causing subjects to have to revisit the first-order, content-dependent reasons that authority (on the Razian account) is supposed to preempt.

My argument is that to explain plurality of authority, we need an account which makes the existence of legitimate authority reasonably knowable in circumstances where there are multiple, non-integrated claimants. The concept of relative authority acknowledges that more than one authority can meet the normal justification for the same subjects; the relativity condition indicates how those overlapping authorities must interact. Continuing with the Razian normal justification, the account of relative authority makes it clear that where there are multiple legitimate authorities over the same subjects; that is, more than one could serve the subjects' conformity with reason, their legitimacy is conditional upon their interaction. In turn, subjects can rely upon these authorities coordinating or cooperating when this is necessary to their legitimacy; thus avoiding the problem of identifying which among multiple prima facie authorities is actually legitimate. The relativity condition explains how multiple authorities can have legitimate authority despite (and sometimes because of) their plurality, via an interaction which allows them to help subjects comply with the balance of reasons for action that applies to them.

The relativity condition itself does not fill in the details of which reasons apply to actual relationships between plural authorities. The precise character of those relationships, running along a spectrum from cooperation and coordination, through toleration, to conflict, will depend upon the balance of reasons. These are variable according to circumstances, but there are several basic categories:

1. When there is a common problem facing subjects of overlapping or shared authorities, the authorities must *cooperate* with each other.
2. When there is a coordination problem involving subjects of multiple or overlapping authorities, those authorities must *coordinate* their responses.
3. When there is conflict between obligations imposed by overlapping authorities upon the same subjects, each of which is independently legitimate for those subjects, the authorities must *tolerate* that conflict up to the point that it generates a problem along the lines of (1) or (2) above.

Both (1) and (2) are consistent with Raz's normal justification of authority, but they cannot be subsumed within it for two reasons: first, because the normal justification makes legitimate authority dependent upon a reasonably knowable answer to the question of who has authority; and second, because the normal justification is supposed to

be substantive – it does not condition legitimacy upon the procedures through which substantive outcomes are achieved (Hershovitz 2003). Relationships of tolerated conflict are slightly different because they impose a constraint on an authority's action; they preclude tactics by one legitimate authority to exclude or undermine another, because to do otherwise would interfere with that authority's capacity to help its subjects conform to reason.

This pluralist account replaces confusion or collapse or competition of authorities in the face of multiplicity, with either toleration, cooperation or coordination. It preserves the possibility of legitimate authority in situations of overlap or even conflict not for its own sake, but because this seems to be a better explanation of the contemporary practice of dispersed, pluralistic authority. Importantly, it also provides a device for evaluating the legitimacy of inter-authority relationships: whether they should cooperate or coordinate, whether conflicts between them should be tolerated, or whether one ought to exclude another.

11.4 A pluralist theory of law

If my account of relative authority is plausible, it unsettles conventional wisdom about law's claims to authority and/or the authority that law has; while at the same time helping to explain some of the puzzles surrounding the interaction of legal systems and their claims to supremacy. The ideas about authority and supremacy are related, but I will explore separately how the conception of relative authority alters (a) law's (claim to) supremacy and (b) law's (claim to) authority. I then consider (c) what law must be like if it is to make these claims in good faith.

First, a general note about claiming and its significance for jurisprudential enquiry. The claims that law makes are often treated as central to theories about the nature of law, particularly when those claims are thought to be moral claims (Raz 2009, pp. 29–33; Gardner 2010). In analytical jurisprudence, the significance of any claims that law necessarily makes is that they enable us to theorise about what law must be like if it is to make those claims in good faith. Yet a claim to authority is not the same thing as having authority, so we can also engage in normative theorising about the conditions under which law's claims are true or justified, and use these to test any particular claims that are made. In both the analytical and the normative inquiries, the actual practice of claiming is not the target of the enquiry; it is, instead, the trigger for analysing whether law lives up to its claims, and what the making of those claims reveals about law itself.

