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How free is free? Testamentary Freedom and the Battle between 'Family' and 'Property'

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I. Testamentary freedom in the common law

In the late 17th century, the great English philosopher John Locke thought about freedom and what it meant in the context of ideas of property. He mused that:

> Freedom is not, as we are told, a liberty for every man to do what he lists ... but a Liberty to dispose and order, as he lists, his person, Actions, Possessions and his whole Property, within the Allowance of those laws under which he is; and therein not subject to the arbitrary will of another, but freely to follow his own.[1]

Locke's idea of freedom was one within a particular context – 'within the allowance' of laws. So what, then, was this 'allowance' within the testamentary domain? And how far did Locke, and his successors in legal philosophy, guide our present thinking? In this article I seek to provide some answers to these questions.

My interest in such issues is a long-standing one. It informed the subject of my doctoral thesis where I grappled with the idea of testamentary freedom as essentially reflecting a balance – between ideas of family and

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† President, Australian Law Reform Commission, Professor of Law Macquarie University (on leave for the duration of my appointment as Commissioner). This paper draws upon my doctoral work (PhD, UNSW, 1994), a number of articles in which testamentary freedom has been a recurring theme (some written under my former name of 'Atherton'), and a presentation I gave at Macquarie Law school in November 2008 in the series, 'Limiting Leviathan: Law and Liberty' and at the TC Beirne Faculty of Law, University of Queensland in February 2009. The views in this article are my own and not the views of the Australian Law Reform Commission.

1 P Laslett (ed), *John Locke – Two Treatises of Government*, (2nd ed, 1967), ch VI [57].

ideas of property.[2] What I found was that the degree of 'freedom' depended on how much weight was on either side of the scales; and that the scales have never reached a point of equilibrium, often swinging wildly as different forces and tensions are brought into play.

To see this in its barest of philosophical bones, we need to go back to Locke's time and the origins of contemporary thinking about property – and wills.[3] Freedom in will making embodied a particular way of thinking about property in the common law and was bound up in a shift, identified by Professor Ronald Chester, 'from feudal to individual conceptions of property in Western society'.[4] Locke marked one point on this intellectual journey. The earlier medieval rules were quite a way away from the hearty individual imagined by Locke and allowed only limited testamentary powers. Inheritance of land was instead constrained by primogeniture – the law of descent of realty to the heir – and personalty was distributed according to schemes of fixed shares – 'reasonable parts' – for the widow and children, a system that is still reflected in civilian tradition.[5]

The concept of 'testamentary freedom' or 'liberty of testation' was propelled by the same philosophical discourse that led to the ascendancy of concepts of freedom of contract and laissez-faire economics and was part of the 'liberty to dispose … as he lists' in Locke's thinking. Each expressed the idea of freedom *from* state control in favour of the power and choice of the individual.[6] Locke was the English champion of the shift towards individual rights of property away from control of the King and feudal property structures. His arguments were a justification of the victory of

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2 R Atherton, '"Family" and "Property": A History of Testamentary Freedom in New South Wales with particular reference to Widows and Children' (PhD Thesis, University of New South Wales, 1994).

3 Locke (1632–1704) was an adherent of the natural law view of property. His justification of property lay in the principle of labour, that a person who 'removed something from the state of Nature' and 'mixed it with his labour' was justified in retaining it: Locke, above n 1, ch V, 'Of Property' [27].

4 R Chester, *Inheritance, Wealth and Society* (1982) 11.

5 See, eg, G Gross, 'The Medieval Law of Intestacy' (1904–6) 18 *Harvard Law Review* 120; Sir W Holdsworth, *History of English Law* vol III, 550–63.

6 The doctrine of economic freedom, encapsulated in the concepts of laissez-faire and 'freedom of contract', is seen best in the writings of the English Classical economists, such as Adam Smith (1723–1790) and David Ricardo (1772–1823): see, eg, the excellent discussion in PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979). This period in the development of liberal ideas is considered, for example, by R Bellamy, 'TH Green and the Morality of Victorian Liberalism' in R Bellamy (ed), *Victorian Liberalism: Nineteenth Century Political Thought and Practice* (1990).

parliamentary supremacy over absolute monarchy in the 'Glorious Revolution' of 1688 that ousted the Roman Catholic James II in favour of his Protestant daughter, Mary, and her husband, the Dutch King William of Orange. And it was Locke's advocacy for the protection of citizens in their 'lives, liberties and estates',[7] in this context, that has formed the basis of modern discussions of freedom of property and individual rights.[8] 'The end of Law', he stated, was 'not to abolish or restrain, but to preserve and enlarge Freedom'.[9] But the idea of enlarging freedom, or liberty, was not, however, an unlimited concept, it sat within 'the allowance of laws'.

Testamentary freedom was a child of this intellectual tradition, and it reflected different aspects depending on the particular lens of the viewer. When viewed through a property lens, the power of testation was seen as a natural extension of the rights of disposition of property *inter vivos*. John Stuart Mill, for example, considered that testamentary powers were 'one of the attributes of property' and that 'the ownership of a thing cannot be looked upon as complete without the power of bestowing it, at death or during life, at the owner's pleasure',[10] or 'as he lists' in Lockeian terms. It was an incentive to industry and the accumulation of wealth,[11] but it was also preferable to a system of fixed inheritance rights, which held no incentive to heirs to work and, therefore, could reduce the total wealth of a nation.[12] Subject only to rules that governed the validity of trusts (and various qualifications developed ostensibly on 'public policy' grounds), the owner's post-mortem powers could reach down generations through the power of the 'dead hand'.[13] It was not, however, an unlimited power. It sat, after all, within 'the Allowance of those laws under which he [the testator] is', as Locke said.

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7 W Hamilton, 'Property – According to Locke' (1932) 41 *Yale Law Journal* 864, 868 n 6 notes the various forms in which this phrase appeared in Locke's work.

8 CB Macpherson analyses Locke's debt to the work of Thomas Hobbes (1588–1679): CB Macpherson, *The Political Theory of Possessive Individualism – Hobbes to Locke* (1962).

9 Locke, above n 1, ch VI, 'Of Paternal Power' [57].

10 JS Mill, *Principles of Political Economy* (1848), Bk II, ch 2 [4].

11 H Sidgwick, *The Elements of Politics* (1897), ch VII, 'Inheritance'; J Wedgwood, *The Economics of Inheritance* (1939) (first published 1929), 200–201.

12 Wedgwood, above n 11, 194; HJ Laski, *The Grammar of Politics* (1925), 528; H Dalton, *Some Aspects of The Inequality of Incomes in Modern Communities* (1929) ch VII, 'Effects of the Non-Fiscal Law', especially s 4, 301.

13 See, eg, LM Simes, *Public Policy and the Dead Hand* (1955); Jill E Martin (ed), *Hanbury & Martin—Modern Equity* (17th ed, 2005) ch 13.

However, when viewed through a family lens, testamentary freedom reflected other manifestations of the discourse on liberty. Locke, for example, located the power of testation as 'a part of Paternal Jurisdiction'.[14] This was not a new idea. Even in the *Statute of Wills* 1540 (32 H VIII c 1), the power of devise was described as a power for making provision 'to and for the advauncement of his wife, preferment of his children, and payment of his debtes, or otherwise at his will and pleasure'. 'Preferring', or choosing, among his children, provided, as Locke later argued, 'a tye on the Obedience of his Children' – a power men had 'to bestow their Estates on those, who please them best'.[15] Even though the father's estate was considered as 'the Expectation and Inheritance of the Children ordinarily in certain proportions' (like the approach in civil law systems), it was the father's power 'to bestow it with a more sparing or liberal hand according as the Behaviour of this or that child hath comported with his Will and Humour'.[16] 'At his will and pleasure', as the *Statute of Wills* put it; 'as he lists', to Locke. Through the 'hopes of an Estate' the father secured their obedience to his will.[17]

In the late 18th–early 19th century, Jeremy Bentham, like Locke, saw the father's testamentary power as providing an incentive to children. Bentham described it as a power to reward 'dutiful and meritorious conduct' and as 'an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of their families'.[18] In other words, it was a power to reward or punish. In this way the power of testation was conceptualised both as an aspect of individual fulfilment (to the property owner) – 'for the good of him who commands';[19] and an instrument of social control (by the property owner) – 'the preferment of his children'; 'to do as he lists'. So, as William Blackstone had written in the century before Bentham, testamentary freedom was valued as a 'principle of liberty' and as a power of 'peculiar propriety',[20] won by the gradual stripping away of the medieval restraints on a man's testamentary powers. After the French Revolution of 1789 these views, if

14 Locke, above n 1, ch VI, 'Of Paternal Power' [72].

15 Ibid.

16 Id.

17 Id.

18 J Bentham, 'Principles of the Civil Code' in *The Works of Jeremy Bentham – Published under the supervision of his executor John Bowring* (1843).

19 Ibid Pt II, ch 5, 337. Although Bentham expressed some concern that 'in making the father a magistrate we must take care not to make him a tyrant' (ibid), he considered that fathers needed such a power not only for their own good, but for the good of the community in preserving social order.

20 W Blackstone, *Commentaries on the Laws of England* (1765–69), vol I, 437–8.

anything, hardened in defence of the common law's freedom, over the civilian system of 'forced' shares.

The freedom of testation thus established was confirmed as the rule in succession law by section 3 of the *Wills Act 1837* (UK) which formed the basis of the Wills Acts throughout Australia and remains the foundation of the modern law. Behind this expansion of liberty was a belief that it would achieve a better balance among family members and others than could be achieved through fixed rules of law. The value of that freedom is seen in one of the classic statements on testamentary capacity – that defining prerequisite for the exercise of testamentary powers – in the judgment of Cockburn CJ in *Banks v Goodfellow* (1870) 5 LR QB 549:

> Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given ... The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law.[21]

A power to give by will was allowed; but it was not without consequence. It was circumscribed by the 'moral responsibility' referred to by Cockburn CJ in *Banks v Goodfellow*: to provide for the maintenance, education and advancement in life of children; and to adjudicate among family members according to their virtue, or vice. Freedom, in this context, was not to exist in the abstract. It was located, philosophically, in a framework of moral responsibility, duty and obligation – 'for the advauncement of his wife' and 'the preferment of his children' in *Statute of Wills* terms. But the judgement of the 'worthiness' of the individual's claim, or 'moral right', was entrusted to the testator, on the basis that his judgement was more reliable overall than the concept of fixed shares of the civilian model. It was, in essence, an endorsement of the father's power to give, or to withhold, judging those around him worthy or unworthy, as the

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21 *Banks v Goodfellow* (1870) 5 LR QB 549, 563-565.

case may be. In this way, Cockburn CJ's statement is a natural summary of the liberal intellectual tradition of over two hundred years previously. As JJ Park, the author of a major treatise on the *Law of Dower,* wrote in 1819,

> Independence of mind, as well as the finer sensibilities, revolt from the idea of a stated compulsory appropriation of property in a case where moral duty, and the domestic affections, afford a surer pledge among the virtuous than positive institutions.[22]

Children may have *expected* something from their father's estate, but they were only entitled, in Mill's view, to expect maintenance and education to the extent of making them independent and self-reliant, to 'enable them to start with a fair chance of achieving by their own exertions a successful life',[23] but no more. This was the extent of the 'moral claim' of a child to any provision from a parent; and conversely, the 'moral duty' of the parent to satisfy it. However, if parents *wanted* to leave their children more than this, Mill considered that 'the means are afforded by the liberty of bequest':

> that they should have the power of showing marks of affection, of requiting services and sacrifices, and of bestowing their wealth according to their own preferences, or their own judgment of fitness.[24]

Should, however, the law go further and *limit* testamentary power, either to tip the balance more strongly on the family side of the scales, or for some other reason? Mill considered this 'an ulterior question of great importance'.[25] He saw property as 'only a means to an end, not itself the end', and recognised that the 'power of bequest may be so exercised as to conflict with the permanent interests of the human race', such as 'the mischiefs to society of … perpetuities'.[26] Mill therefore acknowledged that the right of bequest was 'among the privileges which might be limited or varied according to views of expediency'.[27] Hence, he supported the rule against perpetuities as an expedient qualification in the interests of encouraging the utilisation of property. While this was an example of the 'allowance of laws' imagined by Locke, it was 'the mischief' of perpetuities and not any entitlement of family that was in mind.

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22 JJ Park, *A Treatise on the Law of Dower* (1819) 3.
23 Mill, above n 10, ch 2, [3].
24 Id.
25 Ibid [4].
26 Id.
27 Ibid.

The power of testation – and the freedom inherent in it – was not seen therefore as an absolute power. The problem for theorists from Mill's time onwards, however, was to tackle the question of how far that power could, or should, be limited: where should the balance between 'family' and 'property' lie? But questions of curtailing the power of testation were thenceforth characterised as doing precisely that – 'impinging' upon the liberty of the testator. In the 18th and 19th century there were also significant inherent limitations on testamentary freedom – particularly in relation to married women.

II. Married women

The principle of liberty of which Blackstone wrote in the 18th century was largely the province of men; and the position of married women was circumscribed by an interlocking mesh of doctrine that accorded them little free action. A woman's husband incorporated her legal personality, and her status was defined by reference to her marriage to him. Such rules were constructed for her 'protection and benefit',[28] but amounted to a significant contradiction of the principle of liberty articulated by Blackstone and the liberal tradition of which he played a part. While testamentary freedom was a vindication of the liberty of property, the law regarding married women's property *denied* her liberty in the interests of the property itself.

In prior work I have looked, amongst other things, at aspects of the so-called liberty of testation and their impact, particularly with respect to women.[29] For example, the scope of testamentary power was expanded through the movement that led to the abolition of dower – the right of the widow to a life interest in one-third of the realty of her husband that her children might inherit.[30] As dower limited in a significant respect the efficacy of wills, moves to abolish or limit the operation of it were moves which simultaneously facilitated testamentary freedom. Debate on dower was therefore also debate on the underlying issue of the liberty of an individual in regard to the disposition of property on death.

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28 Blackstone, above n 20, vol 1, 433.

29 Including: R Atherton, 'Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century NSW' (1988) 11(1) *University of New South Wales Law Journal* 133; R Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 – the Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago Law Review* 202; R Atherton, 'The Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW): Husband's Power v Widow's Right' (1991) 6 *Australian Journal of Law and Society* 97.

30 The detail of dower is described in RE Megarry and HWR Wade, *The Law of Real Property* (5th ed, 1984) 544–546.

Through a series of moves during the 19th century, dower was eventually abolished.[31] Although its abolition was a necessary part of achieving the security of the purchaser's interest in conveyancing – particularly in the shift to bringing land under Torrens title in Australia – it was at the cost of the interest of married women through which the widow's right of old was transformed into a mere expectation, that her husband would make provision for her in his will.

But a desire to abolish dower did not amount to an overt attack on the position of wives. There is a tacit acknowledgment of a duty to provide for her – as in the preamble to the *Statute of Wills* and the definition of capacity by Cockburn CJ in *Banks v Goodfellow* set out above. In debates at various stages on legislation that formally abolished dower, a consciousness of this obligation was also expressed. 'A man's wife is his first creditor', is how one summed it up.[32] Dower, however, was no longer the means for settling that debt. It may have been *expected* that he would 'give her preference over all others',[33] but it was an expectation without right. If that expectation were unfulfilled, a widow's only 'right' was defined by the difficult, costly and totally unpredictable prospect of a challenge to her husband's testamentary capacity.[34]

However, the end of the 19th century witnessed significant changes in thinking about women and, in turn, women's property rights. A movement gained strength in England, the United States, New Zealand and Australia that sought to reform the law regarding women and gave testamentary freedom a new characterisation – as a power to disinherit wives. Generated by the women's movement, this characterisation lay behind the introduction of Testator's Family Maintenance legislation – that permitted a court to override a will – starting first in New Zealand in 1900.[35]

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31 The story of the abolition of dower in New South Wales is told in R Atherton, 'Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century NSW' (1988) 11(1) *University of New South Wales Law Journal* 133; and AR Buck, '"A Blot on the Certificate": Dower and Women's Property rights in Colonial New South Wales', (1987) 4 *Australian Journal of Law and Society* 87.

32 Edmund Burton, Examiner of Titles, in evidence given to the Royal Commission appointed to inquire into the working of the Real Property Act in New South Wales in 1879: (1879–80), *V & P,* Legislative Assembly NSW, vol 5, 1021 at 1074, No 973.

33 Id.

34 R Atherton, 'Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century NSW' (1988) 11(1) *University of New South Wales Law Journal* 133.

35 R Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 –

III. Testator's Family Maintenance & Family Provision

The story of the introduction of this legislation, an interesting one of the power of personalities and the pragmatism of politics, is a significant site for a study of testamentary freedom. In the very public arena of Parliament, and the antecedent public debate, a campaign for the introduction of a law that in its substance overrode liberty reveals much of the rhetoric of testamentary freedom as a balance of juxtaposed ideas.

Testator's Family Maintenance legislation enabled a court to override a will – and, later, entitlements on intestacy – in favour of a defined group of family members. It created an avenue of challenge, principally for wives and children who had been omitted from, or poorly considered, in the wills of their husbands and fathers. Where the pattern of preceding centuries had been to increase the domain of testamentary freedom, this legislation sent a different message; but it was a limited one, intended as a modest inroad into the testamentary arena.[36] All the Australian jurisdictions adopted it in the early years of the 20th century, followed, in time, by the UK in 1938.[37]

The legislation included a two-stage process for evaluating applications of eligible persons: the 'jurisdictional stage' – an assessment of whether the applicant had been left without adequate provision for his or her proper maintenance, education and advancement in life; and the 'discretionary stage' – a determination of what provision ought to be made out of the estate for the applicant.[38] Orders under the Act were constrained by the discretion and interpreted within a fairly tight compass. The Court did not have power to re-write the will of the testator;[39] nor to provide simply for equal division amongst children.[40] It was to provide only for 'proper maintenance, education and advancement in life'. But the emphasis was, principally, upon 'maintenance' and its very language reflected the

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the Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago Law Review* 202.

36 See R Atherton, 'The Concept of Moral Duty in the Law of Family provision – A Gloss or Critical Understanding?' (1999) 5(1) *Australian Journal of Legal History* 5.

37 See R Croucher and P Vines, *Succession – Families, Property and Death – Text and Cases* (3rd ed, 2009) [15.1].

38 An affirmation of this approach can be found in *Singer v Berghouse [No 2]* (1994) 181 CLR 201, 208; *Vigolo v Bostin* (2005) 213 ALR 692 [5], [74]-[75], [112].

39 See, eg, *Pontifical Society for the Propagation of the Faith v Scales* (1961-62) 107 CLR 1, 19, (Dixon CJ).

40 See, eg, *Cooper v Dungan* (1976) 50 ALJR 539, 540, (Gibbs J).

intellectual tradition from which it grew. So, even though it acted as a counterweight upon the exercise of testamentary powers, its very language expressed the same concepts as Locke and Bentham, and summarised by Cockburn CJ in *Banks v Goodfellow.*

In the 1970s a major review of the legislation was undertaken by the New South Wales Law Reform Commission.[41] While the initial trigger may have been concern among the Attorneys-General as to the lack of uniformity among the States in regard to legislation in this area,[42] this was a time of attention to family issues more generally. It was, for example, the period when legislation giving equal rights to illegitimate children was introduced, in the form of *Children (Equality of Status) Acts*;[43] and it was a highpoint of reform of family law, signified principally in the introduction of the *Family Law Act 1975* (Cth). Testator's Family Maintenance legislation was a natural extension of law reform work that was looking at laws affecting property within families. Although outside the frontline of debate, the rhetoric reveals again the polarised conceptualisation – of family on the one hand, and property on the other – displayed in the earlier discourse on testamentary freedom. The definition of eligible persons and the property reach of the Act were to be intense points of engagement for the protagonists in the reform process.

The 'defenders of liberty' in this arena, if I may call them such, objected to both extensions as encroaching upon testamentary freedom. It had some serious champions – such as Professor R A Woodman of the University of Sydney and Justice F Hutley of the Supreme Court of New South Wales, both leading exponents of succession law, and household names for their expertise in the field.[44] They were approached by the Attorney General for specific comment on the proposals.[45] Their responses

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41 For a study on this work see R Croucher, 'Law Reform as Personalities, Politics and Pragmatics – The *Family Provision Act* 1982 (NSW): A Case Study' (2007) 11(1) *Legal History* 1.

42 Id.

43 Such as the *Children (Equality of Status) Act 1976* (NSW).

44 Hutley J had lectured at Sydney University Law School for many years prior to his appointment to the Supreme Court in 1972, specialising in Succession and Probate. He also published, together with Woodman, the first Australian Casebook on Succession in 1967, as well as writing many articles in the field and the book of *Australian Wills Precedents* in 1970. Details are noted in brief in *Who's Who in Australia* (1977). Woodman also wrote the text *Administration of Assets*, first published by the Law Book Co in 1964.

45 The responses are found in Attorney General, *Special Bundle of Papers – 'Family Provision'* (83/8585): the Hon Mr Justice Hutley, Court of Appeal, New South Wales to FJ Walker, Attorney General, 1 November 1978;

were not included in the Law Reform Commission's Report, as they were sought after its publication,[46] but their negative viewpoints on the Commission's proposals set an important context for the Attorney General in relation to the problem of implementing those proposals. They provide an off-stage voice, as it were – available only to the curious legal historian – but one clearly imbued with the idea of liberty.

Woodman remarked, despairingly, that 'it would be much simpler to abolish altogether the right to make a will and leave all the estate to be distributed on intestacy'.[47] He wanted the eligible applicants confined to spouse, children and grandchildren (including adopted and illegitimate), and those persons in regard to whom the deceased stood *in loco parentis*. Neither he nor Justice Hutley wanted to see the class of applicants enlarged,[48] fearing a significant increase in litigation – reflected in the preface to the third edition of Hutley J's co-authored *Cases and Materials on Succession*, published after the passage of the *Family Provision Act*:[49]

> The most radical complications [in the law of succession by the extension of claims against the estate] have been introduced in New South Wales. George Orwell's Big Brother could not have done better than the reformers who entitled the Act which gave claims against the estate to mistresses and lovers, 'The Family Provision Act 1982'. The Act might have been more properly entitled 'The Act to Promote the Wasting of Estates by Litigation and Lawyers Provision Act 1982'.