11.4.1 Law's (claims to) supremacy

Raz suggests that our 'general knowledge about the law and human society' reveals that law makes a claim to supremacy, and he argues that this claim is one of the existence conditions for a municipal legal system (2009, pp. 118–20). The claim to supremacy takes two forms: (a) a claim to supremacy over non-legal systems, including an entitlement to regulate, exclude, or otherwise control their operation through recognition or incorporation of their norms; and (b) a claim to supremacy over other legal systems. The first claim seems straightforwardly coherent, although there are disputes about whether the claim is a necessary feature of law itself, or merely a contingent feature of legal systems in modern sovereign states (Marmor 2001, pp. 39–42). The second claim is more difficult; it is much less clear whether law's claim to supremacy includes a claim to supremacy over other systems of law. Raz thinks it does, and that 'since all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system' (2009, p. 119).

Both the necessary and the sovereignty-contingent views of the supremacy claim run counter to the phenomena of constitutional and legal pluralism, in which there are many prima facie legal systems, including some in sovereign states, which do not claim supremacy over all others, or which even claim subjection to others. This is an empirical objection; even if law claims supremacy over (for instance) the rules of voluntary associations or family life, it is simply not true that all prima facie legal systems claim supremacy over others. Historically, medieval legal systems were surrounded by others and did not claim supremacy over them, but the objection also holds true in contemporary practice (Marmor 2001, pp. 40–1). Even between state systems, claims to supremacy are not always clearly made. A state's legal system cannot exempt members of its subject-community from also being subject to any extra-territorial rules that other states enact – such as rules regulating cross-border commercial, criminal or tortious activity. The legal system of the 'home' state does not always claim supremacy over these other prescriptions, or even supremacy of jurisdiction, even though executive enforcement authorities in that state may elect not to engage in extraditions or other processes that would give effect to another state's law. Even when such enforcement is refused, all that is claimed is supremacy of enforcement authority, not supremacy of authority to prescribe or supreme jurisdiction. Furthermore, there are federal states and states with complex divisions of sovereignty – e.g.,

for indigenous groups – which do not straightforwardly have single legal systems claiming supremacy (Culver and Giudice 2010). If the supremacy claim is a necessary condition of being a legal system, we would have to either limit it to a claim about the enforcement of laws in a way that runs counter to the contemporary jurisprudential interest in normativity rather than sanction; or deny that any of these systems were legal systems, despite their meeting all other existence conditions and/or displaying other truistic features of legal systems.[7]

Although I think the basic truth of the empirical objection is important (indeed, it captures the very practice of plurality that the core of jurisprudence can no longer ignore), it is not entirely successful as a response to Raz's point. Raz accepts that claims to non-supremacy and multiplicity of legal systems can exist in fact; his point is not that no systems in fact acknowledge each other's claims to supremacy, but that, 'as a matter of law', they cannot (Raz 2009, p. 118). Although Raz does not elaborate an argument for this explanation, it may be linked to his monist conception of authority, in that (replicating his argument for exclusive legal positivism) a legal system cannot acknowledge another's supremacy because this would vitiate its authority by forcing the subject – in order to determine which legal system to obey – to revisit the reasons authority is supposed to preempt.

The empirical objection is not satisfactory unless it is accompanied by a conceptual account about law which denies that legal systems necessarily claim supremacy and/or which explains how different supremacy claims can be integrated and mutually recognised while upholding the authority of law. The account of relative authority can do both – if we can show that law's claim is to relative authority, not supreme authority, we also have a way of integrating competing claims to supremacy. We can avoid Raz's concern that legal systems cannot recognise the supremacy of another by substituting supremacy for relativity: even if a legal system cannot recognise another system's claim to supremacy, it can recognise the relativity of its own claim to the claims of others, and of their claims to its own. Furthermore, no claim to supreme authority over other legal systems could be justified wherever it turns out that legal authority is relative, and therefore no claim to supremacy could be made in good faith, and nothing would follow about the nature of law or legal systems from the fact that some systems actually make such a claim. In short, if we can show that under some conditions legal systems have relative and not supreme authority, then we deny that a claim to supremacy can be a necessary condition of the existence of legal systems.

11.4.2 Law's (claim to) authority

Much has been written about the coherence, contingency or necessity of law's claim to legitimate authority (e.g., Raz 1994; cf. Kramer 1999, pp. 78–112). We can set aside, momentarily, the dispute over the claim's necessity, because the modifications required by the concept of relative authority apply whether or not claiming authority is a necessary or merely common feature of legal systems, and they apply similarly to the claiming of authority and to its existence.

When there are multiple prima facie legitimate authorities in interacting or overlapping domains, and there is no outweighing reason to have just one singular authority, then those purported authorities can have only relative authority and must coordinate or cooperate or tolerate one another in order to be legitimate for their subjects. In these circumstances, law can still claim to possess legitimate authority, but that claim is to relative authority. A claim to relative authority is simply a claim to achieve legitimate authority through appropriate relationships with other authorities. It links the legitimacy of authority with its interdependence. The claim is really a subspecies of a claim to legitimate authority which just includes an indication about how that legitimacy is to be achieved. The relativised claim is a claim to change the moral reasons applying to the subject by working with others who share or also have this normative power, and whose cooperation or coordination is needed for the authority to be legitimate. It is important, however, that a claim to relative authority is not a claim to reduced authority, but a claim that acknowledges the conditionality of one's authority upon appropriate interaction with others. In this respect, it is a more credible claim which builds in conditions that the simple claim to legitimate authority leaves implicit, and is to be preferred to the more sweeping claims that, it turns out, cannot be sustained when facts support relativity.

Legal systems in situations of plurality do make claims to relative authority, and these are conceptually plausible when made in conjunction with recognising the interdependent authority claims of those other legal authorities with whom they must cooperate or coordinate. There are examples of such claims to relative authority among legal institutions at different levels of law. The most obvious involve claims to subsidiary or complementary jurisdiction, which can be seen as claims to relative authority in which one body's legal authority is conditional upon the non-action of another – a type of coordination of their authority. Other examples include arrangements of overlapping, concurrent, or shared jurisdiction, which occur not only within the

much-discussed setting of the European Union, but can also feature in self-government claims by groups within states and states' responses to those claims. Where such concurrency, complementarity or overlap of authority is expressly claimed, these are claims to relative authority.

I will leave open whether a claim to relative authority is a necessary feature of law. That would depend upon the further question of whether it would be conceptually impossible for law to exist in isolation from other instances of law. One might imagine a customary legal system of an isolated community whose members have no interaction with members of outside communities (or at least no interactions involving legal questions); which does not participate in any policy projects involving outside communities; and which applies only its own rules which are not in any way designed to replicate or be compatible with the rules of outside communities. Yet although such a monist account remains a conceptual possibility, it is practically implausible due to the dominance of the state as a political structure which overlays 'official' state law onto such customary legal systems, and in doing so creates plurality between the official and the customary systems while also (usually) triggering interaction with other states. To the extent that official law came to replace customary and/or religious laws in the Westphalian era, one might think the monist picture was restored, but if so, that monism was short-lived. It is arguable that in the post-Westphalian practice of law, plurality is always present to greater or lesser degrees, and therefore law can only make a credible claim to relative and not to supreme authority.

Thus, if Raz is right and it is of the nature of law that it claims legitimate authority, then in situations of plurality we must reinterpret this claim as a relative claim – one which is made in interaction with a host of other legal systems. Even if Raz is wrong and law does not necessarily claim any authority, let alone relative authority, we can still ask about the character of claims to authority which law does make, and from those claims we can learn about important contingent features of law. As Giudice's chapter in this collection suggests, the philosophy of law can gain much from sensitivity to contingent features of law. If a claim to (relative) authority is a contingent and not a necessary feature of law, it is nevertheless a contingency of the kind that analytical jurisprudence needs to be responsive to.