Professor RA Woodman, University of Sydney, Faculty of Law to FJ Walker, Attorney General, 3 October 1978.

46 Woodman to Attorney General, ibid.

47 Id.

48 Hutley to Attorney General, ibid. He commented, however, that the decision as whether to include applicants outside the 'legal family' was 'ultimately a political decision', and he was prepared to concede a small enlargement to include: (i) a mother or father of the deceased's ex-nuptial children; (ii) an applicant who had lived in a de facto relationship for at least five years, which relationship continued until death: p 2. The basis for including these categories he stated was that: 'in both these cases it could truly be said that the applicant could have a genuine expectation defeated by the failure of the deceased to provide for him or her in the will. They are also both cases in which those responsible for administering the deceased estate would have a real opportunity to check the relevant facts': p 3.

49 FC Hutley, RA Woodman and O Wood, *Cases and Materials on Succession* (3rd ed, 1984) O Wood and N Hutley (eds), v.

Hutley J's overriding objection was that the proposals were dealing with questions of 'abstract justice', without real consideration as to the effect on the administration of the estate.[50]

In defending the Law Reform Commission's work against such criticism, the Commissioner in charge of the reference, Denis Gressier, expressed another view of the 'balancing act':

> The fallacy in Professor Woodman's [argument] is that it fails to recognise what the [Law Reform Commission] have understood, namely that our society prizes both the power of the individual to dispose of what is his on his death, and a fair deal for those who were dependent on him. Neither is, nor is perceived to be absolute, so that it is absurd to suggest that if you widen the class you may as well abolish will-making. Widening the class would simply bring the law into greater (though never perfect) accord with social reality, which is messy in so far as people's relationships do not always coincide with the legal stamps put on them.[51]

The real argument was about the *degree* of interference in will-making. On the one hand, commentators like Woodman and Hutley were not prepared to accept further interference – they wanted the legislation defined to limited relationships. On the other hand, there were those, like Gressier and his fellow Commissioners, who were so prepared. Both groups, however, argued from the same starting point: that testamentary freedom should not, as the Law Reform Commission itself put it, be 'plundered'.[52] Both therefore agreed that the basis of family provision was the discretion of the willmaker, subject to the discretion of the court on application by designated family members. Although to the protagonists their points of divergence seemed considerable, in fact they were fundamentally in agreement as to the philosophical approach to the 'rights' of a willmaker and of family members in relation to property on death.

Similar tensions are evident in the context of considering when property which was not in the estate at all, because of some *inter vivos*

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50 Hutley to Attorney General, Attorney General, *Special Bundle of Papers – 'Family Provision'* (83/8585), 1.

51 'Memorandum: LRC's draft Family Provision Bill', New South Wales Law Reform Commission, *Testator's Family Maintenance Papers*, 5.

52 New South Wales Law Reform Commission, *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916* (1974), [6.72] 68.

action of the deceased (including a contract to dispose of property by will), could be clawed-back for purposes of a family provision order. As the Commission recognised:

> The rights involved are fundamental: on the one hand, the right of a person to arrange his affairs in his way and the right of a transferee of property to a secure title and, on the other hand, the right of a family not to be disinherited.[53]

This went much further in terms of the balancing of the scales than had been imagined previously and, conceptually, posed a much greater potential inroad upon notions of the rights of property. It had been suggested before – in 1922,[54] in the 1930s,[55]and again in 1951[56] – this time, however, it was tackled more thoroughly and the Commission's proposals led to the inclusion of 'notional estate' provisions in the *Family Provision Act 1982*.

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53 Ibid [11.3].

54 *Testator's Family Maintenance and Guardianship of Infants (Amendment) Bill 1920.* A copy of the Bill is contained in Attorney General, *Special Bundles – Testator's Family Maintenance*, Bundle 1.

55 Id.

56 'Fifty Years of Equity in New South Wales – a Short Survey', delivered 16 August, 1951 and reprinted in (1951) 25 *Australian Law Journal* 344, 345. McLelland was appointed to the Supreme Court of New South Wales in 1952 and to the Court of Appeal in 1966. He suggested including gifts made *inter vivos* within the reach of the provisions of the Act, based upon an analogy of notional assets for death duty and estate duty. It was such a model that was eventually included in the Act. Although the context in which McLelland's comments were made and his later position on the Court of Appeal gave his remarks added weight, and therefore could support an argument that he was influential in the adoption of the 'notional estate' model in the 1982 Act, this model was an obvious and readily-available precedent in New South Wales at the time and would have been considered whether McLelland suggested it or not.

The objectors were strident in their views. For example, the minority of the General Legal Committee of the Law Society warned that it was 'simply to put another nail in the testator's coffin' and to make the concept of testamentary freedom 'an absolute myth'.[57] Professor Woodman was of similar mind, that 'it represents a savage attack on the rights of a person'.[58]

In response, Gressier thought such views reflected 'a somewhat emotional commitment to individualistic rights of disposition, without any underlying analysis of objectives'. It 'beg[ged] the question'

> … of how to achieve fairness in the operation of an agreed (given we have had [Testator's Family Maintenance] legislation since 1916) legal rule that some interference with people's discretionary rights is socially and morally justifiable.[59]

Notwithstanding the resistance, the *Family Provision Act* was passed – and with a considerably expanded group of eligible applicants as well as claw-back provisions for property transactions. From the point of view of the deceased whose will and *inter vivos* transactions could now be affected by the 1982 Act – where they could *not* have been similarly affected under the 1916 Act – the changes in the 1982 Act could be described as 'sweeping', as the Attorney General remarked in introducing it.[60] But from the point of view of the family that was the apparent object of the '*Family* Provision Act', while the membership of the family was somewhat wider, the position of the family members was, in fact, little different from that under the 1916 Act.

The abolition of dower and the introduction and expansion of Family Provision legislation were two significant points of engagement for the idea of freedom in the succession context, both reflecting the juxtaposition of ideas of family and ideas of property. The later 20th and now 21st century

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57 Law Society of New South Wales, General Legal Committee, Submission, 18 December 1975, [17] 3. There was 'uniform agreement', however, about including in the deceased's estate the amount of any property given away by the deceased with the intention of evading the Act, if such gift was made within three years prior to the date of death, although it was recognised that subjective proof of intention would be difficult: ibid, [13]. Another view was that the provisions did not go far enough: ibid.

58 Woodman made one exception: he considered that a *donatio mortis causa* could be the subject matter of an application. A marginal note was made to Woodman's comments about property: 'OK for duty but not for family provision.'

59 Ibid.

60 NSWPD, vol 172, 3rd Series, Legislative Assembly, 2769.

have continued this story of tension, and similar rhetoric is displayed whenever shifts in the balance are considered.

IV. The pull of different forces

In the current narrative of the succession story we still see the dynamic of *'family versus property'*, but its expression is being played out not, simply, as an increase on the family side of the scales. On the other side, there is a pull towards greater liberty of the willmaker. It is seen in the loosening of formalities through the introduction of 'dispensing powers' in all jurisdictions in Australia, to overcome deficiencies in compliance with wills formalities; and in the introduction of provisions to 'fix' wills through rectification powers, to get closer to what the testator really wants to happen with his or her property on death.[61] Through such means there is greater scope for the operation of the traditional notion of 'testamentary freedom', by giving to the individual a broader power to express his or her views through wills, or things that are near enough to be good enough, through an expansion of the operation of testamentary instruments into what was formerly an impenetrable domain of highly technical rules as to validity – the 'foot or end of the will' itself filled chapters of textbooks. And, if the testator's intention is not wonderfully clear, there is an increasing role for powers of rectification to correct, or fathom, the testator's real intention.[62] All of this allows more freedom to the testator. But, in doing so, we see the continuing clash between 'individual' and 'family' in succession law. It is expressed *philosophically* through conflicting narratives on the purpose of, for instance, family provision legislation; it is expressed *practically* through legislation which expands powers to intrude upon testamentary territory for entirely opposite reasons.

Dispensing powers have transformed probate litigation. The principles are pretty well mapped out now – the putative testator must 'intend the document to constitute his or her will'. This is more than having testamentary intentions in general; more than knowing what you want in a will, and that a particular document (eg, instructions) is a record of it. It is wanting *the very document* to constitute a will. This has been the stumbling block in much litigation. Many cases have brought up documents in which it was very clear that what was written there represented plans for

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61 For a consideration of the varying provisions see Croucher and Vines, above n 37, [8.13]ff.

62 *Wills Act 1968* (ACT) s 12A(1); *Succession Act 2006* (NSW) s 27 (formerly *Wills, Probate and Administration Act 1898* (NSW) s 29A); *Wills Act 1936* (SA) s 25AA; *Wills Act 1992* (Tas) s 47; *Wills Act 1997* (Vic) s 31; *Wills Act 2000* (NT) s 31; *Succession Act 1981* (Qld) s 31. See Croucher and Vines, ibid, [10.13]ff.

testamentary disposition, but did not pass the statutory threshold. Why? Because without that *extra* level of certainty, that the person 'intended the document to constitute his or her will', the general intentions could remain precisely there, part of an ongoing *draft* of plans. People can be remarkably fickle in their will-making – and wills, after all, are the one last great act of control over one's children, the right to be respected and honoured in one's dotage through the power that testamentary freedom gives us. This sounds harsh, but it is the reality of the lives of many seniors. Such feelings are alive and living and well in contemporary probate practice as they were at the time people like Locke, Bentham and Mill wrote.[63]

V. How free is free?

The discussion and caselaw on the dispensing power and family provision show the tensions that remain in succession law today. And it is still very much a dialogue – or an argument – between two strongly competing ideas. It is expressed in a variety of ways: as 'family versus property'; as 'giving' or 'taking away'; even as saying that succession law is 'an attempt to express the family in terms of property'.[64] Throughout all the philosophical discussion about powers of testation and limits on them, as well as the practical manifestation of laws through cases in court, the standpoint is the same – the freedom of the testator, as property owner, to make decisions with respect to property both during lifetime and on death, sitting within an overall framework of moral obligation towards family, but to a large extent within his or her own domain. In contrast, the standpoint in the civil law was one in which the testator's power was framed – and limited – by legal obligation.

The civilian testator's family obligations – to a spouse and to children – qualified and defined the freedom of testamentary disposition.[65] The pivotal points were the same: 'family' and 'property'. But the balance between them, as expressed in the succession laws of the common law and civil law traditions, reflected different jurisprudential and philosophical developments. The language captured this in a very real sense. From the common law point of view the language was that of 'freedom': 'freedom of property', 'testamentary freedom'. From the civilian point of view the

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63 The children usually don't see it that way – hence family provision practice. From their side of the family equation there is a gut sense of 'entitlement', an almost dynastic assertion of right.

64 TFT Plucknett, *A Concise History of the Common Law* (5th ed, 1956) 711.

65 For this section of the paper I have drawn on my discussion on the comparison of common law and civil law ideas in this regard in R Croucher, 'Freedom of disposition versus forced heirship – property versus family' in A Kaplon (ed) *Trusts in Prime Jurisdictions* (2nd ed, 2006) 443.

language expressed obligation: 'community of property', 'forced heirship' – although the latter concept should perhaps be better described, as Professor Michael McAuley has commented, as 'lawful', rather than 'forced' heirship.[66] Indeed, even the language of 'forced' heirship was a common law viewpoint upon the civil law provision of *legitim*, or, in the French, *la réserve héréditaire* (*réserve*).

The English, and by extension the common law, tradition is one in which individualism has reigned. The civilian tradition, in contrast, may be described as one in which family reigns. Hence, from the viewpoint of a civil lawyer, rather than saying that the law of succession is 'an attempt to express the family in terms of property', it may be seen as 'an attempt to express property in terms of family'. Both traditions share the necessity for the juxtaposition of the two concepts or forces in relation to inheritance: the rights of an owner of property to designate its recipient, and the rights or claims of family members to receive the property of another family member.

As outlined in the first part of this article, the dominance of the individual in the inheritance decision-making arena in the common law was part of an intellectual tradition which, in common with the French, began in the shared abandonment of feudal traditions,[67] but, in *rejection* of French notions, the common law went much further down the pathway of the power of the individual as distinct from the family in English law. The 'freedom of testation', which became the hallmark of the law of succession in the common law, was an assertive concept. It embodied an implicit assumption that the freedom was an achievement; and that anything detracting from that freedom was, pejoratively, 'interference' with, or 'restriction' of, that freedom. Testamentary freedom was, in the inheritance context, the defining precept of the maxim that 'the Englishman's home is his castle'.[68] It marked the definition between the public and private spheres, setting the boundaries between those who were 'within' and those who were 'without' the castle walls. It also defined the extent of the 'Englishman's' sovereignty within his private territory. Testamentary freedom was at once a political as much as a social and economic expression.

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66 M McAuley, '*Pro Portione Legitima* – A Polemic in Defence of Children as Heirs-at-Law', in: *Papers of the International Academy of Estate and Trust Law – 2001* (2002) 249, 251.

67 Chester, above n 4, 11.

68 A proverbial, late sixteenth century saying: *Oxford Dictionary of Phrase and Fable* (2000) 337.

However underlying any reform or change of succession law, the recurring theme is the proper place of family provision in its wider context: namely, separate property or family property; and its relationship to provisions on dissolution of marriage. The common law expresses individualised ideas of property law, not a law of family property. Civilian systems start from the opposite position. Understanding this, and confronting the challenges and tensions in the existing law, provides the foundation upon which a proper evaluation of a system based on separate property and discretion as opposed to one based on fixed shares can be made. Ideas of 'testamentary freedom' and 'forced heirship' are in counterpoint. They are, indeed, expressions of property *versus* family.

There is also an important balancing between autonomy and dynasty – and this is played out most clearly in the family provision arena. Dynastic expectations are one thing; increasing longevity is another. If we live into our 90s – and many of *us* will – then dynastic expectations are really those of another century. The inheritance of our children is their early childhood – their education (from long day care, through to private school, for many; and then to university) – they get 'their inheritance' as part of their 'maintenance, education and advancement in life'. Parents don't die now in a way that produces an orderly fulfilment of dynastic expectations of children.

I once flippantly wrote about the assurance of old age being the ability to command the respect of our children through the power of the money that we had maintained into our elderly years.[69] This was written as a debating posture, from a quaintly 'feminist' viewpoint, but this is becoming the reality. If we earn our way into a comfortable middle age, and then do not quietly fade away within a decade or so of retiring, we will need our own savings to support our old age – and to enjoy it. The esteemed American academic, Professor John Langbein, has spoken of the fact that children now 'get their inheritance early' – largely through an investment by parents in their education. The liberal philosophers lauded the self-reliant individual and the value in the sweat of the brow as the true justification of property. The expression of that in our law is the right to some ease in our dotage and to let, indeed encourage, our children along their own road in life.[70] It is, indeed, the age of the self-funded retiree.

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69 'Testamentary Freedom: A Motherhood Statement', in *Papers of the International Academy of Estate and Trust Law—2001* (2002), 273–281.

70 Expressed for example by Reg Ansett and Andrew Lloyd Webber: *Ansett and Ansett v Moss* [2007] VSC 92; A Ramachandran, *Fortune's a phantom for Lloyd Webber's children* (2008) <http://www.smh.com.au/news/entertainment/people/composer-wont-give-

Succession law is one of the slower moving waterways of jurisprudence – but also one of the most fundamental and most significant philosophically in relation to property in families. In the 1970s the New South Wales Law Reform Commission raised the question whether some concept of fixed shares should be reintroduced. The Commission recognised that there was a broad choice to be made with respect to property in family on death – between discretionary powers as included in Family Provision legislation and fixed rights – as a basis for dealing with family property. They asked the simple question: 'What, in 1974, is the best way for the law to assure to the family of a deceased person adequate provision out of his estate?'[71] While it put the question squarely in the spotlight, it didn't remain there. In the 1977 Report it was dropped altogether. Why? 'We think that the time for proposing fundamental changes in [the laws of succession] has not yet come'.

That 'the time … has not yet come', expresses an adherence to testamentary freedom at least as a conceptual framework for ideas of family and ideas of property. Family provision legislation does not express the 'expectation' of inheritance of which Mill wrote, but it does give a place for it to be heard. And the 'allowance of laws' still has some role to play, but more as a counterweight. So, how free is free, in this context? Pretty much, but not absolutely so.

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his-kids-the-lot/2008
/10/07/1223145321219.html> at 7 October 2008.

71 New South Wales Law Reform Commission, *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916* (1974), [2.1, 19]; and see [3.14]–[3.15], [29]–[30].

A Theory of Earth Jurisprudence

PETER D BURDON[†]

I. Introduction

Although we are integral with the complex of life communities, we have never been willing to recognise this in law, economics, morality, education or in other areas of the human endeavour.[1]

Despite great variation, Western theories of law are predominately anthropocentric. This is specifically true for both natural law and legal positivism, which are concerned ultimately with human beings and human good. More specifically, legal theory is concerned with 'relations between individuals, between communities, between states and between elementary groupings themselves.'[2] Only in rare circumstances does legal theory consider the influence of nature, non-human animals, and place as relevant to human law.[3] The anthropocentric tenor or western law is expressed further by legal concepts such as private property[4] and the restriction of legal rights to human beings.[5] Indeed, the separation and hierarchical

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1 Thomas Berry, *The Dream of the Earth* (1982) 21.

2 Nicole Graham, *Lawscape: Property, Environment, Law* (2011) 15.

3 Alongside Earth Jurisprudence note the emerging discipline of law and geography. Law and geography analyses the role of place, space and nature in law. See further Nicholas Blomley, *Law, Space and the Geographies of Power* (1994); 'Landscapes of Property' (1998) 32(3) *Law and Society Review* 567; Nicholas Blomley, D Delaney and R Ford, *The Legal Geographies Reader*: *Law, Power and Space* (2001). See also, Tim Bonyhady, *Words for Country: Landscape and Language* (2002); and Lee Godden, 'Preserving Natural Heritage: Nature as Other' (1998) 22 *Melbourne University Law Review* 719.

4 See Peter Burdon, 'What is Good Land Use? From Rights to Responsibilities' (2010) 34(3) *University of Melbourne Law Review* 708.

5 See Prue Taylor, 'The Imperative of Responsibility in a Legal Context: Reconciling Responsibilities and Rights' in J Ronald Engel, Laura Westra, and Klaus Bosselmann (eds), *Democracy, Ecological Integrity and*

ordering of the human and non-human worlds constitutes the primary assumption from which most Western legal theory begins. Legal theorist Nicole Graham advances this point further, arguing: '[b]y imagining and juxtaposing objective and subjective thought, abstract rules and particular contexts and then by privileging objectivity and abstraction, legal positivism epitomises anthropocentric logic.'[6]

In response, this article introduces an emerging legal philosophy termed Earth Jurisprudence. In contrast to anthropocentric legal philosophies, Earth Jurisprudence represents an ecological theory of law. Central to Earth Jurisprudence is the principle of Earth community. This term refers specifically to two ideas. First that human beings exist as one interconnected part of a broader community that includes both living and nonliving entities. Further, the Earth is a subject and not a collection of objects that exist for human use and exploitation.[7] This principle does not deny the moral status of human beings or claim that all forms of non-human nature have moral equivalence with humanity.[8] Instead, it seeks to shift our focus away from hierarchies and asserts that all components of the environment have value. It takes the wellbeing or common good of this comprehensive whole as the starting point for human ethics.

The article proceeds in three parts. Part I details the origin and philosophical structure of Earth Jurisprudence. Part II offers an original interpretation of Earth Jurisprudence that situates the theory within the broad structure of natural law philosophy. It argues for the recognition of two kinds of 'law' organised in a hierarchy. At the apex is the Great Law, which represents the principles of Earth community and is measured with reference to the scientific concept of ecological integrity. Beneath the Great Law is Human Law. Human Law is defined as rules articulated by human authorities, which are consistent with the Great Law and enacted for the comprehensive common good. The interrelationship between the Great Law

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International Law (2010) 203.

6 Graham, above n 2, 15.

7 This concept is informed by Thomas Berry, *The Great Work* (1999); Aldo Leopold, *A Sand County Almanac* (1986); Nicholas Agar, *Life's Intrinsic Value* (2001); and Lawrence E Johnson, *A Morally Deep World: An Essay on Moral Significance and Environmental Ethics* (1991).

8 See further, Nicholas Low and Brendan Gleeson, *Justice, Society and Nature* (1998) 97 and Konrad Ott, 'A Modest Proposal about How to Proceed in Order to Solve the Problem of Inherent Moral Value in Nature' in Laura Westra, Klaus Bosselmann and Richard Westra (eds), *Reconciling Human Existence with Ecological Integrity* (2008) 48. Ott argues that the division of the moral community into subclasses is necessary 'since any environmental ethics needs a basic conception for conflict resolution which can meet different types of conflicts.'

and Human Law is discussed in Part III. Drawing on natural law philosophy, Earth Jurisprudence contends that Human Law derives its legal quality and authority from the Great Law. In this function, the Great Law acts as a bedrock standard or measure for Human Law. Laws that contravene the Great Law and risk the health and future flourishing of the Earth community are considered defective or a corruption of law. A defective law is not morally binding on a population and citizens have a moral justification for civil disobedience aimed at reforming the law.

II. What is Earth Jurisprudence?

Earth Jurisprudence is an emerging philosophy of law, proposed by Thomas Berry in 2001.[9] Its origin can be explained in a number of ways. One account explains it as a response to the present environmental crisis.[10] It can also be considered a form of critical legal theory. In this regard, advocates of Earth Jurisprudence would subscribe to the early principles of critical legal studies, in particular, its critique of law in legitimising particular social relations and illegitimate hierarchies.[11] Earth Jurisprudence is also a development from the environmental movement and environmental philosophy more generally.[12] What unites its proponents is a belief that society and the legal order reflect a harmful and outdated anthropocentric worldview. Earth Jurisprudence analyses the contribution of law in constructing, maintaining and perpetuating anthropocentrism and looks at ways in which this orientation can be undermined and ultimately eliminated.

As progenitor, Berry is primary amongst advocates for Earth Jurisprudence. Berry was a persistent critic of the anthropocentric paradigm and its prevalence in western law. In his important essay, *Legal Conditions for Earth Survival*, he argues that the present legal system 'is supporting exploitation rather than protecting the natural world from destruction by a

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9 For a brief history, see Cormac Cullinan, 'A History of Wild Law' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (2011) 12.

10 For updated statistics see the World Watch Institute <http://www.worldwatch.org> and the Earth Policy Institute <http://www.Earth-policy.org/>.

11 It is acknowledged that advocates of Critical Legal Studies said very little about the environment.

12 See also Klaus Bosselmann, *When Two Worlds Collide: Society and Ecology* (1995). Bosselmann presents a formidable analysis of the intersection between law and environmental philosophy. Developing this intersection has also been the primary goal of the Global Ecological Integrity Group <http://www.globalecointegrity.net/>.

relentless industrial economy.'[13] Berry also critiques Legal positivism on the basis that it posits 'abstract' categories or doctrines as the highest authority in human society.[14] He notes: 'humans [have] become self-validating, both as individuals and as a political community' and no longer act with reference to a higher power 'either in heaven or on [E]arth.'[15] He also critiques contemporary notions of private property as a mechanism that authorises human exploitation of nature[16] and the non-recognition of rights outside of the human community.[17]

In 1987 Berry set about describing how human society could shift both its idea of law and its legal system in response to the principle of Earth community. Most of his remarks are broad, as witnessed in his early paper *The Viable Human*:

> The basic orientation of the common law tradition is toward personal rights and toward the natural world as existing for human use. There is no provision for recognition of nonhuman beings as subjects having legal rights … the naïve assumption that the natural world exists solely to be possessed and used by humans for their unlimited advantage cannot be accepted … To achieve a viable human-Earth community, a new legal system must take as its primary task to articulate the conditions for the integral functioning of the Earth process, with special reference to a mutually enhancing human-Earth relationship.[18]

The idea of 'mutual-enhancement' is fundamental to Earth Jurisprudence. As demonstrated in ecological science, human beings are deeply connected and dependent on nature.[19] The idea that human good can be achieved at the

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13 Thomas Berry, 'Legal Conditions for Earth's Survival' in Mary Evelyn Tucker (ed), Evening Thoughts: Reflecting on Earth as a Sacred Community (2006) 107.

14 Thomas Berry, 'Foreword' in Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2003) 13.

15 Ibid.

16 Berry, above n 7 (1999), 61-62.

17 Thomas Berry, 'Rights of the Earth' (2002) 214 *Resurgence Magazine* 45. The idea that nature has rights is a key platform of Earth Jurisprudence. For further discussion see Peter Burdon, 'Rights of Nature: Reconsidered' (2010) 49 *Australian Humanities Review* 69 and Peter Burdon, 'Rights of Nature: The Theory' (2011) 1 *IUCN Environmental Law Journal* <http://www.iucnael.org/en/component/docman/doc_download/660-earth-rights-the-theory.html>.

18 Berry, above n 1, 5-6.

19 Eugene Odum, *Fundamentals of Ecology* (1971) 3. Because ecology is

expense of the larger Earth community is an illusion. Instead, the health and flourishing of the comprehensive Earth community is a prerequisite for human existence. This necessitates a shift from the anthropocentric notion that nature exists for human use and toward the facilitation of 'mutually enhancing' human-Earth interactions.[20] Further, it considers the principle of Earth community as both relevant and necessary to our idea of law.

While not explicit, it is possible to discern from the writings of Berry an argument for the existence of two types of 'law' that are organised in a hierarchical relationship. The first order of law is Great Law, which refers to the principle of Earth community.[21] The second order of law is Human Law, which represents binding prescriptions, articulated by human authorities, which are consistent with the Great Law and enacted for the common good of the comprehensive Earth community. Two matters typify the interrelation between the Great Law and Human Law. First, Human Law derives its legal quality and power to bind in conscience from the Great Law. Because human beings exist as one part of an interconnected and mutually dependant community, only a prescription directed to the comprehensive common good has the quality of law.[22] In decisions concerning the environment or human-Earth interactions, it is appropriate to construct Human Law with reference to the Great Law. For other matters, the legislator has broad freedom and lawmaking authority. Second, any law that transgresses the Great Law can be considered a corruption of law and not morally binding on a population.

It will be clear to anyone familiar with legal philosophy that the basic structure and relationship between these different types of law share

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concerned especially with the biology of groups of organisms and with functional processes on and in land, oceans and fresh water, it is also proper to define ecology as 'the study of the structure and function of nature, it being understood that mankind is a part of nature.'

20 Berry, above n 7 (1999), 3.

21 Note that Berry highlights three principles as being critical to the new story. They are interconnectedness (communion), differentiation and autopoiesis. See Thomas Berry and Brian Swimme, *The Universe Story: From the Primordial Flaring Forth to the Ecozoic Era* (1992) 71-79. Of these three principles, Berry considers interconnectedness to be primary, see Anne Marie Dalton, *A Theology for the Earth: The Contributions of Thomas Berry and Bernard Lonergan* (1999) 129. For a sketch of how all three of these principles can be applied in law, see Judith E Koons, 'Key Principles to Transform Law for the Health of the Planet' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (2011) 45.

22 This statement is deliberately contrary to contemporary statements on legal positivism.

resemblance to the Thomist and neo-Thomist natural law traditions. Lynda Warren comments on this resemblance:

> At first sight, the similarities seem obvious. The classical doctrine of natural law is based on the existence of a body of law – natural law – that is universal and immutable. It has been described as a higher law against which the morality of 'ordinary' laws can be judged. This higher law is discoverable by humans through a process of reason.[23]

Despite these similarities, many advocates of Earth Jurisprudence are dismissive of natural law philosophy and contend that its inherently anthropocentric tenor makes it a poor and potentially confusing point of comparison for explaining an Earth-centred legal philosophy.[24] Klaus Bosselmann for example contends:

> Structurally the ecocentric orientation of values is a turning towards the ideas of natural law. In this context some authors point towards understanding in a natural-law sense. I do not believe that it is necessary to revert in this way, nor that it could be of any help – considering the unproductive rivalry between positivism and natural law.[25]

In regard to this concern, it is recognised that one major barrier to those engaged with articulating Earth Jurisprudence is language. Concepts such as 'nature' and 'natural law' carry the baggage of over two thousand years of largely anthropocentric use and development. Further, the construction of Earth Jurisprudence as a branch of natural law has the potential to become focused on an unproductive conflict with legal positivism. [26]

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23 Lynda Warren, 'Wild Law – the Theory' (2006) 18 *Environmental Law and Management* 11: 13.

24 See Cullinan, above n 14, 77.

25 Bosselmann, above n 12, 236.

26 Note that the differences between contemporary Natural law theories and Legal Positivism are only slight. See Brian H Bix, 'On the Dividing Line Between Natural law Theory and Legal Positivism' (1999-2000) 75 *Notre Dame Law Review* 1613. Following this analysis – if (1) Earth Jurisprudence is reduced to the claim that objective scientific evidence regarding our interconnectedness with nature should be used to evaluate our political and legal institutions and (2) legal positivism reduces to the claim that there is a possibility of, and value to, a descriptive or conceptual theory of law separated from any such scientific date, then there would seem no reason why one could not support or advocate both positions.

Still, this article maintains that Earth Jurisprudence can correctly be described as a theory of natural law.[27] Following the reasoning of feminist theologian Carol Christ, it argues that we should not simply abandon a negative word or concept. Rather, we should attempt to find new meaning in the term or else the 'the mind will revert back to familiar structures at times of crisis, bafflement or defeat.'[28] Thus, while natural law has traditionally been interpreted in an anthropocentric fashion, this article will employ its broad framework for ecocentric goals. Further, as explained in more detail below, the description of Earth Jurisprudence offered in this article is arguably more defensible than traditional Thomist and neo-Thomist natural law philosophy. The broad relationship between Earth Jurisprudence, natural law and Legal positivism is articulated in Table 1 below. The table is structured with reference to the key arguments of Earth Jurisprudence presented in this article.

Table 1: Earth Jurisprudence, Natural Law and Legal Positivism

Issue	Earth Jurisprudence	Natural Law	Legal Positivism
There is a 'higher law' to human law.	The Great Law is a higher law. It is interpreted by human beings through reason based on scientific understanding. The Great Law is not a purely objective truth. Science provides approximate descriptions that are interpreted and applied by human lawmakers.	The natural law is a higher law. It is interpreted by human beings through reason based on self-reflection and conscience. The natural law is considered objective and universal.	Human law is the only thing termed law.

27 Warren, above n 23, 13.

28 Carol Christ, 'Why Women Need the Goddess' in Carol Christ & Judith Plaskow (eds), *Women Rising: A Feminist Reader in Religion* (1979) 275.

Human Law	The prima facia authority of human law is contingent on consistency with the Great Law. Human Law is purposive and directed toward the comprehensive common good of the Earth community Earth jurisprudence focuses on human-Earth interactions. It may not be relevant to every law that is passed by a legislature. It provides lawmakers freedom in this regard.	The prima facia authority of human law is contingent on consistency with the natural law. Human Law is purposive and directed toward the common good of human beings. Natural law advocates a necessary connection between law and morality. It considers itself relevant to all moral or ethical issues in law.	Law is whatever is contained in legislation enacted by lawmakers. Lawmakers have prima facia authority.[29] All laws are binding, though a person may choose not to follow it as a matter of conscience and suffer the legal consequences.
Legal Quality and Authority	Where relevant, Human Law receives its legal quality from the Great law. A purported law that does not attain legal quality is not morally binding.	Human Law receives its legal quality from the natural law. A purported law that does not attain legal quality is not morally binding.[30]	Human law is self-validating with reference to a basic norm or union of primary and secondary rules.[31]

The relationship between these three descriptions of law is explained further below. Part III begins by outlining the legal categories advanced in Earth Jurisprudence. As noted in Table 1, Earth Jurisprudence advocates for a 'higher law' or Great Law that serves as a standard for Human Law. Further, it defines Human Law as purposive and directed toward the common good of the comprehensive Earth community. These points represent structural and operative correlations between Earth Jurisprudence and natural law philosophy. Part IV explores these correlations further and argues that Berry's writing on law was deeply influenced by the natural law writing of Thomas Aquinas. For this reason, it explores the legal categories proposed in Earth Jurisprudence alongside the analogous legal categories proposed by Aquinas. This section contends that a comparative approach provides deep insight into Earth Jurisprudence and the writing of Berry.

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29 Exclusive legal positivist, Joseph Raz, maintains that law does not have prima facia authority. See Joseph Raz, *The Authority of Law* (1979).

30 This is consistent with the modern interpretation of natural law. See John Finnis, *Natural Law and Natural Rights* (1980) 290.

31 Regarding reference to a basic norm, see Hans Kelsen, *Pure Theory of Law* (1967). For union or primary and secondary rules, see H L A Hart, *The Concept of Law* (1994).

III. The legal categories of Earth Jurisprudence

In 1934 William Nathan Berry entered a Catholic monastery of the Passionist order. Upon being ordained as a priest in 1942 he chose the name Thomas in honour of the Catholic Priest of the Dominican Order, Thomas Aquinas. Berry acknowledges that Aquinas exerted a considerable influence over aspects of his theological and philosophical writing. He states:

> From Thomas I learned that the universe entire is the primary purpose of both creation and redemption, the more comprehensive purpose is the entire ordering of things. Such indeed is what he says in His *Summa Contra Gentiles* where he tells us that 'The order of the universe is the ultimate and noblest perfection of things' (SCG,II,46). Also in the *Summa Theologica*, he says, 'the whole universe together participates in and manifests the divine more than any single being whatsoever' (ST,1,47,1).[32]

While not explicitly acknowledged, this influence is also evident from a careful reading of Berry's writing on Jurisprudence – in particular Berry's regard for 'higher laws'. The natural law tradition represents the most significant jurisprudential legacy left by Aquinas and has inspired generations of neo-Thomist theorists.[33] Aquinas's treatment of law is found in the second part of his *Summa Theologica* beginning with question 90 and continuing through to question 108. The often-named 'Treatise on Law' has enjoyed an autonomous life outside of the comprehensive *Summa.* However, as John Finnis suggests, 'an adequate understanding of it must depend on what has preceded it and what follows it.'[34] Thus, although this section focuses on questions 90-108, where necessary, it also draws from the comprehensive work.

For Aquinas, the term 'law' is analogous and does not have consistent meaning with each use.[35] His legal theory encompasses four

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32 Thomas Berry, 'Foreword' in Dalton, above n 21, vii. See also Matthew Fox, 'Matthew Fox Tribute to Thomas Berry' (2002) <http://www.Earth-community.org/images/FoxTribute.pdf>. See also Matthew Fox, 'Some Thoughts on Thomas Berry's Contributions to the Western Spiritual Tradition' in Ervin Laszlo and Allan Combs (eds), *Thomas Berry Dreamer of the Earth: The Spiritual Ecology of the Father of Environmentalism* (2011) 16.

33 For a history see Brian H Bix, 'The Natural Law Tradition' in Joel Fienberg and Jules Coleman (eds), *Philosophy of Law* (2004) 9.

34 Finnis, above n 30, 301.

35 Ralph McInerny, 'Foreword' in Thomas Aquinas, *Treatise on Law: Summa*

types of law, organised in a hierarchy. At the apex is Eternal Law, which comprises of God-given rules or divine providence, which govern all of nature.[36] The second order is natural law, which is that portion of Eternal Law that one can discover through a special process of reasoning, involving intuition and deduction, outlined by Greek authors.[37] Divine Law refers to the law of God as revealed in scripture.[38] Human Law sits at the bottom of this ordering and consists of rules, supported by reason and articulated by lawmakers for the common good of human society. Speaking to this ordering, McInerny comments that '[t]o speak of God's governance of the universe as a "law" and of the guidelines we can discern in our nature as to what we ought to do as "laws" can puzzle us because what the term "law" principally means is a directive of our acts issued by someone in authority.'[39] Nonetheless, it is clear from Aquinas' discussion in question 90 on the 'essence of law'[40] that human positive law is at the forefront of his mind when using the term 'law'.[41] Indeed, in question 90, article 4, Aquinas defines law as 'nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.'[42]

The basic relationship between Aquinas's hierarchy and that proposed by Earth Jurisprudence is outlined in Table 2 below:

Table 2: Natural law and Earth Jurisprudence

Natural law	**Earth Jurisprudence**
Eternal Law (providence)	N/A
Natural law	The Great Law
Divine Law	N/A
Human Law	Human Law

This table illustrates in a very basic way the structural relationship between Earth Jurisprudence and Aquinas's theory of natural law. Both adopt a higher view of law[43] and describe the consequences of contradicting

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Theologica, Questions 90-97 (1956) vi. McInerny notes further that law is a term 'with an ordered set of meanings, one of which is regulative of the others.'

36 McInerny, above n 35, ix.

37 J W Harris, *Legal Philosophies* (2004) 7.

38 Ibid.

39 McInerny, above n 35, vi.

40 Note that the title 'essence of law' was not used by Aquinas and was provided by later editors, ibid viii.

41 Ralph McInerny, *Thomas Aquinas: Selected Writings* (1998) 611.

42 Aquinas, above n 35, 10-11.

43 Harris, above n 37, 145.

their unique focus. The categories of Eternal Law and Divine Law are absent from this discussion. Aquinas describes Divine Law as revelation revealed in Christian scripture.[44] As such, it has no corresponding category in a secular description of Earth Jurisprudence. For Aquinas, Eternal Law represents the source and foundation for the other types of law. Aquinas describes eternal law in question 93, article 4, as 'the very Idea of the government of things in God the Ruler of the Universe.'[45] Put otherwise, it is the divine system of government,[46] providence,[47] the divine plan and the timeless universal order, which act as the measure for all other laws.[48] As a Catholic priest, one might reasonably ask whether Berry would have included reference to Eternal Law in a more detailed study of Earth Jurisprudence.[49] Answering this question, however, is beyond the scope of the article.

We turn now to consider the first category of law proposed in Earth Jurisprudence, termed the Great law. This category is explored by comparison with the corresponding legal category of natural law advanced by Aquinas. This comparative approach provides greater insight into, and understanding of, the nature of the Great Law. It also provides an opportunity to state explicitly the differences between the two categories of law and how Earth Jurisprudence answers some of the pertinent criticisms levelled against natural law philosophy. This section also considers those aspects of the Great Law that are compatible with Legal positivism.

1. NATURAL LAW AND THE GREAT LAW

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44 Aquinas, above n 35, 29.

45 Ibid 46.

46 Ibid.

47 Aquinas makes several references to divine providence in *Summa Theologica*. Most importantly, in question 104, article 4 he notes: 'God in his providence directs all things in the world to their ultimate good, that is, to himself.'

48 McInerny, above n 41, 611.

49 Evidence for this possibility can be noted in Berry's argument for recognising and acting in accord with the Universal Logos which he regarded as 'the ultimate form of human wisdom', Berry, above n 1, 20. The term Logos can be traced back to ancient Greece and the philosophy of Heraclitus (535-475 BC). Heraclitus introduced the term *Logos* to describe a similar immanent conception of divine intelligence and the rational principles governing the universe, Raghuveer Singh, 'Herakleitos and the Law of Nature' 24 (1963) *Journal of the History of Ideas* 457. Logos is relevant to the present discussion, because as Lloyd Weinreb notes in *Natural Law and Justice* (1987) 56: 'Eternal Law is little more than a Christianised version of Logos and the Platonic vision of a universe ordered with a view to the excellence and preservation of the whole.'

A. *Aquinas and Natural Law*

Natural law is at the heart of Aquinas' writing on law. His first description is found in question 91. He notes that natural law represents that aspect of the Eternal Law that is knowable by finite human minds and applicable to human beings.[50] Appropriately, Germain Grisez describes natural law as 'an intellect size bite of reality.'[51] Because of our capacity for self-government, human beings are considered a measured measure.[52] Our nature provides clues as to how we should behave in order to achieve fulfilment. Put another way, Aquinas argues that human beings have a 'natural inclination'[53] or *telos*, and reason accordingly to act willingly toward it.[54] When these ends are discerned by reason they take on precepts and thus are analogous to law in the primary sense of the term.[55] This argument depends on an ontological premise, made earlier by Plato, that everything in nature has an essence and a tendency to fulfil it. Aquinas argued that reason constitutes the essence of human beings. We fulfil our natural inclination by using reason consciously to direct our action toward particular ends.[56] Weinreb comments 'it would make no sense and would contradict the perfect order of the created universe for human beings to have the capacity to reason and to lack the opportunity to exercise the capacity practically.'[57] Thus, our moral freedom is not in conflict with the Eternal Law, but fulfils it in a manner consistent with our rational nature.

In question 91 Aquinas describes this process as a specifically human participation in the Eternal Law. In question 94, article 2, he maintains that natural law consists of 'first principles to matters of demonstration.'[58] These are starting points and first principles of practical reasoning. Aquinas notes that a principle is self-evident in two ways.[59] First, a proposition is self-evident in-itself if its 'predicate is contained in the notion of the subject.'[60]

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50 David Novak, 'Natural Law in a Theological Context' in John Goyette, Mark Latkovic and Richard S Myers, *St Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives* (2004) 44.

51 Germain Grisez, 'The First Principle of Practical Reason: A commentary on the *Summa Theologica,* 1-2, Question 94, Article 2' (1965) 10 *Natural Law Forum* 174.

52 Aquinas, above n 35, xii. Human beings are subject to the natural law and able to discern it.

53 Ibid 15.

54 Lloyd L Weinreb, *Natural Law and Justice* (1987) 57.

55 McInerny in Aquinas, above n 35, xii.

56 Aquinas, above n 35, 16.

57 Weinreb, above n 24, 57.

58 Aquinas, above n 35, 58.

59 Ibid.

60 Ibid.

For example, the 'proposition, *Man is a rational being*, is, in its very nature, self evident, since who says *man*, says *a rational being*.'[61] For Aquinas, it was unthinkable that such a proposition be considered false. However, 'some propositions are self-evident only to the wise'[62] who have received instruction of the meaning of terms inherent to a proposition.[63] Thus, Aquinas remarks, 'to one who understands that an angel is not a body, it is self-evident that an angel is not circumscriptively in a place.'[64]

Aquinas's conception of natural law focuses on human reason. As Harris states, 'herein lies the 'natural' quality of natural law.'[65] A proposition is natural if one can derive it through reason, intuition and deductions drawn therefrom. Aquinas states repeatedly that first principles of natural law are known to human beings directly and immediately. Indeed, he argues that God has 'instilled it into man's mind so as to be known by him naturally.'[66] Aquinas establishes a means of discovering the first principles of practical reason, rather than an exhaustive list.[67] While his methodology is beyond the scope of this article, some examples include that 'good is to be done and pursued and evil is to be avoided' and that 'since… good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance.'[68] Aquinas also holds that there are natural inclinations common to all animals, relating to sexual intercourse[69] and education of offspring.[70] The fulfilment of these inclinations belongs to the natural law.

We turn now to consider the influence of natural law philosophy on the Great Law. This section also considers points of distinction between the two theories and argues that the Great Law is more defensible than Aquinas's description of natural law.

B. *The Great Law*

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61 Ibid.
62 Ibid 59.
63 Ibid.
64 Ibid.
65 Harris, above n 37, 7.
66 Aquinas, above n 35, 11.
67 Ibid. In contrast Finnis claims that his seven forms of human good represent an exhaustive list. See Finnis, above n 30, 90-91.
68 Aquinas, above n 35, 60.
69 James Rachels, *The Elements of Moral Philosophy* (1998) 55-56.
70 Weinreb, above n 24, 58. See also The Vatican, 'Declaration on Euthanasia' in Peter Singer (ed), *Ethics* (1994) 253-256.