11.4.3 The features of relatively authoritative law

A theory of law would be incomplete if it failed to explain the features of law that the claim to relative authority entails, whether they are

necessary or merely contingent. The key feature is a capacity to be responsive to other instances of law, not merely open to them (cf. Raz 2009a, p. 119). More precisely, legal systems, through the officials who make claims and act on law's behalf, must be capable of being responsive to one another.

Here we can distinguish two possible types of responsiveness between legal systems – 'associations' and 'interactions' – which can both satisfy the demands of legitimate relative authority, though in different ways. Elsewhere I have discussed unilateral 'association', involving action from only one system which incorporates rules from another system, or elects to apply the rules of the other system in order to achieve coordinated, compatible or harmonised outcomes (Roughan 2009). Incorporation involves a unilateral outreach by one system, of which the target system need not even be aware, and involves borrowing content from another system by replicating it in one's own system. It does not necessarily involve acknowledging the authority of the system from which the content is borrowed, merely that its content is desirable. Similarly, giving direct effect to rules of a different legal system might involve recognition of its separate authority, but this separate authority is then subsumed under the control of the host legal system and, specifically, its law-applying institutions. Both kinds of associations between systems are unilateral, operating under the authority of just one of the systems, yet both are paths to securing authority in situations of relativity. Where reason is equally or incommensurably balanced between the options proposed by the two different systems, and there are reasons to coordinate their content, one system's unilateral decision to adopt, incorporate or directly apply the option chosen by the other has the effect of securing the authority of both. Relative authority makes each system's authority conditional on the conduct of the other authority, but this does not necessarily mean they need to cooperate to come up with a joint solution. They may simply need to be made compatible, and this can be achieved through the unilateral conduct of either system.

In contrast, 'interactions' involve multiple legal systems engaging in cooperative activity or dialogue which harmonises or makes compatible their respective content and its application, or which arranges their content and application to achieve some outcome to which they both contribute. Cooperation pursues this directly and entails joint mutual commitments; dialogue pursues it through mutual responsiveness with incremental adjustments that may be less overt.[8] Neither process requires strict harmonisation of laws, but it does require either

working out procedures to adjudicate those conflicts that need to be resolved, or otherwise finding ways to ensure that the rules of the overlapping/interacting systems are not so confusing or inconsistent for subjects that they cannot use them as reliable guides for their practical reasoning, planning and dispute resolution. This might mean arriving at rules that are consistent or compatible, or at least applying those rules in ways that are compatible. In this the roles of courts and legislatures are both important. For instance, where courts in two systems are aware of a potential conflict between their respective laws, and aware of the importance of coming to compatible decisions, then they may engage in a dialogical coordination by rendering compatible decisions. Similarly, legislatures can enact laws which give effect to cooperative bilateral or multilateral commitments, or which make dialogical gestures aimed at encouraging another system's law-making institutions to do likewise and eventually achieve compatibility (Berman 2009).

In both the unilateral and multilateral forms of association, legal systems are not simply open to other systems; they are responsive to them. When different systems have relative rather than independent authority, this responsiveness is crucial to their having authority at all.

11.5 Relative legal authority in normative and explanatory analyses

It should be clear from the foregoing that there are normative implications of a theory of relative legal authority, and that the account of relative authority is parasitic upon a normative defence of plurality of law. Normative arguments determine when plurality of law and the interaction of relative authorities might be valuable, or when the need for singular or hierarchically centralised law outweighs any value in plurality. Arguments about plurality also indicate whether justified relationships between authorities must be hierarchical or heterarchical;[9] and whether, on some matters, degrees of difference and even conflict can remain without upsetting the legitimacy of authority.