The Great Law and natural law differ on the meaning to be attributed to the term 'nature'. For Aquinas, 'nature' means 'reason' and not the physical environment or principles deduced from its study.[71] Certainly, the absence of matters pertaining to the physical environment in natural law philosophy is striking, causing Jane Holder to reiterate (albeit in a different context) Lloyd Weinreb's denunciation of 'natural law without nature.'[72] Indeed, while natural law theorists have considered the effect of biological and physical laws on the realisation of human happiness,[73] and a natural law conception of ownership has been attempted,[74] this does not amount to a 'developed treatment of the physical environment and human/nature relations' in natural law literature.[75]

In contrast to the legal category of natural law, the Great Law is concerned with the physical environment and in particular the concept of Earth community. Berry argues that human society should broaden its present focus from human beings to recognise the 'supremacy of the already existing Earth governance of the planet as a single, interconnected community.'[76] For Berry, this orientation toward the natural world 'should be understood in relation to all human activities'[77] and that 'Earth is our primary teacher as well as the primary lawgiver.'[78] Former president of the Czech Republic, Václav Havel, echoed a similar sentiment in a 1984 address to the University of Toulouse:

> We must draw our standards from the natural world. We must honor with the humility of the wise the bounds of that natural world and the mystery which lies beyond them, admitting that there is some thing in the

71 James Harris, *Legal Philosophies* (2005) 6.

72 Jane Holder, 'New Age: Rediscovering Natural Law' in MDA Freeman (ed), *Current Legal Problems* (2000) 172.

73 Finnis, above n 30, 380.

74 J Boyle, 'Natural Law, Ownership and the World's Natural Resources' (1989) 23 *Journal of Value Inquiry* 191. Boyle concludes at 191: 'the category of natural resources might not be particularly useful framework for moral analysis. Certainly this category does not, on natural law grounds, mark out an area where any special moral considerations apply.' See also Murray Raff who investigates the natural law roots of private property, Murray Raff, *Private Property and Environmental Responsibility* (2003) 121-159. Raff puts forward a compelling argument that registered title is the globalising land title system and ought to be re-attached it to its jurisprudential routes, which involve religion and natural law.

75 Holder, above n 72, 172.

76 Berry, above n 13 (2006), 20.

77 Berry, above n 7 (1999), 64.

78 Ibid. See also Thomas Berry, *The Sacred Universe* (2009) 96.

> order of being which evidently exceeds all our competence.[79]

In his book *Wild Law,* Cormac Cullinan adopts the term the Great Jurisprudence (the Great Law in this article[80]) to help make sense of the re-characterisation envisioned by Berry.[81] Cullinan defines this term as 'laws or principles that govern how the universe functions' and notes that they are 'timeless and unified in the sense that they all have the same source.'[82] As described by Cullinan, this law is manifest in the universe itself and can be witnessed in the 'phenomenon of gravity', 'the alignment of the planets', the 'growth of planets' and the 'cycles of night and day'.[83] Consistent with natural law philosophy, human beings are limited in the extent that they can understand the Great Law. Indeed, the Great Law represents those aspects of nature that scientific analysis is able to interpret and provide approximate description of. What distinguishes human beings from the rest of nature is not greater participation in the Eternal Law, but the capacity to describe approximately the Great Law and alter our behaviour to consciously act in accordance with or indeed contrary to it.[84]

Before continuing, it is important to pause and consider in more detail Cullinan's description of the Great Law as representing the laws of nature. In particular, we need to discern what is a law of nature and in what sense they have meaning or relevance for human law. In response to the first question, it must first be noted that laws of nature play a central role in scientific thinking. Martin Curd notes that 'some philosophers of science think that using laws to explain things is an essential part of what it means to be genuinely scientific' and 'support for the view that scientific explanation must involve laws is widespread (though not unanimous).'[85] Many also believe they are justified in trusting or relying on scientific

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79 Václav Havel, quoted in Janine M Benyus, *Biomimicry: Innovation Inspired by Nature* (2002) 1. See also David Orr, 'Love It or Lose It: The Coming Biophilia Revolution' in Edward O Wilson (ed), *The Biophilia Hypothesis* (1993).

80 Because of confusion resulting from the use of the term 'jurisprudence' in this concept, the term 'Great Law' will be preferenced in this article.

81 Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2003) 84. It has been brought to the author's attention via private correspondence that the term Great Jurisprudence was used for the first time by Thomas Berry at a meeting at Airlie House in Washington, 2001.

82 Ibid.

83 Ibid.

84 See also Brian Swimme, *The Universe is a Green Dragon* (2001) 32.

85 Martin Curd, 'The Laws of Nature' in Martin Curd and JA Cover (eds), *Philosophy of Science, The Central Issues* (1998) 805. See also David Armstrong*, What is a Law of Nature?* (1983).

inferences, because these predictions are based on established laws. In this view, our expectations regarding the behaviour of systems, materials and instruments are considered reasonable, to the extent that they are drawn from a correct understanding of the rules that govern them. Much energy is devoted to the discovery of laws and 'one of the most cherished forms of scientific immortality is to join the ranks of Boyle, Newton and Maxwell by having a law (equation of functional relation) linked to one's name.'[86]

However, despite the status of laws in science, there is no general agreement on how to define a law of nature. This presents a significant challenge to Cullinan's description of the Great Law. Indeed, how can human lawmakers consider the laws of nature when creating certain types of human law, if there is no consensus on what a law of nature is? In response to this problem two mutually opposed philosophical accounts have been developed. The first, termed necessitarian, contends that there are real necessities in nature, over and above the regularities that they allegedly produce and law-statements are descriptions of these necessities.[87] The second account, regularists, posit that there are no necessities but only regularities – that is, correlations and patterns – and laws are descriptions of regularities.[88] Both philosophical accounts address four interrelated issues: (i) semantics of the meaning of law statements; (ii) metaphysical questions concerning the 'fact', to which law statements refer; (iii) epistemological questions pertaining to the basis to which claims of knowledge of a law are justified; and (iv) explanations of the various role of scientific laws.[89] In answering these questions, both philosophical accounts encounter distinct difficulties. CA Hooker provides a pertinent example:

> [I]f there are necessities in nature, as the first account claims, how exactly do we identify them: how can we tell which of the inductively confirmed regularities are laws? On the other hand, if there are only regularities, as the second account claims, does this mean that our intuitions and scientific practices are awry and that there really is no distinction between laws and accidental generalizations?[90]

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86 Curd, above n 85, 805.

87 Ibid.

88 Ibid. This is a general statement on each school, there are significantly different variants of each account and also positions that altogether deny the existence of general laws, or deny that science should aim to describe them.

89 CA Hooker, 'Laws, Natural' in Edward Craig (ed), *The Shorter Routledge Encyclopedia of Philosophy* (2005) 550.

90 Ibid.

Compounding this comment is the wide variety of laws supplied by current science and the complexity of the relationship between those laws, regularities and causes.[91] Beyond this is a nagging uncertainty about the relevance of such laws to human law. How, for instance, can Newton's law of motion or Boyle's law of mass and pressure meaningfully assist in the drafting of law? Of what possible importance are they to an institution that seeks to govern human relationships and behaviour? Through what mechanism are certain laws prioritised over others? In response, this article argues that even if agreement can be reached on what constitutes a law of nature, it is difficult to see how such a broad focus can assist human lawmakers.[92]

Rather than describing the Great Law with reference to universal laws of nature, I contend that the focus of Earth Jurisprudence should be on the ecological integrity of the Earth community.[93] This connection retains a strong connection between law and science, and focuses our attention on a verifiable standard that is directly relevant to human-Earth relationships. Ecological integrity originated as an ethical concept as part of Aldo Leopold's classic 'land ethic'[94] and has been recognised in legislative instruments such as the *Clean Water Act US* (1972).[95] As described the Laura Westra, the generic concept of integrity 'connotes a valuable whole, the state of being whole or undiminished, unimpaired, or in perfect condition.'[96] Because of the extent of human exploitation of the environment, wild nature provides the paradigmatic example of ecological integrity.

Among the most important aspects of ecological integrity are first the autopoietic capacities of life to regenerate and evolve over time at a specific location. Thus, integrity provides a place-based analysis of the evolutionary and biogeographical process of an ecosystem.[97] A second aspect is the

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91 Ibid.

92 Ecology has been criticised on the basis that it presents no laws and is thus a lesser science than physics. For a contrary argument see Mark Colyvan, 'Laws of Nature and Laws of Ecology' (2003) 101(3) *Oikos* 649.

93 The concept 'ecological integrity' has been developed principally by the Global Ecological Integrity Group <http://www.globalecointegrity.net/>.

94 Aldo Leopold, *A Sand County Almanac: Essays on Conservation from Round River* (1966): 'a thing is right when it tends to preserve the integrity, stability and beauty of the biotic community' and 'wrong when it tends to do otherwise.'

95 Section 101(a) has its objective 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'

96 Laura Westra, 'Ecological Integrity' in Carl Mitcham (ed), *Encyclopedia of Science, Technology and Ethics* (2005) 574.

97 Paul Angermeier & James Karr 'Protecting Biotic Resources: Biological

requirements that are needed to maintain native ecosystems.[98] Climatic conditions and other biophysical phenomena can also be analysed as interconnected ecological systems.[99] A third aspect is that ecological integrity is both 'valued and valuable as it bridges the concerns of science and public policy.'[100] To bridge this chasm, models such as the multimetric Index of Biological Integrity allows scientists to measure the extent to which systems deviate from verifiable integrity levels that are calibrated from a baseline condition of wild nature.[101] Degradation or loss of integrity is thus any human-induced positive or negative divergence from this baseline standard.[102] Finally, if given appropriate legal status, 'ecological integrity' recognises the intrinsic value of ecosystems and can help curve the excess of human development and exploitation of nature.

As should be evident from this overview, defining the Great Law with reference to ecological integrity does not purport to be static or able to render consistent application across jurisdiction. Instead, the role of ecological science in Earth Jurisprudence is to provide approximate descriptions of ecosystem data in such a way that can be interpreted and applied by human lawmakers. Put otherwise – Earth Jurisprudence retains the lawmaking authority of human beings. It seeks to provide 'reasons for action' and compel them to consciously align human law with the Great Law and ensure that ecological integrity is respected and ultimately protected.

Recognition of human agency and choice is critical and enables Earth Jurisprudence to avoid the traps of David Hume's well-rehearsed argument of noncognitivism.[103] Briefly, Hume argued that one cannot derive an 'ought' from an 'is' and no amount of information about the facts of the world or of human nature provides proof that anything ought to be done or

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Integrity versus Biological Diversity as Policy Directives' (1994) 44(10) *BioScience* 690.

98 For studies on water, see James Karr & Ellen W Chu, *Restoring Life in Running Waters* (1999). For terrestrial systems, see Reed Noss, 'The Wildlands Project: Land Conservation Strategy' (1992) *The Wildlife Project* 10.

99 Westra, above n 96, 575.

100 Laura Westra, 'Ecological Integrity and the Aims of the Global Ecological Integrity Project' in David Pimentel, Laura Westra, and Reed F. Noss (eds), *Ecological Integrity: Integrating Environment, Conservation and Health* (2000) 20.

101 James Karr, 'Ecological Integrity and Ecological Health are not the Same' in Peter Schulze (ed), *Engineering Within Ecological Constraints* (1996) 96

102 Westra, above n 96, 575.

103 David Hume, *A Treatise of Human Nature* (2002) [first published 1740] 302.

not done.[104] This is a logical point – an assertion about the relationship between propositions. Hume's intention is to deprive natural law philosophers of that 'most revered philosophical weapon'[105] the deductive syllogism. Indeed, since Hume, few would defend the following syllogism: (i) All of nature is interconnected; (ii) humans are part of nature; (iii) therefore humans *ought* to behave in a manner that recognises this interconnection. Here the conclusion contains a copula not contained in the premises, namely, 'ought'. While there might be hundreds of reasons for recognising and responding to this interconnection, logical deduction is not one of them.[106] To avoid the pitfalls of this argument, Earth jurisprudence seeks to take the first steps toward normative conclusions and rely on human will and rationality to bridge what GE More termed the 'naturalistic fallacy'.[107]

2. HUMAN LAW

In question 90, article 4, Aquinas defines Human Law as 'an ordinance of reason for the common good, made by him who has care of the community, and promulgated.'[108] The description of Human Law advanced in Earth Jurisprudence shares many of these elements. However, three points of refinement need to be established from the outset: (i) in Earth Jurisprudence the 'common good' is understood with reference to the wellbeing of the Earth community and not simply its human component; (ii) in Earth Jurisprudence the 'common good' is not defined in utilitarian terms as pertaining to the greatest good for the greatest number.[109] Instead, it refers to the securing of conditions that tend to favour the health and future flourishing of the Earth community.[110] While this view encourages human

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104 Ibid.

105 Harris, above n 37, 13.

106 See Peter Singer, *The Expanding Circle: Ethics and Sociobiology* (1981) 79. Singer contends: '[T]he fact that the bull is charging does not, by itself entail the recommendation: "Run!" It is only against the background of my presumed desire to live that the recommendation follows. If I intend to commit suicide in a manner that my insurance company will think is an accident, no such recommendation applies.'

107 George Edward Moore, *Principia Ethics* (1903).

108 Aquinas, above n 35, 10-11.

109 This is true also for neo-Thomist interpretations of natural law. See for example Finnis, above n 30, 154 Finnis defines the common good in terms of conditions that 'tend to favour the realization, by each individual in the community, of his or her personal development.'

110 Berry, above n 13 (2006), 149. On this point, Berry notes that 'every component of the Earth community, both living and nonliving' has the right to 'habitat or a place to be and the right to fulfil its role in the ever-renewing processes of the Earth community.' See also Arne Naess, 'The Shallow and

flourishing, it also limits liberty to actions that are consistent with the flourishing of the Earth community. In this sense, Earth Jurisprudence is intimately concerned with ecological integrity and the flourishing of the environment;[111] and (iii) Aquinas' appeal to reason is supplemented by the use of scientific description. As articulated in Earth Jurisprudence, acknowledging these standards in one's deliberations is part of what it means to be reasonable.

Drawing on these points, this article defines Human Law as *rules, supported by the Great Law, which are articulated by human authorities for the common good of the comprehensive whole.* Importantly, this definition shares similarities with Legal positivism. This is perhaps not surprising; especially when one considers that Aquinas is also considered an important contributor to positivist thought.[112] Key areas of relationship include the presumptive authority of human beings to make binding prescriptions for the community. Further, Earth Jurisprudence does not contest the benefit of positive law in achieving social/common goods that require the deployment of state power or the co-ordination of public behaviour. The dividing line between Earth Jurisprudence and Legal positivism rests on several fine distinctions, which nonetheless carry theoretical significance.

The most obvious difference between Earth Jurisprudence and Legal positivism is the appeal to 'higher law' considered above. Further to this point, this article argues that Human Law ought to be described as a project with a purpose. This is consistent with the description of law offered by Aquinas and secular natural law theorist Lon Fuller.[113] Aquinas for example comments in question 90, article 2:

> [S]ince the law is chiefly ordained to the common good, any other precept in regard to some individual work, must needs be devoid of the nature of a law, save in so

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the Deep, Long Range Ecology Movement: A Summary' 16 *Inquiry* 95. At 96 Naess notes that each part of nature has the capacity for 'happiness', 'flourishing' and 'self-realization'.

111 On ecological integrity see Laura Westra, Ecological Integrity (2005) <http://www.globalecointegrity.net/pdf/Westra%20on%20Ecological%20Integrity.pdf>. See also James Karr, 'Health, Integrity and Biological Assessment: The Importance of While Things' in David Pimentel, Laura Westra and Reed Noss, *Ecological Integrity: Integrating Environment, Conservation and Health* (2000).

112 See John Finnis, 'The Truth in Legal Positivism' in Robert P George (ed), *The Autonomy of Law*: *Essays in Legal Positivism* (1996) 195.

113 Lon Fuller, *The Morality of Law* (1964) 53. As Fuller notes, law is the 'enterprise of subjecting human conduct to the governance of rules.'

> far as it regards the common good. Therefore every law is ordained to the common good.[114]

This statement is supported by Fuller, who argues that the central purpose of law is human flourishing and for people to coexist and cooperate within society.[115] On this account, human law cannot truly be understood without understanding the ideal or 'common good' towards which it is striving.[116] However, while natural law philosophy defines the parameters of community with exclusive reference to human beings,[117] the focus of Earth Jurisprudence is on the comprehensive Earth community. This accords with ecological insights into the interconnectedness of nature and recognition that human good cannot be isolated and measured independent of the good of this comprehensive community.[118]

It is not clear that the purposive interpretation of law advanced in Earth Jurisprudence contradicts Legal positivism in any way that positivists would wish to deny. Indeed, if notions of purpose and common good form an important element of legal development, as is often admitted,[119] then it is difficult to see the justification for taking an exclusive attitude. As argued by Fuller, to exclude the ideal from a theory of law on the basis of a 'separation of description and evaluation' is to miss the point entirely. The social practice and institution of law, 'is by its nature a striving towards' ideals such as common good.[120] From this perspective, legal authorities are not entirely free to create law. They must acknowledge and respond to factors that have consequence for law's purpose – the attainment of the comprehensive common good.[121]

To be clear, not every Human Law will be affected by this standard. This selective approach is consistent with the description of natural law offered by Cicero. Cicero argued that there are some matters for which the

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114 Aquinas, above n 35, 6.

115 Fuller, above n 113, 123. Fuller notes further that legal philosophy *should* deliberately define law so as to assist good legal enterprises.

116 Brian H Bix provides a helpful example in *A Dictionary of Legal Theory* (2004) 72. He notes 'there are many human activities, from painting to jogging, to boxing, that are hard to understand unless one knows the objective or ideal toward which the participants are striving.'

117 For example Finnis, above n 30, 134-161.

118 Odum, above n 19.

119 MDA Freeman, *Lloyds Introduction to Jurisprudence* (2008) 50.

120 Lon Fuller, 'Human Purpose and Natural Law' 53 (1956) *Journal of Philosophy* 697. Note that Fuller described the purpose of law in terms of 'order', 'good order' and 'justice'.

121 See Kenneth Winston, 'The Ideal Element in a Definition of Law' (1986) 5 *Law and Philosophy* 89: 98.

'Gods' have no concern and over which human lawmakers have legitimate authority to decide.[122] Following this reasoning, Earth Jurisprudence does not have an obvious or direct relationship to the law of assault or contract law. Further, unlike natural law philosophy, it does not seek to enter broad ethical discourse and advance opinion on sexual preference or matters concerning life and death.[123] Instead, Earth Jurisprudence is concerned specifically with matters concerning human interaction and modification of the environment. It has obvious implications for property law, environmental law, planning law, natural resource management, and conservation heritage, to name a few.

Once one takes a purposive or functional approach to law, important consequences follow regarding laws that contravene this standard. Part IV argues that Great Law acts as a standard for Human Law and a measure for legal quality. Further, purported laws that are inconsistent with the Great Law are considered defective and not morally binding on a population. In this regard, Earth Jurisprudence provides a legal justification for challenging the authority of law and engaging in civil disobedience.

IV. The interaction between the Great Law and Human Law

This article has outlined the legal categories Great Law and Human Law. It described Great Law with reference to the ecocentric principle of Earth community. Human Law was described as rules passed by human authorities that are consistent with the Great Law and are enacted for the good of the Earth community as a whole. Regarding the interaction between these two categories of law, two points are discussed and analysed in this section. First, only prescriptions that are consistent with the Great Law and directed toward the comprehensive common good have the quality of law. Second, any purported law that is in conflict with the Great Law is defective or a mere corruption of law and not morally binding on a populace. In this instance, Earth Jurisprudence provides a justification for civil disobedience. We consider these points in turn.

1. LEGAL QUALITY

Earth Jurisprudence requires Human Law to be articulated with reference to the principle of Earth community. Cullinan supports this interpretation, holding that the Great Law should be understood as the 'design parameters within which those ... engaged in developing Earth Jurisprudence for the

122 Cicero, *The Republic and the Laws* (1998) 134

123 See for example Finnis, above n 30, 90-91.

human species must operate.'[124] This approach requires lawmakers to interpret the Great Law and translate their conclusions in a way that recognises nature's integrity as a bedrock value or limit for Human Law.[125] Because the Great Law requires interpretation, there are likely to be a range of rules that are consistent with the Great Law rather than one correct application. The rules actually chosen by lawmakers need not coincide with the rules that specific individuals within that community would have chosen.[126] They need not even regard them as sensible or desirable.[127] However, by advocating a necessary connection between law and the environment, Earth Jurisprudence ensures that environmental ideas are not imposed from the outside in an ad hoc or limited way.[128] Instead, they are central to our idea of law and an immediate measure of legal quality.

Shortly before dying in 2009, Berry commented on how the Great Law could set the design parameters for Human Law. He wrote:

> It would be appropriate if the prologue of any founding Constitution enacted by humans would state in its opening lines a clear recognition that our own human existence and well-being are dependent on the well-being of the larger Earth community…this statement might be followed by a statement that care of this larger Earth community is a primary obligation of the nation being founded.

Such a statement would be particularly appropriate in the assembly of nations known as the United Nations. As things are at present, each of the nations identifies itself as a 'sovereign' nation, that is, a people bounded together by a national covenant whereby it declares itself as self-referent, that is, subject to no other Earthly power in the conduct of its affairs… there is no mention of any relationship with the natural world or with any other

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124 Cullinan, above n 14, 84-85.

125 Earth Jurisprudence does not seek to take control of the lawmaking process. Nor do principles, such as Earth community, represent normative statements that can be applied directly as law. In regard to this concern, see Eric T Freyfogle, *Bounded People, Boundless Lands: Envisioning a New Land Ethic* (1998) 108.

126 Finnis, above n 30, 289.

127 Ibid 290. Reference to desirability is particularly important in the context of large corporations who may wish to continue the 'business as usual' mentality.

128 For example, division six of the *Environmental Protection and Biodiversity Act 1999* (Cth), which provides for the production of an environmental impact statement.

mode of being, not even of the planet we live on and out of which comes all that we are and all that we have.[129]

These comments recognise the critical role of positive law in implementing the broad changes required by Earth Jurisprudence. They are also consistent with other proposals for an Eco-Constitutional State,[130] the recognition of the rights of nature in national Constitutions[131] and attempts in international law to formulate a covenant for ecological governance.[132] The essence of this work is captured in the Project for Earth Democracy.[133] Bosselmann explains that Earth democracy 'requires a shift from economics to ecology realizing their common ground ie the Earth our home.'[134] Existing forms of governance were designed and exist to promote human well-being.[135] Under this anthropocentric framework, environmental governance is a small concern. It is an 'add-on or a minimalist, shallow program … the poor cousin of economic governance.'[136] However if principles such as Earth community were recognised at the Constitutional level, legislators would be required to have appropriate regard of them when articulating Human Law. A purported law that was inconsistent with the principles of Earth democracy would be open to legal challenge and under current principles of Constitutional law could be rendered invalid.[137]

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129 Berry in Cullinan, above n 14, 13-14.

130 See for example, Bosselmann, above n 12, 222-264. See also Robyn Eckersley, *The Green State: Rethinking Democracy and Sovereignty* (2004).

131 For an overview of recent developments, see Burdon above n 17.

132 Important examples include the 1983 World Charter for Nature; 1991 Caring for the Earth; 1992 Declaration of the Parliament of World Religions; 1996 Earth Covenant; 1997 Declaration on the Responsibilities of the Present Generations Towards Future Generations; 2000 Earth Charter; 2000 A Manifesto for Earth; and 2002 A Manifesto for Life. For an overview and discussion of their application to Earth Jurisprudence, see J Ronald Engel and Brendan Mackey, 'The Earth Charter, Covenants, and Earth Jurisprudence' in Peter Burdon (ed), *Exploring Wild Law The Philosophy of Earth Jurisprudence* (2011) 313.

133 Klaus Bosselmann, 'Earth Democracy: Institutionalizing Sustainability and Ecological Integrity' in J Ronald Engel, Laura Westra and Klaus Bosselmann (eds), *Democracy, Ecological Integrity and International Law* (2010) 91 and Vandana Shiva, *Earth Democracy: Justice, Sustainability, and Peace* (2005). At 107 Bosselmann defines Earth democracy as a type of democracy that 'promotes decision-making that is reflective of the relationship between human and non-human spheres and their ecological balancing.'

134 Bosselmann, above n 136, 103.

135 Ibid. See also Berry in Cullinan, above n 14, 14.

136 Bosselmann, above n 136, 103.

137 Tony Blackshield and George Williams, *Australian Constitutional Law and*

While proponents of Earth Jurisprudence advocate a relationship with positive law, they also recognise that the Great Law is prior to Human Law and is not something created by lawmakers.[138] Rather, it should be considered analogous to other fundamental principles such as liberty, equality and justice. If these principles are considered the three pillars of civilisation, the Great Law provides their foundation. As such, it provides a standard through which to judge the moral authority of existing laws.

One visible example of the relationship between the Great Law and Human Law can be noted in 2007 when former vice president of the United States, Al Gore stated: 'I can't understand why there aren't rings of young people blocking bulldozers, and preventing them from constructing coal-fired power plants.'[139] These comments were followed in a 2008 address to the Clinton Global Initiative: 'If you're a young person looking at the future of this planet and looking at what is being done right now, and not done, I believe we have reached the state where it is time for civil disobedience to prevent the construction of new coal plants that do not have carbon capture and sequestration.'[140] In the example raised by Gore, we can presume that the proponent in question has applied for and received the relevant legal permits and licenses to carry out construction of a coal plant. Consistent with other large-scale projects, there has likely been some form of community consultation, opportunity for public comment and negotiation with stakeholders. However, because of the known ecological damage caused by coal-fired power plants and the risk they pose to the long-term common good, Gore questions the legitimacy of the project. More than this, he expresses his dismay that individuals are not positively 'breaking the law' to stop the project.

To understand these comments it is useful to refer once more to the natural law tradition. From this perspective, it is possible to interpret Gore's

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Theory (2002) 11.

138 On the primacy of the Great Law, see Cullinan, above n 14, 74: 'So it is that even the sophisticated governance structures of the European Union allocate greater fishing quotas than the fish stocks can bear, year after year. They have many scientists who advise them against doing so, but at the heart of it they do not accept (or do not care) that human governance systems are subservient to the unyielding rules of nature. No directive from Brussels can overrule the principle that continued over exploitation will reduce the fish population until it reaches levels that are so low that commercial fishing is not viable.'

139 Matthew Leonard, *Al Gore Calling for Direct Action Against Coal* (2007) <http://understory.ran.org/2007/08/16/al-gore-calling-for-direct-action-against-coal/>.

140 Michelle Nichols, 'Gore Urges Civil Disobedience to Stop Coal Plants' (2008) <http://uk.reuters.com/article/idUKTRE48N7AA20080924>.

statements in (at least) three different ways. First, as saying that the law authorising the construction of a coal-fired power plant has the potential to cause such great harm to the Earth community that there is no *moral* obligation to obey that law.[141] Second, that the law in question is not *legally valid* or that there is no law at all.[142] Finally, that the law is legally valid but that it is not law in the *true* sense of the word.[143] That is – because the law is strongly contrary to environmental health, it is *defective as law*.[144] Mark C Murphy elaborates on the use of the term defective:

> To say that something is defective is to say that it belongs to a certain kind and there are certain standards of perfection that are internal to it (that are intrinsic to it, that necessarily belong to) members of that kind. To be an alarm clock just is, in part, to be the sort of thing that if it cannot sound an alarm when one wishes to be awakened, it is defective. But something can be an alarm clock even if it cannot sound an alarm: it might be broken, or poorly constructed, or whatever.[145]

According to the third interpretation of Gore's statement, law has certain standards that are internal to it and a failure to meet these standards renders a purported law defective. Consistent with the purposive description of Human Law detailed above, it is the third interpretation that will be advanced in this article. From this perspective, Earth Jurisprudence advocates a particular methodological approach. It suggests that theorising about law should not be a neutral exercise[146] that is divorced from the

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141 While this is a legitimate interpretation of Gore's statement, it says nothing about the nature of law. It is thus contrary to the ecological and purposive description of Human Law presented in this article. Other adherents to natural law philosophy would similarly reject this 'moral reading', on the basis that it trivialises the natural law article. As Murphy observes, interpreting natural law as a claim about the justifiability of disobeying unjust laws, 'is excruciatingly uninteresting, a claim that almost everyone in the history of moral and political philosophy has accepted, and thus is not much worth discussing', Mark C Murphy, *Natural Law in Jurisprudence and Politics* (2006) 10.

142 This position is similar to the 'strong natural law article'. For arguments in favour of this position, see G Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (2006) 26 *Oxford Journal of Legal Studies* 7 and R Alexy, *The Argument for Injustice: A Reply to Legal Positivism* (2002) 54.

143 For an examination of legal validity in natural law philosophy, see Murphy, above n 144, 9-12.

144 Ibid 12.

145 Mark C Murphy, *Philosophies of Law* (2007) 44.

146 This point is also central to the critical legal studies movement.

broader context of our existence and fails to have appropriate regard for the common good of the comprehensive Earth community.

This contextual interpretation of Earth Jurisprudence is supported further by the notion of 'central case' advanced by Finnis.[147] Briefly, the 'central case' is an approach within social theory that seeks to describe an institution whose interpretation varies substantially between different theorists. Rather than discussing what all interpretations have in common, a central case methodology chooses characteristics that may appear fully only in the most developed or sophisticated instantiation of the thing.[148] Finnis uses this methodology to draw a distinction between the 'focal' and 'secondary' meanings of law.[149] The focal meaning of law refers to its ideal form, a form to which actual law is a mere striving or approximation.[150] In contrast, the 'secondary' meaning of law refers to instances of law that are 'undeveloped, primitive, deviant or other "qualified sense" or "extended sense" instances of the subject matter.'[151] When we are concerned with law in the secondary sense – prescriptions that are merely 'in a sense law' – there is no point in asserting that they lack legal validity. Rather, they are valid and enforceable laws that fall short of the ideals that are contained in the concept of law in its fullest sense. Here the positivist argument that any standard which meets the predetermined criteria for validity in a particular legal system is valid, sits alongside and can co-exist with the ecocentric account of law, on which 'true' law aims at securing the comprehensive common good.

Following Aquinas, Finnis describes the central case of law to be the 'complete community', defined as 'an all-round association' that includes the 'initiatives and activities of individuals, of families and of the vast network of intermediate associations.'[152] Its purpose or point is to secure the common good or – the 'ensemble of material and other conditions that tend to favour the realisation, by each individual in the community, of his or her personal development.'[153] Thus, as described by Finnis, the focal meaning of law is to secure the common good of human beings by co-ordinating the different goods of individuals within the community. Finnis contends that this is the true purpose of law and any law that conflicts with this goal is not

147 Finnis, above n 30, 10. For a critique of Finnis's attempt to identify the central case of law with morality, see Hart, above n 31, 12.

148 Brian H Bix, above n 116, 30-31.

149 Finnis, above n 30, 9-10.

150 Ibid 11.

151 Finnis, above n 30, 9-10. This argument can be traced back to Aristotle's 'Nicomachean Ethics' and 'Politics'. See Jonathan Barnes, *The Complete Works of Aristotle* vol II (1984) 1157a30-33 and 1:1275a33-1276b4.

152 Finnis, above n 30, 147.

153 Ibid 154.

a law in the focal sense of the term. They are not true laws 'in the fullest sense of the term' and 'less legal than laws that are just.'[154]

The notion of 'central case' has the potential to be useful for supporting the theory of law advanced in Earth Jurisprudence. It also avoids unnecessary criticism that would attach to the argument that a law that was inconsistent with the Great law was not a law at all.[155] However, to be consistent with the principle of Earth community, the 'complete community' described by Finnis would need to be extended from human beings[156] to include the comprehensive Earth community.[157] Interestingly, Finnis recognises that ecological interconnectedness is a form of relationship.[158] He also provides for the extension of his definition of the 'complete community'. Looking to the future he contends '[i]f it appears that the good of individuals can only be fully secured and realised in the context of the international community, we must conclude that the claim of the national state to be a complete community is unwarranted.'[159] Following this logic further, if the good of individuals and communities can only be secured by extending the central case of law to the Earth community, then this comprehensive community should be the reference from which to judge legal quality. This would mark a shift from an anthropocentric interpretation of law and toward an ecocentric interpretation.

2. CORRUPTIONS AND CIVIL DISOBEDIENCE

Human Laws that are inconsistent with the Great Law are not laws in the focal sense of the term. They are defective and judged from the perspective of law's focal meaning, not morally binding by virtue of their own legal quality. This gives rise to issues concerning the authority of law and civil disobedience.[160] Due to space constraints, this section cannot engage with

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154 Ibid 279.

155 For an example of his, this argument has been made in the context of natural law philosophy, see Finnis, above n 30, 34. Finnis argues that the true classical doctrine never purported to derive 'ought' from 'is'.

156 Finnis, above n 30, 152.

157 Cullinan, above n 14, 77-78. Cullinan critiques Finnis on his limited understanding of community. Cullinan argues further that 'if we shift our point of reference from what we consider to be good for the individual in (Western) societies to what is good for Earth, the conclusions are likely to be very different. From an Earth jurisprudence perspective, the inherently anthropocentric flavour of current concepts of natural law makes the debates that have raged around these ideas seem rather artificial.'

158 Finnis, above n 30, 150.

159 Ibid.

160 For a broad overview of these topics, see Hugo Adam Bedau (ed), *Civil Disobedience: In Focus* (1991) and Christopher Heath Wellmann and

the broad complexities of this topic. In particular it does not consider the intricacies of how civil disobedience should be defined,[161] whether citizens in a contemporary Western democracy are ever justified in engaging in civil disobedience[162] and whether such democracies are capable of responding to the present environmental crisis.[163] The aim is the modest one of outlining the consequence for a law that contravenes the Great Law and is rendered defective or contrary to law's focal meaning.

The article defines Human Law so as to retain presumptive authority of human beings to make binding prescriptions for the community. While this presumption is subject to debate,[164] this section does not attempt a resolution. Instead, for present purposes, it is sufficient to say that the law necessarily *claims* moral authority and not that it necessarily *has* moral authority.[165] Rather than becoming entangled in this discourse, proponents of Earth Jurisprudence focus on describing law in a way that removes the self-validating nature of legal positivism and considers Human Law in the context of the Great Law. From this perspective the authority of laws

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Anthony John Simmons, *Is There A Duty to Obey the Law?* (2005).

161 See for example, John Rawls in *A Theory of Justice* (1999) 320: 'civil disobedience [is] a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of government.'

162 This article maintains that there are legitimate grounds for civil disobedience. For a discussion against this position see T H Green, *Lectures on the Principles of Political Obligation* (1907) 111. The alternative position is well represented by Peter Singer, *Democracy and Disobedience* (1973) 105-132.

163 See Freya Matthews, *Ecology and Democracy* (1996).

164 The most influential modern argument in favour of law's presumptive authority is the modern social contract theory articulated by Rawls, above n 164. Rawls argues at 3 that such a proposition 'required no argument' and that 'at least in a society such as ours' (the United States) there was a moral obligation to obey the law. For an argument against laws presumptive authority, see Raz, above n 29.

165 Denise Meyerson, *Jurisprudence* (2011) 18. Note that our ultimate obligation to obey the law is a moral obligation and not a legal obligation. See further Singer, above n 165, 3. Singer argues that our obligation to obey the law cannot be legal since this 'would lead to an infinite regress – since legal obligations derive from laws, there would have to be a law that says we must obey the law. What obligation would there then be to obey this law? If legal obligation, then there would have to be another law … and so on. If there is any obligation to obey the law, it must, ultimately be a moral obligation.'

promulgated by human authorities are *contingent* on their consistency with the Great Law and the attainment of the comprehensive common good.[166]

Arguments pertaining to the contingent nature of legal authority are commonplace in political philosophy.[167] What makes Earth Jurisprudence unique within this discourse is the method it advocates for determining legal quality. Through the principle of Earth community, it provides a rational basis for the activities of legislators and furnishes a guide to decide whether citizens have a moral obligation to obey the law. This method does not purport to be purely objective and provide a certain test for determining when civil disobedience is justified.[168] Indeed, whether in a particular case our presumed obligation to obey the law can be outweighed is not something that can be determined in the abstract.[169] Its application to 'hard cases'[170] is likely to be subject to as much debate and disagreement as other moral justifications for civil disobedience.

Amongst the objections to describing legal authority as contingent are appeals to avoiding bad example, civil disturbance or the weakening of

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166 A similar focus is taken in natural law philosophy. See Finnis, above n 30, 360. Finnis contends that if lawmakers use their 'authority to make stipulations against the common good ... those stipulations altogether lack the authority they would otherwise have *by virtue of being his*. This reasoning is influenced by Aquinas who in question 96, article 4, emphasised the relationship between obligation and common good and recognises the existence of first principles of natural law, which are immutable, Aquinas, above n 35, 96. An example of an immutable first principle is 'Do harm to no man'.

167 See for example M B E Smith, 'Do We Have a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale Law Journal* 950 and Heidi Hurd, *Moral Combat* (2008).

168 In critique of 'higher law' justifications for civil-disobedience Carl Cohen notes in 'Militant Morality: Civil Disobedience and Bioethics' 19(6) *Hastings Center Report* 23 that such approaches: 'encounter perennial difficulties: the source, authority and content – and even the meaning – of such laws….are matters of unending dispute.' Recent debates over climate change provide a pertinent illustration of the complexities of reaching agreement on scientific issues. For an overview of this debate, see Andrew Dessler and Edward A Parson, *The Science and Politics of Global Climate Change: A Guide to the Debate* (2010).

169 Commenting on this point, Singer notes at above n 165, 64: 'to expect any work of theory to give answers to such questions is to expect more than theory alone can give.'

170 Term is borrowed from Ronald Dworkin, *Taking Rights Seriously* (1978). Hard cases refer to those instances where competently trained and thoughtful people might come to different conclusions about the result.

an otherwise just legal system.[171] This objection can also be stated in consequentialist terms whereby one is asked to consider the potentially negative consequences that may follow for a society in which people disobey the law. Thomas Hobbes represents the classical source for this proposition, arguing that 'perpetual war of every man against his neighbour'[172] was the condition of a lawless society. Finnis makes this argument in terms of 'collateral obligation'. He contends:

> It may be the case, for example, that if I am seen by fellow citizens to be disobeying or disregarding this 'law', the effectiveness of other laws, and/or the general respect of citizens for the authority of a generally desirable ruler or Constitution, will probably be weakened, with probable bad consequences for the common good. Does not this collateral fact create a moral obligation?[173]

Such arguments of principle tend to ignore empirical evidence, which suggests that actual examples of concerted civil disobedience do not produce a weakening of bonds to comply with other legislation.[174] Instead, civil disobedience tends to be targeted and focused rather than indiscriminate and violent.[175] Far from weakening a democratic state, civil disobedience is justified by the role it plays in bringing publicity to, or perhaps a fair hearing of,[176] a particular issue. Civil disobedience may also provide a method for compelling lawmakers to reconsider a purported law.[177] In the context of Earth Jurisprudence, it may be the case that a lawmaker may act or fail to act with regard to the consequences that a purported law might have for the common good of the Earth community. In this circumstance, civil disobedience that aims to make lawmakers reconsider their actions is a potential method for settling the issue and realigning Human Law with the Great Law. Further, in jurisdictions that provide discretion for prosecutors, the test of legal quality advocated by Earth Jurisprudence may be used to guide those responsible for

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171 For a comprehensive overview, see M B E Smith, 'The Duty to Obey the Law?' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (1996) 465.

172 Thomas Hobbes, *Leviathan* (1996) [first published 1651] 143.

173 Ibid.

174 Singer, above n 60, 136-147. See also Ronald Dworkin, 'On Not Prosecuting Civil Disobedience' (1968) 10(11) *New York Review of Books* 14.

175 Singer, above n 160, 136-147.

176 See Bertrant Russell, 'On Civil Disobedience' in *The Autobiography of Bertrand Russel* (1969) 141-142.

177 Singer, above n 160, 84.

implementing the law about when protests ought to be tolerated (both morally and pragmatically).[178]

A purported law that is inconsistent with the Great Law may, depending on the specific circumstances, be so serious that civil disobedience is justified regardless of the consequences to government.[179] The justification for this position is tied to the primacy of the Earth community and the recognition that human beings are interconnected and dependant on nature. If a purported law is so insensitive to the Great Law that it places the lives of human beings and other components of the Earth community in jeopardy, it is difficult to see the rationale for preferencing the maintenance of a human political institution. It is not difficult to take this abstract statement and apply it to instances of the present environmental crisis outlined in the introduction to this article. If governments fail to take necessary action to prevent dangerous climate change or continue to approve industrial practices that degrade ecosystem or species biodiversity, then on what grounds is their own authority assured? Further, could the actions of protesters who resist government action/inaction be considered morally legitimate and not deserving of punishment? Certainly, these are complex questions and deserving of more attention than can be allocated in this article. However, at a basic level Earth Jurisprudence maintains that we must question the value and legitimacy of any law that surpasses the ecological limits of the environment to satisfy the needs of one species. Such an action is unsustainable and risks the common good and future flourishing of the interconnected Earth community.[180]

V. Conclusion

This article presents an interpretation of Earth Jurisprudence as a legal philosophy. It has sought to outline the legal categories proposed in Earth Jurisprudence and consider how they interact with each other. It began by describing Earth Jurisprudence as a theory of natural law. It posited the existence of two kinds of 'law', organised in a hierarchy. At the apex is

178 N Fairweather, 'The Future of Environmental Direct Action: A Case for Tolerating Disobedience' in N Fairweather, Sue Elworthy, Matt Stroh and Piers Stephens (eds), *Environmental Futures* (1999) 108-112 lists seven additional criteria for justifying environmental disobedience.

179 This is contrary to other statements justifying civil disobedience. For example, Singer notes at above n 160, 85; 'Once it becomes apparent that the majority are not willing to reconsider [their position]…disobedience must be abandoned.' It is difficult to accept this position in the context of serious threats to the Earth community brought about by government action/inaction over environmental issues.

180 See also Cullinan, above n 14, 74.

Great Law, which represents the principle of Earth community. Below the Great Law is Human Law, which represents rules articulated by human authorities that are consistent with the Great Law and enacted for the common good of the comprehensive Earth community. Human Law was also described as purposive rather than neutral or value free. The stated purpose of human law is to secure conditions that favour the health and future flourishing of the Earth community. On this account, Human Law cannot truly be understood without reference to the ideal or common good toward which it is striving.

Regarding the interaction between legal categories, this article argued that Human Law derives its legal quality from the Great Law. Further, that a purported law that is in conflict with the Great Law is defective and not morally binding on a populace. Defective laws, while still enforceable by the state, are considered not 'true' laws or law 'in the fullest sense'. Earth Jurisprudence does not seek to invalidate human law. Rather, it provides a rational basis for the activities of legislators and a guide to deciding whether one has a moral obligation to obey. Purported laws that neglect or contravene this standard can (in theory) provide a justification for civil disobedience. Civil disobedience can further be justified because of the role it can play in bringing publicity or a fair hearing to an issue and also as a means of encouraging lawmakers to amend a defective law.

Confucian Constitutionalism: Classical Foundations

BUI NGOC SON[†]

I. Introduction

'Constitutionalism' is a modern term but the notion is traceable back to classical antiquity. Western scholars tend to consider the origins of constitutionalism to be endemic to the western cradle.[1] Are there constitutionalist wisdoms in the repository of Oriental ancient lore? In particular, are there the beginnings of constitutionalism in Confucian political philosophy?

This is an important question for the promotion of constitutionalism in China and other East Asian nations like Japan, Korea, and Vietnam where Confucianism has a long tradition. If there exist constitutionalist ideas in Confucianism, the traditional legacy may not be a cultural impediment to East Asia's transition to modern constitutionalism. In a more positive sense, Confucianism can be used to legitimatise the transition and hence make the process more natural, and Confucianism can be explored to expedite constitutionalism in the region.