The advantages and disadvantages of the plurality of law have been analysed in detail elsewhere (e.g., Krisch 2009). Suggested advantages sometimes tie the presence of multiple, fragmented and disordered systems of law to principles of political pluralism (e.g., Rosenfeld 2008; Berman 2007; de Sousa Santos 2002), arguing that a plurality of systems of law can give effect to competition or simple coexistence between different eligible conceptions of the good, between the practices and

beliefs of different communities, and even between different kinds of affiliations that individuals share. At other times, plurality is linked to a particular value, such as individual autonomy or community self-determination (McWhinney 2002). Others argue for plurality as a type of check and balance on power, in which one level of law can keep other levels in check (Cover 1981).

The arguments on the other side challenge the consistency of plurality with the formal and substantive versions of the rule of law. The formal objection is concerned with the ability of law to guide conduct in a way that treats subjects with respect; that is, by meeting the formal requirements of the rule of law which enable subjects to plan their lives around clear, consistent and coherent rules. The substantive objection is concerned with the substantive principle of equality, and the need to ensure that a plurality of legal orders does not mean that some members of a community are worse off than others because of their subjection to different rules (Waldron 2010).

Debates about plurality are sometimes framed as a contest between singularity or centrality of legal orders on the one hand, and plurality on the other. Yet that framing is misleading, for neither monist nor pluralist arrangements are necessarily better at serving their supposedly respective values (Krisch 2009). Pluralist arrangements might in fact be stable, certain and predictable, yet fail to really give effect to values of pluralism or self-determination or, worse, they might magnify the risk of oppression. On the other hand, monist arrangements might be changeable or incoherent or unevenly applied and so lack the virtues associated with the rule of law, even while having content that supports political pluralism or self-determination in forms that are more successful than simply having multiple legal systems. The response to Waldron's (2010) worry – that under a plurality of orders, like cases may not be treated alike – is not the obvious retort that there is sometimes good reason to treat like cases differently, because the real concern is the case where not only is there no good reason to treat like cases differently, but doing so is actually contrary to reason. This concern targets the kind of plurality in which minority, ethnic or religious communities have their own legal standards which are contrary to reason in a way that outweighs any value associated with that community's self-determination.[10] Yet this is no objection to plurality of law per se; rather, it is an objection to legal standards that have such immoral content. The moral problem is not that some people are treated differently than their neighbours under different legal systems, but that some people are treated badly.

The theory of relative legal authority reframes this debate by linking plurality with the normative account of legitimate authority. It shows that both the value and the danger of plurality are instrumental, tied to its success or failure in securing legitimate authority. We make any values that plurality can carry dependent upon the success of pluralist arrangements in having authority that is effective and also justified. Plurality itself is justified only where the justification of authority requires or permits it. On this view, any pluralist arrangements which fail to serve their subjects due to inconsistencies or any other formal defect are not authoritative, but the defect is in their authority, not in plurality itself.

The theory of relative authority also makes it clear that such legal orders whose content is, independently, contrary to reason cannot be contenders for sharing in legitimate authority. To have authority, they must be capable of meeting the normal justification for authority, conditional upon their appropriate interactions with other legal orders similarly qualified. Thus, a legal order which instantiates requirements contrary to reason cannot be prima facie authoritative, and even if its officials do cooperate or coordinate with authoritative legal orders, that interaction will not make them authoritative unless they actually remove those rules that are contrary to reason. As a matter of authority, there is no relative authority from the outset because there is only one legitimate authority in play. Thus we can isolate the true location of the value and danger of plurality, and demonstrate that the concerns about the consistency of plurality with the rule of law are no greater than they would be for any singular legal order.