At first glance, it seems counterintuitive to search for the origins of constitutionalism in Confucianism. In Charles Howard McILwain's negative definition, constitutionalism is 'opposite to despotic government,'[2] while Confucianism is normally incriminated as a cause of despotism. [3] In

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1 See Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (1999) 5; Raymond Polin, *Plato and Aristotle on Constitutionalism: An Exposition and Reference Source* (1998); Graham Walker, 'The Idea of Nonliberal Constitutionalism' in Ian Shapiro and Will Kymlicka (ed) *Nomos XXXIX: Ethnicity and Group Rights* (1997) 161-62; Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (2005).

2 McIlwain, above n 1, 24.

3 This is traceable to the iconoclasts of the May Four Movement. In opposing Confucianism and expediting for human rights, science, and democracy,

fact, some scholars point out that Confucianism is fundamentally different from constitutionalism. For example, Chen Yu in the article entitled '*Confucianism versus constitutionalism*' explains that while constitutionalism focuses on rule of law, individualism, people's rights, and litigation, Confucianism puts emphasis on rule of men, collectivism, people's obligations, and disfavours lawsuits.[4]

However, in recent years, some scholars have been optimistic about the potential existence of constitutionalist ideas in Confucian intellectuals. Chaihark Hahm for example has fervidly explored 'Confucian constitutionalism' defined by him as 'the application of *li* as a regularized restraint on the ruler through disciplining his body and mind.'[5] Additionally, Sungmoon Kim also discovered Confucian constitutionalism of Mencius and Xunzi through comparatively analysing their respective perspectives on virtual, ritual and royal transmission.[6] Finally, Jaeyoon Song's explanation of the constitutionalist meaning of *Zhou Li (Rituals of Zhou)*, a Confucian classic, should be mentioned.[7]

I believe that although efforts in shedding constitutionalist light on Confucian political concepts are creditable, it is far from true that a systematic and full exploration of the constitutionalist ideas in the Confucian classical philosophy has been conducted. Halm's study just deals with the practical rather than philosophical aspect of Confucian constitutionalism with a narrow concentration on the disciplinary dimension of the Confucian *li*. Kim and Song's studies provide sporadic constitutionalist ideas of the classical Confucian philosophers and works, but ignore the constitutional importance of other Confucian concepts, such as *minben* and especially the doctrine of rectification of names and its concomitant *Spring and Autumn Annuals.*

The ambition of the present paper is to initiate a cognitional odyssey to classical Confucianism, or pre-Chin Confucianism established by Confucius (551-479 BC) and developed by Mencius (372 – 289 BC) and Xunzi (312–230 BC) during the late Spring and Autumn Period (770-476 BC) and Warring States Period (475-221 BC) in the history of China, to

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Chen Duxiu and his supporters linked Confucianism to despotism. *See* Peter Zarrow, *China in War and Revolution 1895-1949* (2005) 134.

4 See Chen Yu, 'Confucianism versus Constitutionalism' (2007) 2(2) *Journal of Cambridge Studies* 32-3

5 Chaihark Hahm, 'Confucian Constitutionalism' (2000) 153.

6 Sungmoon Kim, 'Confucian Constitutionalism: Mencius and Xunzi on Virtual, Ritual, and Royal Transmission' (2001) 73(3) *The Review of Politics* 371-99.

7 See Jaeyoon Song, 'The *Zhou Li* and Constitutionalism: A Southern Song Political Theory' (2009) 36(3) *Journal of Chinese Philosophy* 324-38.

systematically generalise the classical theoretical foundations of Confucian constitutionalism.

For latter discussions, I will first define some words to explain the concept of constitutionalism. I will then move forward to exploring the classical philosophy of Confucian constitutionalism. My generalisation is as follows. Like any other form of constitutionalism, Confucian constitutionalism is generated due to the apprehensiveness of despotic government. In searching for an antidote to despotic government, the classical Confucians suggest a *zheng ming* government which can be understood as constitutional government. The purpose of this government is to ensure governmental responsibility for people's welfare, which is well demonstrated in the concept of *minben* (people as basis). The Confucians then propose the means to articulate the standards for rectifying the governmental power, named as *li* – a variant of unwritten constitution. To enforce the *li*, they anticipate the practice of moral self-rectification by the ruler and the external rectification of ruler by wise and virtuous scholars. The study is concluded with a summary of the main findings and some reflections on the relation of Confucianism to the promotion of constitutionalism in contemporary East Asia.

II. The concept of constitutionalism

For a more systematic and intelligible approach, I would differentiate between the essence, the goal, and the means of constitutionalism.

To begin with, what is the essence of constitutionalism? CH McILwain is frequently mentioned as an American constitutionalist scholar who developed the idea of constitutionalism as a mechanism of imposing restraint on the arbitrary power of government. He asserts that 'constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.'[8] By 'law' or 'legal', McIlwain does not exclusively mean positive law: 'That law may be unwritten and entirely customary, as it has been for the greater part of its history; or it may be set forth in a single official document as in our state and federal constitutions, but in every case it is a law that puts bounds to arbitrary will.'[9]

Carl J Friedrich provides an analogous guidance. He defines constitutionalism as 'a system of effective restraints upon governmental

8 McIwain, above n 1, 24

9 CH McIwain, *Constitutionalism and the Changing World* (1969) 244.

action.'[10] For him, the effectiveness of the restraints does not depend on the legal formality: 'It should be evident that the existence of formal legal restraints is in no wise an indication of the existence of a constitutional order in the political sense.'[11] Rather, 'a restraint may be very effective and thoroughly regularized, without necessarily being embodied in positive law unless law is very broadly defined as including all custom.'[12]

What is the goal of constitutionalism? Influenced by liberalism, western constitutional scholars tend to conceive the purpose of constitutional government as to protect individual rights.[13]. In fact, as Graham Walker asserts: 'Constitutionalism predates the enlightenment. Liberalism does not.'[14] He explains that theories of constitutionalism developed in the pre-enlightenment period by Greek thinkers like Aristotle and Polybius, Cicero and other constitutional theorists of Republican Rome, medieval scholars, and social contract philosophers do not focus on liberty. Walker concludes that the liberal definition of constitutionalism is the outcome of the modern conflation of constitutionalism and liberalism.[15]

The crucial point I need to underline in Walker's conception is that 'constitutionalism in its essence is not individual rights but fettered power.'[16] Threat to individual liberty is not the sole danger that needs limitations of the governmental power because 'from the perspective of other places and other histories, there may well be other harms to avoid, and other goods to pursue publicly, besides individual freedom.'[17] I find this argument pretty serviceable for understanding the foundations of constitutionalism in East Asia, where the public has not accentuated individual liberty. I believe that defining constitutionalism as limitation-of-power holders to protect individual rights can only be congenial for understanding American constitutionalism, where liberty is conceived as predominant value. In non-Christian traditions, people may commit to general values other than liberalism or individualism.

I find that Walker provides a pertinent conception to comprehend the goal of constitutionalism in general. He generalises that 'the appeal of constitutionalism, now and in previous eras, seems precisely to lie in its capacity to *ward off tyranny* by structuring public life and institutions in a

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10 Carl J Friedrich, *Constitutional Government and Democracy* (1950) 26.
11 Ibid 123.
12 Id.
13 See Ronald Dworkin, 'Constitutionalism and Democracy' (1995) 3 *European Journal of Philosophy* 1.
14 Walker, above n 1, 160.
15 Ibid 160-64.
16 Ibid 163.
17 Ibid 163-64.

way that keep them *accountable to general public standards*.'[18] By way of metaphor, an unbridled horse may become pugnacious, dangerous and unserviceable; similarly, power that has slipped the leash may easily become a Trojan horse for general public standards. Public values are vulnerable to the mercurial whims of the procrustean ruler. Public values may be in peril if whims of politicians are free from restraints, thus allowing them to wield power by character of *ipse dixit* in pursuit of their egoistic interests. In short, the state power must be effectively restrained to ensure general public standards.

For the ends of ensuring the government is responsible for general values, constitutionalism may carry diverse means designed to superimpose limitations on the state-power holders. Cursory examination gives the lie to the idea that the enactment of a constitution is an ineluctable step in the establishment of constitutional government . In fact, constitutionalism is not equal to a constitution notwithstanding the etymological genealogy. Walker asserts that: 'Defining quality of constitutionalism is not having definite texts; it is the public articulation of (at least some of) a polity's normative architecture, that is, of those conventions and practices, principles and understandings that, when not simply taken for granted, are invoke to control more particular disputes. These things can be articulated via all forms of influential public discourse.'[19] The important point here is that the rudiment of constructing constitutionalism is 'the public articulation' which means to verbally manifest 'a polity's normative architecture'. Making a constitution is just one kind of 'all forms of influential public discourse.' Walker is not alone in proposing this kind of concept. Richard S Kay equally opines that constitutionalism necessarily entails the creation of prior rules to define and limit the power of the state and that it is necessary to invoke some fixed verbal formulation of those rules[20]. He then notes that 'the medium by which the formulation is preserved is and communicated is not crucial. It could be oral or electronic, but for the founders of the United States Constitution, of course, it was written.'[21]

Finally, constitutionalism normally requires structural limits on state power.[22] Modern examples of constitutional government witness the prevalent practices of such structural limits as separation of power, federalism, bicameralism, presidential veto, parliamentary impeachment, and especially judicial review. It should be noted that these are structural

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18 Ibid (italics added).

19 Ibid.

20 Richard S Kay, 'American Constitutionalism' in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (1998) 27.

21 Ibid.

22 See Walker, above n 1, 167.

means of mature modern western constitutionalism. Premodern and non-western constitutionalism may carry other structural limits.

III. Confucian Constitutionalism: Classical Foundations

A. CONFUCIANISM VERSUS DESPOTISM

It is conventionally thought that the notions of constitutionalism are generated due to the apprehension of arbitrary power. As shown in McIlwain's negative definition of constitutionalism, it is opposite to despotism. Given that, it is necessary to descry the Confucian stance toward arbitrary rule or despotism or tyranny,[23] the starting point of searching for constitutionalist origins in Confucianism.

In contrast to modern criticism of Confucianism that 'it is related, as it always was, to political despotism (…),'[24] I contend that classical Confucianism adopts a stance critical of despotism. To begin with, the *Shu Jing* or *The Book of Historical Documents* shows a negative disposition towards despots. As indicated in the work, such revolutionists as the Tang of Shang and King Wu, who were about to capsize the despots, tended to justify their conduct on the grounds of the popular cacophony against despotic rulers.[25] In another Confucian classic called *Li Ji* or the *Book of Rites*, Confucius caustically compares that 'oppressive government' which is a typical indicator of despotism as 'more terrible than tigers.'[26]

The *Analects* provides more evidence for Confucius' aversion toward arbitrary rule. This can be firstly corroborated by his formulation of 'four bad things' pertaining to persons in authority: 'To put the people to death without having instructed them; - this is called cruelty. To require from them, suddenly, the full tale of work, without having given them warning; - this is called oppression. To issue orders as if without urgency, at first, and,

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23 'Arbitrary rule', 'despotism' and 'tyranny' are terms close in meaning. 'Despot (Greek *despotes*) related to someone who resorts to arbitrary rule.' See Eric Carlton, *Faces of Despotism* (1995) 10. 'Despotism and tyranny are virtually synonymous terms for governments uncontrolled by law or custom. Power in such government is typically concentrated in the hands of a single authoritarian ruler.' See Frank N Magill (ed), *International Encyclopedia of Government and Politics*, *Volume One* (1996) 365.

24 Xinzhong Yao, *An Introduction to Confucianism* (2000) 271.

25 See James Legge, *The Chinese Classics with Translations, Critical and Exegetical Notes, Prolegomena, and Copious Indexes ,Volume III., The Shoo King (Shu Jing*) (1960) 175.

26 James Legge, 'Li Ki' ('Li Ji') in *Sacred Books of the East, Vol. XXVIII,* F Max Müller (ed) (1885) 191.

when the time comes, to insist on them with severity; - this is called injury. And, generally, in the giving pay or rewards to men, to do it in a stingy way; - this is called acting the part of a mere official.'[27] The first three bad things are obviously linked to arbitrary rule. with respect to the first fault, Confucius's concern is that without public acknowledgement of ruling principles, public power can be arbitrarily practiced. The second fault, 'oppression', is clearly related to unpredictable and mercurial execution of public power. The spirit of the third bad thing - injury, according to Leonard Shihlien Hsu, 'resembles that of the *post facto* law which is made unconstitutional in practically all modern states.'[28] In general, it can be deducted from the above language that arbitrary rule in Confucius' percipience is a 'bad thing.'

Equally significant, Confucius genuinely dreads uncontrolled power. One day, the Duke Ting asked Confucius: 'Is there a single sentence which can ruin a country?' He replied, 'If a ruler's words be good, is it not also good that no one oppose them? But if they are not good, and no one opposes them, may there not be expected from this one sentence the ruin of his country?'[29] To explain Confucius' sally in constitutional parlance, the country can be destroyed by unchecked power.

In a more acrimonious tone, Mencius goes further to assert that bad rulers should be dismissed. In a conversation with King Hsüan of Ch'i, Mencius implicitly states that when the king drives his kingdom into a bad situation his power should be left in abeyance.[30] More explicitly, in another audience with the King, in replying to the King's inquiry on the historical military events pertaining to the flagellations of King Tang and King Wu upon King Jie and King Zhou respectively, Mencius obviously supports the legitimacy of regicide in the case of executing despots or tyrants. [31]

In the same vein, Xunzi unequivocally asserts that a culpable tyrant is not a virtous ruler, and deserved dethronement in favour of the worthy. He states: 'To execute a tyrannical lord is like executing a "solitary

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27 James Legge, *The Chinese Classics with Translations, Critical and Exegetical Notes, Prolegomena, and Copious Indexes*, *Volume I., Confucian Analects, The Great Learning, The Doctrine of the Mean* (1960) 353-54.

28 Leonard Shihlien Hsu, *The Political Philosophy of Confucianism* (1975) 110.

29 Legge, above n 27, 269.

30 *See* James Legge, *The Chinese Classics with Translations, Critical and Exegetical Notes, Prolegomena, and Copious Indexes*, *Volume II., The Works of Mencius* (1960), 164-65 (Slightly modified).

31 Id at 167.

individual.'"[32] Xunzi, then, advocates the legitimacy of King Tang's and King Wu's banishment of the tyrant Jie and the tyrant Zhou respectively.[33]

In short, there is ample evidence in the Confucian classical works addressing the antagonism to despotism or tyranny. Importantly, if constitutionalism is negatively defined as the antithesis of despotic government, the Confucian antagonism to despotic government can be accounted as the starting point of Confucianism in explicating constitutionalist postulates. The continuing odyssey entails a deeper consideration of whether the Confucians had any alternative for despotism in any constitutionalist sense.

B. RECTIFICATION OF NAMES AS CONSTITUTIONALISM

Constitutionalism is widely eulogised as 'the antidote to tyranny.'[34] McIlwain also proclaims that: 'the only alternative to despotism is constitutionalism.'[35] While passing stricture upon tyranny or despotism, do the classical Confucians envisage any 'antidote' or 'alternative' in any constitutionalist sense? I believe that the doctrine of *zheng ming* (rectification of names[36]), developed by Confucius and expounded by Mencius and Xunzi, is the corollary of their dread of arbitrary or despotic power. Z*heng ming* government is Confucianism's shibboleth formulated in the hope that public power will function in a proper manner.

Many philosophical scholars have underlined the importance of the doctrine of *zheng ming* in Confucian political philosophy.[37] However, what has been ignored is the constitutional importance of the doctrine. Tom Ginsburg and Chaihark Hahm are the rare constitutional scholars who pay attention to the constitutional dimension of Confucianism, but unfortunately they, while focusing on the concept of *li*, have neglected the constitutional significance of *zheng ming*. In this section, I shall argue that Confucianism's doctrine of the rectification of names can be comprehended in constitutionalist connotation.

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32 John Knoblock, *Xunzi: A Translation and Study of the Complete Works, volume III* (1994) 35.

33 Ibid.

34 Walker, above n 1, 154.

35 McIlwain, above n 9, 271.

36 In this study, *zheng ming* and rectification of names are interchangeably used.

37 See Chung- ying Cheng, *New Dimensions of Confucian and Neo-Confucian Philosophy* (1991) 221; Chenyang Li, *The Tao Encounters the West: Explorations in Comparative Philosophy* (1999) 63.

First, it should be noted that for Confucius, rectification of names is the doctrine advanced mainly to deal with matters regarding government. This is well illuminated by the fact that Confucius introduced the term '*zheng ming*' in his repartee to Zi Lu's inquiry on what he should do first if the Lord of Wei employs him to administer the government: 'What is necessary is to rectify names.'[38]

Because Confucius presented the term '*zheng ming*' in the situation related to the Lord of Wei, some are inclined to explain it on the grounds of the historical context associated with the Wei state.[39] The historian Sima Qian of the early Han Dynasty, for example, believed that the name (*ming*) in Confucius' view of rectification of names (*zheng ming*) refers to the two names: 'father' and 'son.'[40] On the other hand, for some other Han commentators, Confucius' *zheng ming* is not restricted to the historical context of the relationship of father to son as the author of *Shi ji* believed. For example, Ma Rong (74-166) regarded Confucius' *zheng ming* as 'to correct the names of the one hundred affairs.'[41]

It may be true that when introducing the doctrine of rectification of names, Confucius was aware of the imbroglio of Wei; however, it is unclear that the *ming* (name) in his *zheng ming* is restricted to 'father' and 'son.' At the same time, the expansion of *ming* (name) to the names of all things appears to reach beyond the intention of Confucius. When initiating the doctrine, Confucius may inadvertently give support to nominalists,[42] but he

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38 Legge, above n 27, 263.

39 Historically, the prince of Wei was Lord Zhe of Wei who fought with his father Kuai Kui for the rulership of the state. Kuai Kui, the eldest son of Duke Ling of Wei (d 493 BC), offended his father and was forced into exile. When Duke Ling died, the people chose his grandson Zhe to be their ruler, but Kuai Kui sought for the help of the state of Jin to gain the throne. See Zhang Dainian, *Key Concepts in Chinese Philosophy*, (Edmund Ryden trans, 2002 ed) 462.

40 For more elaborations on Sima Qian's perspective, see John Makeham, *Name and Actuality in Early Chinese Thought* (1994) 36; see also, John Makeham, *Transmitters and Creators: Chinese Commentators and Commentaries on the Analects* (2003) 334.

41 Dainian, above n 39, 463.

42 Xunzi dedicates a separate chapter in his work to discuss this theme. John Knoblock, *Xunzi, Volume III,* 113-138. I contend that the rectification of names in Xunzi's philosophy is both governmental and nominal, in that Xunzi writes the chapter both for defining governmental responsibilities and for differentiating different things. The Han commentators' expansive deconstruction of Confucius' doctrine of rectification is attributable to Xunzi's chapter. Today, the doctrine has been studied beyond the political sphere. The doctrine has also been the concern of linguistic and nominalistic studies. See for example, John Makeham, *Name and Actuality.*

himself, by *zheng ming*, is not a nominalist who intends to correct linguistically the names of all things. My contention is that *zheng ming* is governmental rather than linguistic. Confucius introduces the doctrine for governmental purpose and to deal with governmental matters. By rectification of names, Confucius mainly aims at rectifying the names of persons in authority.

Additionally, it should be emphasised that Confucius considers rectification of names the priority of a governmental program. Even, elsewhere in the *Analects*, he declares that: 'to govern means to rectify.'[43] Confucius tends to equate execution of governmental affairs to rectification of names.

Why is rectification of names essential for government? What is it? To understand the doctrine, it is necessary to firstly explain what names (*ming*) means in *zheng ming*. For Confucius, name is more than a linguistic medium used to identify things and people. In explaining Confucius' rectification of names, Fung Yu-lan defines name as the essence or concept of things. The name 'ruler', for example, is the essence which makes a ruler a ruler.[44] From this point of view, the names of people are not merely linguistic labels but, in a more substantial meaning, their essences.

The continuing matter is what constitutes the essence of a person from Confucius' perspective. Confucian humaneness (*ren*) holds that human beings are by nature social beings. Henry Rosemont Jr writes: 'in order to be a friend, neighbor, or lover, for example, I must have a friend, neighbor, or lover. Other persons are not merely accidental or incidental to my goal of fully developing as a human being, they are essential to it.'[45] From Confucius' point of view, the relationships that people live are not something external to them; in deepest sense, these relationships constitute the essence of their lives. Only through interpersonal relationships is one named as father, son, minister, or prince.

Hence, names like 'father', 'son', 'minister', or 'prince' are not only words to label people; rather, they encompass these relationships. For example, one is no longer called 'prince' if one does not experience the corresponding relationship with ministers and subjects. Moreover, for Confucius, each relationship that a person is involved in normally suggests

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43 Legge, above 27, 258.

44 See Fung Yu-lan, *A History of Chinese Philosophy Vol.1*, (Derk Bodde trans, 1952), 59.

45 Henry Rosemont Jr, 'Two Loci of Authority: Autonomous Individuals and Related Persons' in Peter D Hershock and Roger Tames (eds) *Confucian Cultures of Authority,* (2006) 10.

possible virtue. It is on this ground that Chung- ying Cheng defines names in Confucius' rectification of names as including 'labels for relationships between individuals and the values inherent in those relationships.'[46]

As names include relationships, they indicate the roles of people in which their duties and the functions are defined. The name 'prince', for example, proposes what the named is supposed to do. It should be noted that as the prince's relationships are essential to him, he lives rather than plays the roles in those relationships: in so far as he lives these roles, he is named as 'prince.' Furthermore, since name implies positive virtue, it suggests certain ways of behaviour. Therefore, the name 'prince' points out not only what the named will do but also what he ought to do. Chenyang Li helpfully generalises names as being 'both descriptive and prescriptive.'[47]

Having defined the meaning of 'names,' we can now clarify what rectification of names is. According to Fung Yu-lan, it means that 'the actual must in each case be made to correspond to the name, the thing's essence or concept.'[48] The essential spirit of *zheng ming* is the correspondence between the names and the actuality. Consequently, rectifying the names involves various actions to maintain the correspondence between the names and the actualities. Since names indicate the relationships which define the roles together with their inherent virtues, it follows that to rectify the names is to rectify the relationships, which means to maintain the socio-political order by which those who carry certain names shall act in accordance with the roles and the virtues that the names or the relationships stand for. Consider this discourse for more illustration. When the duke Ching of Chi asked Confucius about government, he replied, 'There is government, when the prince is the prince, and the minister is the minister; when the father is father, and the son is son.'[49] In the sentence that 'the prince is the prince,' the first word 'prince' refers to a physical prince, while the second word 'prince' refers to the relationships which define the duties and functions together with moral values that the physical prince is supposed to follow. 'The prince is the prince' means to safeguard the correspondence between the real actions of the physical prince with the roles and moral values that the term 'prince' stands for.

In negative meaning, rectification of names is to avert the situation in which the acts of those who carry social titles do not correspond with the roles and the values that the titles stand for. It is on this ground that

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46 Cheng, above n 37, 222.
47 Li, above n 37, 67.
48 Fung, above n 44, 59-60
49 Legge, above n 27, 256.

Confucius demands: 'he who is not in particular office, has nothing to do with plans for the administration of its duties.'[50]

From this, it can be seen that the Confucian program of rectification of names is more than precision of nomenclature. According to Chung- ying Cheng's explanation,

> rectifying names demands the correspondence of names to the natural facts as well as to the implementation of values. Thus, this doctrine does not just require definitional consistency, but implies a recognition of principles; that is, recognition of standards of action, and that can be used to judge what is true, good, and right, on the one hand, and what is false, bad, and wrong, on the other. To rectify names therefore is to establish standards of the true, the good, and the right. But because moral knowledge of right and wrong in a normal situation carries a command for doing right, to rectify names therefore, is related to the program for carrying out the command for doing the appropriate thing in accordance with the proper situation.[51]

Put it in another way, the Confucian program of rectification of names involves the articulation and execution of standards defining the functions and the values inherent in those functions. Governmentally speaking, rectification of names means to maintain the concordance between the real actions of the governors, like sovereigns and ministers, with the standards defining their duties, authority, and expected values. As the priority of the Confucian governmental program, rectification of names therefore involves the articulation and implementation of standards for the operation of public power.

Understanding it in this sense, I contend that the Confucian rectification of names is relatively in propinquity to constitutionalism. To rectify the names means to ensure the proper operation of public power. Rectification of names therefore implies the limitation of arbitrary power. In that sense, a rectified government tends to become a limited government. In the *zheng ming* government, the power holders are required to function in concordance with their names or the standards defined by their authorities, duties, and expected virtues. Quite similarly, in modern constitutional government, the physical political institutions, such as the congress, the president, and the prime minister, are required to function in accordance with the metaphysical constitutional standards (or the constitutional names)

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50 Ibid 213.

51 Cheng, above n 37, 222.

commonly defined by a written constitution. The constitutional judges, by practicing the constitutional review power, guarantee this concordance. Both *zheng ming* government and constitutional government are designed for the actual correspondence of the material governmental institutions to the governmental standards to ensure the proper use of public power and to prevent arbitrary power.

To be sure, that analogy alone is not sufficient to justify the conclusion that *zheng ming* government is a constitutional government. Constitutionalism in substantial meaning is 'about its *telos*.'[52] Moreover, constitutional government requires publicly articulating constitutional standards. Additionally, constitutionalist projects lead to manipulating means to ensure the concordance of the material constitutional institutions with the constitutional standards. Given that, the continuity of this odyssey requires considering how Confucianism conceptualises the telos of government, the institutional manifestation of standards for organising and operating state power, and the means to implement these standards and whether these conceptualisations reflect constitutionalist ideas.

C. MINBEN (PEOPLE AS BASIS): THE TELOS OF ZHENG MING GOVERNMENT

Constitutionalism presupposes the idea of the existence of a proper relationship between the government and its subjects. The propriety of the relationship means that governmental power must be limited to general public standards. In this section, I shall argue that the Confucian concept of *minben* (people as basis) can be regarded as the source of constitutionalism in the Confucian intellectual legacy since it suggests that a *zheng ming* government must be responsible for general public standards.

The concept of *minben* has been established in the *Shu Jing*. We find these verses in the classic: 'The people should be cherished; they should not be down-trodden. The people are the root of the country; the root firm, the country is tranquil.'[53] As people are the root or the base, the creation of government is for the people.[54] The happiness of the people is regarded as the end of government.[55]

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52 Nicholas Tsagourias, 'Introduction- Constitutionalism: A Theoretical Roadmap' in Nicholas Tsagourias (ed) *Transnational Constitutionalism: International and European Models*, (2007) 3.

53 Legge, above n 25, 158-59.

54 Ibid 254-55.

55 Ibid 262-63.

Confucius goes further to develop the concept of *minben* on the foundation of his humanism (*ren*). While *ren* is understood as the love of all men, its incarnation in the political realm is the ruler's love of the people. In political meaning, to love the people means to work for their happiness. In the *Analects*, Confucius is reported to respond to the duke of Sheh's enquiry on government that 'good government obtains, when those who are near are made happy, and those who are far off are attracted.'[56]

From Confucius' perspective, the good government must be responsible for the welfare of the people, which includes both material and spiritual aspects. This can be well illustrated by this passage in the *Analects*: 'When the Master went to Wei, Zan Yu acted as the driver of his carriage. The Master observed, "How numerous are the people!" Yu said, "since they are thus numerous, what more shall be done for them?" "Enrich them," was the reply. "And when they have been enriched, what more shall be done?" The Master said, "teach them."'[57] It can be seen that in Confucius' thought, the responsibilities of the government are to firstly ensure prosperous conditions for the people and to subsequently educate them.

In the political field, to love the people or to work for the benefit of the people means two things: first, not to do bad things to them; second, to do good things for them. This is demonstrated in Confucius' proclamation of four principles of bad government and five principles of good government. The four principles of bad government pertain to doing harmful things to the people that a person in authority should avoid, including: cruelty, oppression, injury, and meanness. Five principles of good government are related to doing beneficial things for the people that a person in authority should promote, including: to benefit the people without wasting great expenditure, to lay tasks on the people without their repining, to pursue desire without being covetous, to maintain a dignified ease without being proud, and to be majestic without being fierce.[58]

Mencius expounds and goes further to develop the concept of *minben*. Mencius famously declares that 'the people are the most important element in a nation; the spirits of the land and grain are the next; the sovereign is the lightest.'[59] In developing the concept of *minben*, quite different from Confucius, Mencius particularly accentuates the responsibility of the government for the material benefits of the people.[60]

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56 Legge, above n 27, 269.
57 Ibid 266-67.
58 Ibid 352.
59 Legge, above n 30, 483.
60 See also, Viren Murthy, 'The Democratic Potential of Confucian *Minben* Thought' (2000) 10(1) *Asian Philosophy* 35.

Mencius considers nourishing the people as the foremost task of the humane government. His rationale lies in the conviction that the constancy of material life is the precondition for the constancy of spiritual life.[61]However, Mencius by no means underestimates the importance of educating people. He asserts 'if they [the people] are well fed, warmly clad, and comfortably lodged, without being taught at the same time, they become almost like the beasts.'[62] Mencius even suggests that the government should establish educational institutions for the instruction of the people.[63] While Mencius' goal was to morally educate people, he paid great attention to the livelihood of the people since he believed that economically decent conditions are required for the flowering of humane mind. Given that, material conditions are the instrument for spiritual life, and nourishing the people is subsidiary to educating them.

Xunzi also defends the principle of *minben.* Quite similar to the Hobbesian perspective, Xunzi gives credence to the inherently evil human nature whose natural development will drive human life to the state of anarchism, chaos and cruelty.[64] However, this does not necessarily lead him to the invocation of a Leviathan government, as Thomas Hobbes did, or draconian penal laws, as his unexpected student Han Fei did. Rather, he thinks that this inborn nature can be rectified by moral education and it is for this educational task that government is established.[65] Hence, Xunzi asserts that the people are not created for the sake of the lord; conversely, the lord is established for the sake of the people.[66] Therefore, quite similar to Confucius and Mencius, Xunzi states that: 'if the lord of men desires to be secure, no policy is as good as even-handed government and love of people.'[67] To love the people or to work for the sake of the people, the government must both educate them and take care of their livelihood. One of the ways of the ruler, he states, 'lies in expertise in providing a living for people and in caring for them.'[68]

The Confucian concept of *minben* is teleologically linked to the doctrine of rectification of names. The welfare of the populace is the *telos* of the *zheng ming* government. Insofar as the government serves for the benefit of its subjects it is qualified as a true government. Conversely, if the government or the ruler betrays the benefit of the people, it is not a true

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61 See Legge, above n 30*,* 147-48 (slightly modified)
62 Ibid 251.
63 Ibid 242.
64 See Knoblock, above n 32*,* 150-51.
65 Ibid 151.
66 Ibid 224.
67 Knoblock, above n 32*, Volume II, 97.*
68 Ibid 181.

government or a true ruler. It is on this ground that Mencius regards the tyrant Zhou as 'a robber', 'a ruffian' and 'a mere follow' rather than a sovereign, and that Xunzi considers Tang and Wu true rulers as they 'were considered the father and mother of the people' and Jie and Zhou Xin not as true rulers who deserved to be superseded as they 'were hated as the predators of the people.'[69] In short, a rectified government must be the government for the people.

The Confucian *minben* has widely been explained to support democracy.[70] At the same time, the concept has never been read in the light of constitutionalism. At first glance, it seems counterintuitive to relate the *minben* government to the constitutional government since the *minben* concept accentuates the concerns of public good which will lead to the advance of power[71] while constitutional government emphasises the limitation of power.

Modern constitutional theorists inspired by the notions of individual autonomy and the state's neutrality, originating from Enlightenment's individualism and liberalism, tend to stress the reduction of public power for constitutionalist purposes. In fact, constitutionalism is not always about the reduction of a political leaders' authority. Stephen Homes is instructive on this point as he states: 'In general, constitutional rules are enabling, not disabling; and it is therefore unsatisfactory for identifying constitutionalism exclusively with limitations on power […] Constitutions do not merely limit power; they can create and organize power as well as give power a certain direction.'[72] To say this in a precise way, constitutionalism is about the limitation of a particular kind of power - *arbitrary power*, not public power in general. The constitutional government cannot operate effectively without necessary instruments of puissance. Hence, there is place for empowerment in constitutionalist polity. A fortiori, proper distribution of power is a channel to avert arbitrary rule: governors must function properly within the empowered parameter.

In the deepest sense, constitutionalism is the political condition in which power is properly practiced, which in turn lies in the responsibility of the power holders. Rossiter underlines:

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69 Knoblock, above n 32*, 35*.

70 See Murthy, above n 60, 132.

71 See Michael C Davis, 'Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values,' (1998) 11 *Harvard Human Rights Journal* 117.

72 Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Jon Elster and Rune Slagstad (ed) *Constitutionalism and Democracy*, (1988) 227-28.

> Any system of government genuinely committed in theory and adhering in practice to constitutionalism of any form – and particularly to democracy – must involve the principle of responsibility in all of its meanings, including especially: answerability; duty; obligation; oversight; accountability; trusteeship; and causality.[73]

The *minben* concept is highly consonant with this principle of constitutionalism. Even though the advancement of public good may require correspondingly the aggrandisement of power, the Confucian theory of *minben* suggests that the ruler must be responsible in practicing his power. To work for the welfare of the people, the ruler, from the perspective of Confucianism, bears prodigious responsibilities. He should preside over people with gravity, be final and kind to all, advance the good and teach the incompetent.[74] He should honour the talented and virtuous, and bear with all, praise the good, and pity the incompetent.[75] He should love propriety, righteousness, and good faith.[76] He should pay reverent attention to business, be sincere, be economic in expenditure, have love for men, and employ the people in the proper seasons.[77] One may want to further embellish this catalogue, but these are sufficient to verify the profound Confucian concern for responsible government. In conclusion, as the *minben* concept necessarily leads to responsible government, it can be counted as the idea of constitutionalism in the Confucian intellectual world.

In addition, those who deny the constitutionalist implication of the *minben* concept may argue on the grounds of the *telos* of constitutionalism that *minben* does not include the notion of rights[78] while the protection of human rights are the goal of constitutional government. M*inben* accentuates generally the governmental concerns for the public good which fundamentally includes the material and spiritual needs of the people. In western constitutional theory, the claims of such good are put forward under the rubric of 'social economic and cultural rights.' However, Confucianism does not find it meaningful to claim such needs on the ground of a human being.[79] This is closely associated with Confucians' emphasis on harmony which favours temperance in the relationship between the government and

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73 Cited in Polin, above n 1, 12.
74 See Legge, above n 27, 152.
75 Ibid 340
76 Ibid 265
77 Ibid 140
78 See Andrew J Nathan, *Chinese Democracy* (1985) 127.
79 See Wejen Chang, 'Confucian Theory of Norms and Human Rights' in Wm Theodore de Bary and Tu Weiming (eds) *Confucianism and Human Rights* (1893) 132.

the people and consequently presumes that people's aggressive claims and struggles for their inherent benefits may undermine the apollonian state of the polity.

Nevertheless, the absence of a rights concept cannot be invoked to negate the constitutionalist meaning of *minben*. As illustrated by Craham Walker, the conception that the goal of constitutionalism is to champion human rights is the consequence of the modern restriction of constitutionalism which stemmed from the liberalism and individualism of the Enlightenment.[80] Liberalism and individualism therefore can only be considered the *telos* of western liberal modern constitutionalism. Given that, non-western and premodern constitutionalism need not be examined through a liberalistic and individualistic lens. Above all in the constitutionalist polity is the spirit of responsibility for the 'general public standards.' The constitutional government is responsible for values other than rights. To that extent, the ruler in the *minben* scheme is conceptualised to be responsible for 'general public standards' rather than to be free to pursue his egoistic interests. In this sense, the Confucian concept of *minben* satisfies the teleological requirement of constitutionalism.

D. LI (RITUAL): CONFUCIAN CONSTITUTION

Those who gainsay the constitutionalist meaning of *minben* may even state that the relationship between the government and the people in the *minben* scheme is paternalistic.[81] On the other hand, as Immanuel Kant asserts, under a paternal government, 'the subject, as immature children who cannot distinguish what is truly useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgment of the head of state as to how they ought to be happy, and upon his kindness in willing their happiness at all.'[82] Such a government is the 'greatest conceivable *despotism.*'[83] It seems logical to follow that the *minben* government implies despotism or authoritarianism rather than constitutionalism.

It should be candidly noted that there is no lack of statements in the Confucian scriptures which compare the ruler to the parents of the people.[84] However, it would be a fallacy to, based on such evidence, reduce Confucian governmental inquiry to mere paternalism and hence to despotism or authoritarianism. While comparing the ruler to the parents of

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80 Walker, above n 1, 160-64

81 See Lucian W Pye, *Asian Power and Politics: The Cultural Dimensions of Authority* (1985) 81.

82 *Kant's Political Writings*, Hans Reiss (ed) (HB Nisbet trans, 1970) 74

83 Ibid (original italics).

84 See Legge, above n 27, 370; 374; Knoblock, above n 32, 35.

people, the classical Confucians by no means believe that the ruler can unilaterally and arbitrarily superimpose his discretion upon the docile people. Rather, Confucian governmental theory proposes that the ruler, in governing the people, must be limited by pre-established rules termed as *li* (ritual) in the Confucian nomenclature. In this section, I argue that the concept of *li* stands for constitutionalist ideas.

To begin with: what is *li*? *Li* has no English equivalent.[85] According to Homer Dubs, there are thirteen English words that translate to the word *li*, viz: religion, ceremony, deportment, decorum, propriety, formality, politeness, courtesy, etiquette, good form, good behaviour, good manners, and the rules of proper conduct.[86] Masayuki Sato notes that in the last two decades *li* has predominantly been translated into English as 'ritual.'[87]

Li is a manoeuvrable concept which possesses various nuances of connotation in different periods of time. While the morphology of *li* 禮 pristinely refers to religious ritual of libation,[88] the evolution of the concept leads to the inclusion of other things. In the Shang dynasty, *li* mainly indicated religious liturgy, but in the Zhou dynasty and especially when the Duke of Zhou systematically codified the *li* of Zhou, *li* was expanded to incorporate socio-political institutions and norms. At the same time, in the *Book of Poetry,* reportedly created during the Spring and Autumn period prior to Confucius, *li* was conceptualised as manners and social norms. Confucius appropriates the precedent meanings of *li* and goes further to develop a novel sense, that is, the moral norm. Following Confucius, Mencius views *li* as social norms, and in particular one of the four cardinal moral values.[89] Xunzi pays especial attention to *li*. His distinct contribution is to elevate *li* to the cosmic principle.[90] Benjamin Schwartz helpfully generalises:

> The word *li* on the most concrete level refers to all those 'objective' prescriptions of behavior, whether involving rite, ceremony, manners, or general deportment, that bind human beings and the spirits

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85 Hsu, above n 28, 93.

86 See Homer Dubs, *The Works of Hsun Tze* (1928) 113.

87 Masayuki Sato, *The Confucian Quest for Order: The Origin and Formation of the Political Thought of Xun Zi* (2003) 166.

88 The pictogram *li* 禮 indicates a sacrificial vessel with two pieces of jade above it. *See* Yongping Liu, *Origins of Chinese Law: Penal and Administrative Law in Its Early Development* (1998) 63.

89 For a comprehensive treatment on the development of the concept of li, see: Sato, above n 87*,* 173-236.

90 Knoblock, above n 32*, Volume II,* p 51.

> together in networks of interacting roles within the family, within society, and within numinous realm beyond [….] What make *li* the cement of the entire normative sociopolitical order is that it largely involves the behavior of persons related to each other in terms of role, status, rank, and position with a structured society.[91]

In short, *li* in Confucian philosophy is an extremely inclusive concept, which embraces comprehensively rituals, institutions, social and moral norms, which regulate all dimensions of the peoples' lives, ranging from personal behaviour, familial relationships, to socio-political functions and structures.

In the political meaning, the concept of *li* stemmed from the central doctrine of *zheng ming* government. Leonard Shihlien Hsu states that: '*li* is an applied doctrine of rectification.'[92] The *zheng ming* government demands the political institutions function in concordance with the established standards, which defines the limitations of their authorities and duties together with the expected virtues. This depends on the presence of a set of established standards. *Li* is formulated as the articulation of such standards.

First, *li* defines the institutional framework of government. For the classical Confucians, as Qu Tongzu asserts, *li,* among other things*,* 'are social and political institutions, including law and government.'[93] The fact the Duke of Zhou composed the Confucian work entitled *Zhouli* (Rituals of Zhou) intentionally to describe the structure of the government of the Zhou dynasty well verifies that *li* was conceived of as the institutional framework of government. It is for this reason that Kuo-Cheng Wu considers *Zhouli* as 'the Constitution of Zhou'[94] and Jaeyoon Song renders it as a 'meta-constitution.'[95] In a similar vein, Chaihark Hahm proposes that it can be referred to as 'constitutional law' in a Confucian state.[96] It can be concluded that in Confucian philosophy, *li* establishes the institutional limitations of the government. It defines the scope of the authorities and duties of different governmental institutions. It is on the basis of the institutional limitations set up by the *li* that the rectification of government can be practiced.

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91 Benjamin I Schwartz, *The World of Thought in Ancient China* (1985) 67.

92 Hsu, above n 28, 95.

93 Qu Tongzu [T'ung-Tus Ch'u], *Law and Society in Traditional China* (1961) 231.

94 Kuo-Cheng Wu, *Ancient Chinese Political Theories* (1928) 37.

95 Song, above n 7, 13.

96 Chaihark Hahm, above n 5, 141.

Second, *li* defines the possible virtues which government individuals are supposed to possess. For classical Confucians, *li* connotes moral norms, apart from the governmental institutions. In this sense, *li* can be conceived of as a code of moral rules, which control the conduct of the political men. On the grounds of the code of conduct established by *li*, actions of government can be rectified.

Confucian governmental philosophy is particularly emphatic on the rule of *li*, whose locus classicus can be found in the *Analects*:

> If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by rules of propriety [*li*] they will have the sense of shame and moreover will become good.[97]

The rule of *li* means that all members of the government including the sovereign must be under the rein of *li*: 'If a prince is able to govern his kingdom with the complaisance proper to the rules of propriety (li), what difficulty will he have? If he cannot govern it with that complaisance, what has he to do with the rules of propriety (*li*)?'[98] The Confucian concept of the rule of *li* was the natural corollary of the doctrine of rectification of names. A *zheng ming* government must be under the rule of *li*. In a *zheng ming* government, different political institutions are required to function in concordance with the institutional limitations and the moral norms articulated by *li*.

Since *li* regulates all members of the polity, the rule of *li* implies the restraint of public power. It is because of this that *li* engrosses legal scholars, especially constitutional law scholars. Leonard Shihlien Hsu long ago examined the 'constitutional significance of *li*', according to which *li* is described as a principle in concordance with the 'natural law' and the will of the 'God' that defines the limits of governmental authority.[99] Recently, Tom Ginsburg also views *li* as 'a kind of higher natural law, constraining human positive law.'[100] Since the Confucian *li* presents the general principle, it is understandable that it is compared to natural law in Western legal theory. However, it seems unsatisfactory to discuss *li* under the rubric of natural law. Although the Confucians elevate *li* to general principle, they

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97 Legge, above n 27, 146.