The theory of relative authority also indicates how any defects of plurality in securing the formal rule of law can be overcome. The requirements of relative authority impose a burden on legal actors in pluralist arrangements to cooperate or coordinate to achieve authority that can serve subjects and avoid the harms caused by instability, opacity or unevenness. It is the responsibility of the authorities to avoid placing their joint or interactive subjects in situations of problematic practical conflict, uncertainty, or confusion about their legal rights and obligations. To succeed *qua* authorities, legal officials (on behalf of their systems) must be responsive to other systems with whom they share subjects or domains of activity, and if they are not, in respect of problems which need an authority to resolve them, the legal officials and legal systems lack legitimate authority.

Finally, the theory of relative authority establishes grounds for evaluating the interactions of legal officials with one another. Relative

authorities which fail to realise their authority through cooperation or coordination can rightly be criticised. When they do, that is cause for celebration. For instance, we can identify dialogical relationships between the European Court of Justice (ECJ) and national courts which have already settled some areas of overlapping authority through devices of deference or consistent interpretation. Similarly, some practices of judicial notice of foreign law can be seen as moves to realise relative authority. The role of foreign legal norms in judicial reasoning will often be driven by courts simply wanting to learn from each other's solutions, but sometimes a system's legal content will need to be aligned with foreign law in order to meet the substantive conditions of legitimate authority, including the relativity condition. We can, therefore, use the relative authority theory as a tool for analysing when such alignments are required, not merely desirable, and as a way to respond to arguments that the practice is unprincipled (e.g., Waldron 2005). Instead of searching for a theory about the authority or influence of foreign law, a theory of relative authority offers an explanation of the authority of laws and legal institutions, regardless of their location.

11.6 Conclusion

It should not be surprising that many legal officials are, on behalf of their systems, already engaged in realising their legitimate authority in the way that is required by the relativity condition. After all, the account of relative authority is simply designed to explain – using the tools of legal philosophy and in a way that shows its importance for that field – the phenomenon of plurality that has become a staple feature of the contemporary practice of law. My account offers one piece of the explanation that a new 'pluralist' jurisprudence must give for the facts of overlapping and interactive legal systems; and one response to the challenge of integrating theories of legal pluralism into the jurisprudential canon. In doing so, it offers a step towards a pluralist theory of law.

Notes

The account here draws upon arguments that are developed in full in my as-yet unpublished doctoral thesis. I am grateful to my supervision committee – Jules Coleman, Bruce Ackerman and Daniel Markovits – for feedback on drafts of the larger thesis project, as well as Bas van der Vossen and Maksymilian Del Mar for their comments on earlier versions of this chapter. All errors are my own.

1. For example, see the extensive literature on fragmentation and constitutionalism in international law; including the work produced by the International Law Commission on this topic. International legal theory has also produced rich analyses of governance and institutional legitimacy, developing the work begun by Kingsbury, Krisch and Stewart (2005).
2. Following Buchanan (2003, pp. 233–62), political authority can be distinguished from political legitimacy. Authority is the more demanding characteristic, but there are other questions of legitimacy (understood as the moral justification of political power) that we can ask of governing institutions.
3. In fact I think the phenomena of plurality and inter-authority relationships ultimately show that Raz's account is not a complete justification for public authority, and the necessity of a complementary procedural justification along the lines suggested by Hershovitz (2003; 2010). That argument cannot be presented here; and so I will limit the explanation of relative authority to the conditions of substantive legitimacy as Raz has explained them.
4. For Hart, the curiosities of international law were treated as a test case for application of his general theory of legal systems, and although international law was famously described as being a set of rules and not a legal system, his whole account leaves open the possibility of plurality of legal systems (Hart 1994, pp. 213–37). Kelsen's conclusions, in contrast, were monist. He denied the possibility of multiple legal systems over the same actors and argued that international and state law could, logically, only be conceived as parts of a single legal order grounded on a single grundnorm (Kelsen 1945, pp. 325–88).
5. Apart from work which directly takes up or challenges Hart's or Kelsen's conclusions about international law, analytical jurisprudence has concentrated on theorising about state law (see, e.g., Raz 2009a pp. 104–5). Exceptions to this trend include analyses of customary (international) law (e.g., Finnis 1980, pp. 238–45; Fuller 1982, pp. 211–46).
6. Waldron (2003) argues that even the more straightforward question of inter-authority relationships between officials within the same constitutional system cannot be explained solely by constitutional rules.
7. It is possible to treat law's claim to supremacy as a claim to a monopoly on justified coercion within a particular community, rather than a claim about authority. Questions about justified coercion are top of the list of other questions that are implicated by discussions of plurality but cannot be explored here. These include questioning the possibility of overlapping communities with competing claims to coercive monopolies; and the possibility that more than one claim could be equally or incommensurably justifiable within a single community.
8. On the subject of dialogue between legal institutions, particularly courts, there is an extensive literature which includes extra-judicial publications from leading judges (see, e.g., Kirby 2008; Higgins 2006). Dialogue can include both formal communications in the form of judgments, and the informal dialogues which occur through transnational judicial networks.
9. A heterarchy is a structure of governance in which there are multiple, overlapping sites of authority.
10. This position is consistent with moral pluralism, though it rejects moral relativism. It rests upon a commitment to the universality of moral truth,

alongside what Raz has called a 'new sensitivity to the facts which establish this moral truth' (Raz 1998, p. 195), and it allows that different reasons can apply to members of different communities, without giving up the objectivity of moral reasons.

References

Barber, N. W. (2006). 'Legal Pluralism and the European Union', *European Law Journal,* 12(3), 306–29.

Berman, P. S. (2009). 'The New Legal Pluralism', *Annual Review of Law and Social Science,* 5, 225–42.

Berman, P. S. (2007). 'Global Legal Pluralism', *Southern California Law Review*, 80, 1155–237.

Besson, S. (2009). 'The Authority of International Law – Lifting the State Veil', *Sydney Law Review,* 31(3), 343–80.

Besson, S. and J. Tasioulas (eds) (2010). *The Philosophy of International Law* (Oxford: Oxford University Press).

Buchanan, A. (2003). *Justice, Legitimacy and Self-Determination* (Oxford: Oxford University Press).

Coleman, J. L. (2007). 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence', *Oxford Journal of Legal Studies*, 27(4), 581–608.

Coleman, J. L. (2010). 'The Architecture of Jurisprudence: Part I' (4 July 2010). Available at SSRN: http://ssrn.com/abstract=1634667.

Cover, R. (1981). 'The Uses of Jurisdictional Redundancy', *William & Mary Law Review*, 22, 639–82.

Culver, K. C. and M. Giudice (2010). *Legality's Borders: An Essay In General Jurisprudence* (Oxford; Oxford University Press).

Dickson, J. (2008). 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union', *Problema*, 2, 9–50.

Finnis, J. (1980). *Natural Law and Natural Rights* (Oxford: Oxford University Press).

Fuller, L. L. (1982). 'Human Interaction and the Law', in K. Winston (ed.). *Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham, North Carolina: Duke University Press).

Gardner, J. (2010). 'How Law Claims, What Law Claims', in M. Klatt (ed.). *Institutional Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press).

Hart, H. L. A. (1994). *The Concept of Law*, 2nd edn (Oxford: Clarendon Press).

Halpin, A. (2006). 'The Methodology of Jurisprudence: Thirty Years Off the Point', *Canadian Journal of Law and Jurisprudence*, 19, 67–105.

Hershovitz, S. (2003). 'Legitimacy, Democracy, and Razian Authority', *Legal Theory*, 9, 201–20.

Hershovitz, S. (2010). 'The Role of Authority' (May 25, 2010). *Philosophers' Imprint*, forthcoming; University of Michigan Public Law Working Paper No. 201. Available at SSRN: http://ssrn.com/abstract=1615675.

Higgins, R. (2006). 'A Babel of Judicial Voices? Ruminations from the Bench', *International and Comparative Law Quarterly*, 55, 791–804.

Kelsen, H. (1945). *General Theory of Law and the State* (Cambridge, Mass: Harvard University Press).
Kirby, M. (2008). 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges', *Melbourne Journal of International Law*, 9(1), 171–89.
Kingsbury, B., N. Krisch, and R. N. Stewart. (2005). 'The Emergence of Global Administrative Law,' *Law and Contemporary Problems*, 68(3–4), 15–61.
Krisch, N. (2009) 'The Case for Pluralism in Postnational Law,' *LSE Law, Society and Economy Working Papers* 12/2009.
Koskenniemi, M. (2007). 'The Fate of Public International Law: between Technique and Politics', *Modern Law Review*, 70(1), 1–30.
Kramer, M. (1999). *In Defense of Legal Positivism* (Oxford: Oxford University Press).
MacCormick, N. (1999). *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press).
Marmor, A. (2001). *Positive Law and Objective Values* (Oxford: Oxford University Press).
McWhinney, E. (2002). 'Self-determination of Peoples and Plural-ethnic States: Secession and State Succession and the Alternative, Federal Option', *Recueil des Cours*, 294, 171–263.
Michaels, R. (2009). 'Global Legal Pluralism', *Annual Review of Law and Social Science*, 5, 243–62.
Postema, G. (2007). 'Custom in International Law: A Normative Practice Account', in J. Murphy and A. Perreau-Saussine (eds). *The Nature of Customary law: Legal, Historical and Philosophical Perspectives* (Cambridge: Cambridge University Press).
Raz, J. (1994). 'Authority, Law, and Morality', in *Ethics in the Public Domain* (Oxford: Clarendon Press).
Raz, J. (1998). 'Multiculturalism', *Ratio Juris*, 11, 193–205.
Raz, J. (2009a). *The Authority of Law*, 2nd edn (Oxford: Oxford University Press)
Raz, J. (2009b). *Between Authority and Interpretation* (Oxford: Oxford University Press).
Rosenfeld, M. (2008). 'Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism', *International Journal of Constitutional Law*, 6(3–4), 415–55.
Roughan, N. (2009). 'The Association Of State And Indigenous Law: A Case Study in "Legal Association"', *University of Toronto Law Journal*, 59(2), 135–78.
Shapiro, S. J. (2010). 'What is Law (and Why Should We Care)?', Paper delivered at 1st Conference on Philosophy of Law, Neutrality and Theory of Law, Girona, 20–2 May 2010, and forthcoming in Shapiro, S. J. (2010). *Legality* (Cambridge, Mass: Harvard University Press).
de Sousa Santos, B. (2002). *Toward a New Legal Common Sense*, 2nd edn (London: Butterworths).
Tamanaha, B. Z. (2008). 'Understanding Legal Pluralism: Past to Present, Local to Global,' *Sydney Law Review*, 30, 375–411.
Tamanaha, B. Z. (2001). *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press).
Teubner, G. (1993). *Law as an Autopoietic System* (London: Blackwell).
Twining, W. (2007). 'General Jurisprudence', *University of Miami International & Comparative Law Review*, 15, 1–59.

Twining, W. (2009). *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press).

Von Benda-Beckman, F., K. von Benda-Beckmann, A. Griffiths (eds) (2009). *Spatializing Law: An Anthropological Geography of Law in Society* (Aldershot: Ashgate).

Waldron, J. (2003). 'Authority for Officials', in L. H. Meyer, S. L. Paulson and T. W. Pogge (eds). *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press), 45–70.

Waldron, J. (2005). 'Foreign Law and the Modern Ius Gentium', *Harvard Law Review*, 119, 129–47.

Waldron, J. (2010). 'Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's', in P. Cane (ed.). *The Hart-Fuller Debate in the 21st Century* (Oxford: Hart Publishing), 135–56.

Walker, N. (2003). *Sovereignty in Transition* (Oxford: Hart Publishing).

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