98 Legge, above n 27, 169.

99 See Hsu, above n 28, 96-99

100 Tom Ginsburg, 'Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan' (2002) 27 *Law and Social Inquiry* 794.

by no means suggest promulgating positive law consistent with the *li*. Along a different line to Hsu and Ginsburg, Chaihark Halm refutes interpreting *li* as a form of morality or a Confucian analogue for natural law. Inspired by Michel Foucault's concept of discipline, Halm particularly regards the disciplinary dimension of *li* as its constitutional significance: 'Confucian constitutionalism in this sense refers to the application of *li* as a regularized restraint on the ruler through disciplining his body and mind.'[101] When Halm eulogised the disciplinary facet of *li*, he did think of the Confucius' dictum in the *Analects 12:1*: 'To subdue one's self and return to propriety [*li*], is perfect virtue [*ren*].' For Halm, 'to subdue one's self' (or 'mastering oneself' as his preferable translation) can be rendered as 'self-discipline.'[102] I contend that the meaning of the *Analects 12:1* is actually moral. To discipline oneself in consonance with *li* to become humane is inherently a moral action. To that extent, Halm seems to fall under non sequitur while on the one hand denying discussing *li* under the form of morality and on the other hand signifying the disciplinary meaning of *li*.

I suggest that the constitutionalist significance of *li* lies o\in its traditionalist nature. However, it would be useful first to remember that the Confucians are traditionalists. The constitutional theorist Carl J. Friedrich in his '*Tradition and Authority*' notes that Confucians are 'perhaps the most traditionalist.'[103] Confucius, Mencius, and Xunzi are all admirers of the past, the model of the ancient kings, especially the civilisation of the early Zhou dynasty. Confucius himself declares that he is 'a transmitter and not a maker' and that he believes in and loves 'the ancients.' [104] Particularly, the master is enamoured of Zhou civilization: 'Zhou had the advantages of viewing the two past dynasties. How complete and elegant are its regulations. I follow Zhou.'[105] Mencius supports the *fa* (model) of ancient kings. By that, Mencius in fact gives approval to the traditional cultural heritages, regulations and institutions of Zhou.[106] Xunzi is also an admirer of the 'later kings' which are actually the early kings of Zhou.[107]

Li is the typical representative of Confucianism's traditionalist outlook. Herbert Fingarette points out that *li* is the medium for Confucius to 'talk about the entire body of the *mores*, or more precisely, of the authentic tradition and reasonable convention of society.'[108] William Alford points

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101 Hahm, above n 5, 153.
102 Ibid 79
103 Carl J Friedrich, *Tradition and Authority* (1972) 14.
104 Legge, above n 27, 195.
105 Ibid 160.
106 *See* Fung, above n 44*,* 108-11.
107 Ibid 282.
108 Herbert Fingarette, *Confucius – the Secular as Sacred* (1972) 6.

out that 'thinking about…yesterday' is a prevalent tendency in all intellectual discourse of ancient China.[109] Particularly, he indicates that *li* 'embodied and expressed the most profound insights and experience of the so called- Ancients who had established society and compiled the Classics.'[110]

It should be noted that the rule of traditionalist *li* is not a haphazard loyalty to past facts. For Confucius, as illustrated by Herbert Fingarette, 'the *li* and the *tao* represent deeply authenticated norms for conduct, rather than historically persistent forms of actual conduct (…) The *substantive* wisdom that Confucius taught was not loyalty to tradition but, rather, the intrinsic wisdom of certain ways of living.'[111] Fingarette distinguished 'social fact' and 'social norms', according to which *li* (and *tao*) 'do not refer primarily to past social fact but to social norms, ie., rules or principles for guiding conduct.'[112] For Xunzi, *li* is understood as the Ways of ancient kings recorded in the classics which indicate 'rightness' (*yi*) or 'what is right.'[113] *Li* is therefore the reflection of the general truth authenticated by the ancient sage kings. The spirit of *li* is its consonance with the common sense of rightness.[114] Xunzi says: 'Ritual principles [*li*] use obedience to the true mind of man as their foundation.'[115] In short, the genuine meaning of the rule of *li* is the rule of norms and institutions, which are the embodiments of the reasonable principles authenticated in the tradition.

We are now in a position to examine the constitutionalist implications of *li* which stem from its traditionalist quality. As constitutionalism is opposite to personal rule, which leads to the efforts of western constitutionalist programs to superimpose the popular will upon the will of the ruler, it is conventional to regard popular sovereignty as the fundamental principle of constitutionalism. Especially the principle of the popular authorship of the written constitution, which originated in Rousseau's theory of social contract, is considered the hallmark of

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109 See William P Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law in Chinese Civilization* (1995) 9-29

110 Ibid 211.

111 Herbert Fingarette, 'The Music of Humanity in the *Conversations* of Confucius,' (1983) 10(4) *Journal of Chinese Philosophy* 335 (original italics).

112 Ibid 335.

113 According to Masayuki Sato, in Xunzi's works *li* is juxtaposed to *yi* 104 times to form the two Chinese characters *liyi*. Sato also points out that when *li* and *yi* are separately used, the meaning of *li* overlaps that of *yi* to some extent. *See* Sato, *The Confucian Quest for Order*, 345-47. The subtext is that *li* is normally related to what is right.

114 See Chang, above n 79,126.

115 Knoblock, above n 32, 211

constitutional government. However, it is far from true that constitutionalism is equated to popular sovereignty and hence that a written constitution ratified by the people is the sine qua non of constitutional government. The essential spirit of constitutionalism is the victory of the popular will over the personal will. Given that, popular sovereignty which leads to a contractual written constitution is not the exclusive path to constitutionalist polity. There are other variations to maintain the political order in which the will of the governors is subjugated by the will of the populace.

The rule of tradition brings about such an alternative. Some constitutional theorists have stressed the role of tradition in constitutional theories. For instance, in the works of Carl Friedrich, tradition is of central importance.[116] To Friedrich, tradition is conceived not as a body of dogma to be followed unquestionably by succeeding generations but as the expression of the vital core of truth which reflects the common reason and common deliberations of the best and wisest men.[117] Friedrich defines constitutionalism as regular restraints of the government and tradition, as a kind of higher moral law, knowable by right reason, as one with important roots in the idea of restraints.[118] Robert Lowry Clinton, American scholar of constitutional law and political science, equally emphasises the constitutionalist significance of tradition.[119] Clinton particularly advocates the rule of tradition in a constitutionalist order because tradition presents the social consensus or 'the tastes and values of most people.'[120]

Returning to the case of *li*, it can be also said that because *li* is the embodiment of tradition, it presents the social consensus. The *li* as a set of norms and institutions may originally present the social elites, but as *li*, by cultural osmosis, is handed on from generation to generation as the embodiment of common truth, it becomes the expression of the popular voice. The rule of *li* is therefore designated to a political order in which the popular disposition is paramount. In a polity instilled with *li*, the popular will controls the polity. Consequently, the rule of *li* prevents the imposition of the will of a single ruler upon the society. In this sense, it can be said that the Confucian concept of *li* reflects constitutionalist aspiration.

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116 Dante Germino, 'Carl J. Friedrich on Constitutionalism and the "Great Tradition" of Political Theory' in Roland Pennock & John W Chapman (eds) *Nomos XX- Constitutionalism* J (1979) 19.

117 Ibid 20- 5.

118 Ibid 23.

119 See Robert Lowry Clinton, *God and Man in the Law: The Foundations of Anglo-American Constitutionalism* (1997).

120 Ibid 55.

At the same time, to be constitutionally meaningful, any form indicating the social consensus must be publicly articulated. The primary effort of the constitutionalist project is to publicly articulate rules that will control future people in authority. According to Graham Walker, this action is a prerequisite of constitutionalism due to its objectification: 'Most importantly, to articulate a polity's normative architecture is to objectify it. It is to confer upon it a kind of separate existence- the separate, especially, from the immediate holders of power, even if those holders of power are ones doing the articulating. Public articulation means that the shape and the purposes of the polity are no longer hostage to vagaries of their subjectivity.'[121] This point of view is supported and further illuminated by Beau Breslin.[122] He asserts: 'Constitutionalism now requires the *objectification* […] of created political power.'[123] Constitutionalism obviously needs to objectify the structure and rules within which public power is practiced. That is because objectification produces alimiting effect: once the governors are fenced off from manipulating the polity according to their vagaries, governmental discretions can be limited.

Now, let us consider whether Confucian *li* is objective to the government. Benjamin Schwartz defines *li* as *'objective'* prescriptions of behavior.'[124] Similarly, Chung- ying Cheng describes li 'as an *objectified* principles, norms, or rule of human behavior.'[125] *Li* is objective to the government because of its traditionalist character. Since *li* is the norms and institutions agglomerated throughout generations and ingrained in tradition, it is rigidly anterior to the establishment of the contemporary government. Therefore, *li* averts narcissism of contemporary political figures. Consequently, once the dictates of *li* rein over the government, the destiny of the polity is not dependent on the ruler's subjective predilection. For this, the rule of *li* induces a limiting effect upon the government. It is because of this that the Confucian theory of the rule of *li* suggests a constitutionalist notion.

Beau Breslin, when going further to develop Walker's theory, submits that in order to secure objectification 'a polity's organizing charter must subscribe to the principle of *externality*' in the sense that 'for the conception of constitutionalism to be objective- and thus consequential- the limits impressed upon the will of the sovereign and its representative must in the first place exist separately from the political power centers.'[126]

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121 Walker, above n 1, 165.
122 Beau Breslin, *The Communitarian Constitution* (2006) 112-33.
123 Ibid (original italics).
124 Schwartz, above n 91, 67 (italics added).
125 Cheng, above n 37, 323 (italics added).
126 Breslin, above n 122, 126 (original italics).

However, Breslin believes that only the modern written constitution can be in concordance with the externalist demand of constitutionalist polity.[127] In fact, in the Confucian vision, *li* is equally external to the government. Since *li* presents the traditionalist sedimentations of norms and institutions, it is fixed 'separately from the political power centers.' When *li* is outside the government, rule of *li* actually means the operation of power in concordance with external orders. For this reason, the Confucian conception of rule of *li* is congruent to the spirit of constitutionalism.

Apart from externality, Breslin posits that objectification in constitutionalist government requires the 'discernibility' of legal limitations:[128] One again, he contends that only through the modern single constitutional text can the external legal limitations of the governmental power become discernible.[129] Certainly, constitutionalism needs the transparency of legal restraints since nebulosity is the alter ego of despots. However, it is far from true that a unified constitutional charter is the sole medium for guaranteeing this discernibility. The classical Confucians equally conceptualised that *li* is the external limitations of the ruler that must be apparent to both the ruler and the common people.

Li in Confucian theory is intrinsically knowable, stemming from its traditionalist quality. On this regard, Alasdair MacIntyre's concept of tradition is instructive: 'For such a tradition, if it is to flourish at all […] has to be embodied in a set of texts which function as the authoritative point of departure for tradition-constituted inquiry and which remain as essential points of reference for enquiry and activity, for argument, debate and conflict within that tradition.'[130] In other words, a viable tradition needs indisputably textual manifestation which are subject to interpretation, argument, and even debate. The *li* was a set of traditional norms and institutions, which the Confucians extol in their governmental inquiry, and was textually reified. *Li* was articulated under the format of the Confucian classics. To illustrate, the conventional norms and institutions of the ancient kings that the Confucians eulogise were illustrated in *The Book of Historical Documents*, *The Book of Poetry* and the *Spring and Autumn Annuals* allegedly compiled by Confucius. Additionally, Confucius' particular emphasis on the rule of *li* galvanised the later Confucians in the Western Han dynasty who continually recorded the ancient *li*, which led to the advent of the *Li Ji* or *The Book of Rites*, one of five Confucian classics. In this scripture, *li* establishes the basis of the polity and defines the sphere of government's authorities and functions, the limits of governmental

127 Ibid.
128 Ibid129.
129 Ibid 130.
130 Alasdair MacIntyre, *Whose Justice? Which Rationality?* (1988) 383

power, principles of colonial administration, and foundations for legal adjudications.[131]

Those who are familiar with the following dictum in the *Li Ji* may think that for the common people, the text of *li* must be esoteric: 'the rules of ceremony (*li*) do not go down to the common people. The penal statutes do not go up to great officers.'[132] In fact, as has been corroborated by Herrlee Glessner Creel, these words were intentionally written by some officials as the expression of their hope.[133] The apocryphal passage garbles the Confucian belief. In fact, for the classical Confucians, texts of *li* must be knowable to all. As mentioned above, Confucius considered killing people without pre-instruction as an evil action of the government. The implication is that power should not operate in an opaque manner: the foundations for practicing public power should be apparent to the people. In other words, the people are required to be instructed about the *li,* which defines the scheme and the rules of the government. This leads to the Confucians' efforts in interpreting and transferring them to the public. Confucius established for the first time in Chinese history a private school to disseminate traditional textualized *li* to the plebeians with the educational philosophy that 'in teaching there should be no distinction of classes.'[134] Following Confucius, Mencius and Xunzi accepted ordinary students and educated them with the ancient *li*. In short, in the opinion of the Confucians, *li* must be discernible for everyone, and for this Confucianism particularly underlines the popular education of *li*.

While *li* defines the limits of the government, the public acknowledgement of *li* helps to safeguard the operation of the government within these parameters. Moreover, the popularly knowable *li* can constrict the ruler's ability to neglect his responsibilities for 'general public standards.' It is in these senses that the Confucian theory of the rule of *li* meshes well with the constitutionalist principle of discernibility.

It would be useful to conclude this section with a reference to Edward Shils' assertion that: 'Confucius makes no provision for a constitution.'[135] This is correct to the extent that a constitution is viewed through the

131 See Hsu, above n 28, 96-99.

132 Legge, above n 26 , 90.

133 See Herrlee Glessner Creel, 'Legal Institutions and Procedures during the Chou Dynasty' in Jerome Alan Cohen, R Randle Edwards and Fu-mei Chang Chen (eds) *Essays on China's Legal Tradition* (1980) 39.

134 Legge, above n 27, 305.

135 Edward Shils, 'Reflections on Civil Society and Civility in the Chinese Intellectual Tradition' in Tu Wei-ming (ed) *Confucian Traditions in East Asian Modernity: Moral Education and Economic Culture in Japan and the Four Mini-Dragons* (1996) 53.

positivistic lens as the monistic written basic law ordained by 'we the people.' But, if a constitution is understood from a Diceyan perspective as 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state,' [136] it is far from true that Confucius and other classical Confucians are silent about it. In the Confucian governmental theory, the *li* that includes traditional moral norms and governmental institutions, which establish normative standards for rectification of government, can be recognised as a variant of unwritten constitution – a Confucian constitution.[137]

E. ENFORCEMENT OF LI

Once the standards for rectification of government are established by *li*, the next stage of the *zheng ming* program is to ensure the concordance of political institutions to the *li*. This stage involves enforcement of the established standards or the *li*. The classical Confucians propose two mechanisms for implementation of the rule of *li*: internal rectification and external rectification, corresponding to two components of *li* - moral norms and governmental institutions.

Moral self-rectification is the main means to implement the *zheng ming* government's requirement that those who carry certain governmental titles will act in concordance with the positive virtues of that title defined by the *li* (moral norms). Meanwhile, external rectification is the main means to safeguard the conformity of political institutions to the institutional limitations defined by the *li*. However, there may be a mixture of the two means. External rectification may be useful to the cultivation of the political morality while internal rectification may self-restrict the power holders' violation of the institutional limitations.

1. Internal Rectification.

In the imagination of Confucianism the sovereign should govern the country in concordance with *li* by immanent efforts. In the Confucian world, the ideal government relies not on coercion but on the self-discipline of political men.[138] Confucius considers self-discipline as the way to return to *li*, which is the *sine qua non* for any fully humanised person including the

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136 AV Dicey, *Introduction to the Study of Law of the Constitution* (1920) 22.

137 This does not mean that a Confucian constitution (or *li*) was not written down. As mentioned above, many traditional norms and institutions were written in the Confucian classics. The 'unwrittenness of the Confucian constitution (*li*) means that it, like the English Constitution, was not codified in a monistic charter.

138 See Wm Theodore de Bary, *The Liberal Tradition in China* (1983) 28.

sovereign. [139] The Confucian idea of self-rectification was particularly emphasised and explained in this famous dictum of the *Great Learning*:

> The ancients who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own States. Wishing to order well their States, they first regulated their families. Wishing to regulate their families, they first cultivated their persons. Wishing to cultivate their persons, they first rectified their hearts.[140]

Thus, the rectification of government firstly depends on the self-rectification of the government's individuals. Moral self-rectification assures that those who hold certain positions shall act in concordance with the possible virtues of those positions. Moral self-rectification to return to the *li* therefore becomes the essential step for realising the *zheng ming* government. Moral self-rectification is of constitutionalist importance in that this helps constrict misuse of power by the ruler. Internal efforts of the ruler to comply to the code of conduct is instrumental to limit arbitrary power. In short, once the ruler constantly self-rectifies his personal morality, his practice of public power is regularly constrained.

2. External Rectification: 'scholastic constitutionalism.'

The classical Confucians are never so naïve as to sacrifice the polity to the introspective rectification of the power holders. Beyond that, they propose that in order to enforce the *li*, political power must be checked by an external force. In classical Confucianism, the role of external rectification of the ruler in concordance with the institutional limitations established by the *li* is particularly the responsibility of the virtuous and wise scholars, which I coin as 'scholastic constitutionalism.'

In Confucianism, as Daniel A Bell points out, 'only ethical and intellectual elites have a vocation to lead society […] Only those who acquire knowledge and virtue ought to participate in government, and the common people are not presumed to posses the capacities necessary for substantial political participation.'[141] If Bell can read Confucian elitism so as to support democracy, can it equally be done to support a constitutionalist purpose? I believe that in the vision of Confucianism, the elites are conceived to play a constitutional role, since they are external forces to curb the arbitrary power of the sovereign.

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139 See Legge, above n 27, 250.

140 Ibid.

141 Daniel A Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context* (2006) 153-54.

To begin with, it should be underlined that the scholars occupy a special position in the Confucian governmental inquiry. The scholars, because of their virtue and wisdom, are viewed as even more valuable than the ruler.[142]Therefore, the ruler should respect them and govern the nation through their advice. The scholars are not the servitors of the royalty; rather, they, on the ground of their sui generis merits, should be treated as the friends or even the teachers of the ruler.[143] Consequently, the scholars are not subject to the ruler's arbitrary summons. 'When he [the ruler] wishes to consult with them, he goes to them'[144] as a student. Moreover, if the ruler wishes to be served by the scholars he should show 'the utmost respect and all polite observances' and agree to 'carry their words into practice.'[145]

Confucianism suggests that the virtue and talent of scholars should be honoured by the ruler so that 'he is preserved from errors of judgment.'[146] Hence, the scholars are conceptualised as external means to rectify the misuse of power committed by the ruler. The savants of *li* are necessitated to advise the ruler to govern the kingdom in accordance with the dictates of *li* and prevent him from the infringement of *li*. They can play this constitutional role via either political participation or free scholarship.

Scholars-Officials: Remonstrance

Confucian scholars are taught to participate in the political province typically as ministers. However, a Confucian scholar engages in ministerial relationships not to sacrifice his life to royal whims, but to fully humanise his own living and to help the others humanise their living.[147] Meanwhile *li* is the civilised guidance for these humanising relations. It follows that the rule of *li* in all relationships is required for the process of humanisation.[148] Hence, for the sake of humanisation, it is the responsibility of the scholar-officials to safeguard the rule of *li*. This leads to the fact that the minister, insofar as he is a true Confucian scholar instead of a sycophant, should be loyal not to the ruler but substantially to the *li*. Consequently, if the ruler transgresses the *li*, the humanising onus is upon the minister to remonstrate with him and if he, even in this case, fails to return to the *li*, the minister should end the relationship with the ruler.

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142 Legge, above n 30, 213-14

143 Ibid 387

144 Ibid 214

145 Ibid 445.

146 See Legge, above n 27*,* 409.

147 See Legge, above n 27, 297; Legge, *Mencius,* 458.

148 Wei-ming Tu regards *li* as the process of humanisation. See Wei-ming Tu, 'Li as Process of Humanization' (1972) 22(2) *Philosophy East and West*, 187-201

Furthermore, the concept of scholars-officials' remonstrance is based on the Confucian conviction of the reciprocity of human relationships. Henry Rosemount Jr elucidated that, according to Confucianism, all of the relationships – spouses or lovers, neighbours, subjects, colleagues, friends, and more – are reciprocal.[149] So is the relationship between the prince and the minister.[150] It should be recalled that Confucius' dictum on rectification of names states that 'there is government, when the prince is the prince, and the minister is the minister.'[151] To say this in another way, if the prince is not the prince, then the minister is not the minster. The master holds that 'a prince should employ his ministers according to the rules of propriety (*li*); ministers should serve their prince with faithfulness.'[152] Given that, if the prince is devoid of *li* toward his ministers, then they are not obliged to be faithful.[153] In concordance with this spirit, Mencius acrimoniously asserts: 'When the prince regards his ministers as his hands and feet, his ministers regard their prince as their belly and heart; when he regards them as his dogs and horses, they regard him as another man; when he regards them as the ground or as grass, they regard him as a robber and an enemy.'[154] In short, the ruler-minister relationship is mutual rather than unilateral. The reciprocity of the relationship is the foundation for the possibility of the ministerial censure.

We now explore how the concept of remonstrance is demonstrated. It should be remembered that it is Confucius' opinion that it would be a debacle for a nation in which no one dared oppose the wrong words of the ruler. Therefore, it is necessary for the ministers to censure the wrong words and misconduct of the ruler. In fact, the relic of Confucius' concept of remonstrance can be found in his *Spring and Autumn Annuals*,[155] but he theorises the constitutional principle of remonstrance in the *Analects*. Confucius differentiates 'the great minister' from 'the ordinary minister.' Accordingly, the former is the one 'who serves his prince according to what is right, and when he finds he cannot do so, retires' while the later is no more than the minion who 'will always follow their chief' except from the case of 'parricide or regicide.'[156] Confucius then goes further to suggest that preferably ministers should not dupe the ruler by having a veneer of loyalty, but should more importantly candidly remonstrate with him. When a

149 See Rosemont Jr, above n 45 11.
150 See Chang, above n 79, 171-141.
151 Legge, above n 27, 256.
152 Ibid 161.
153 See Li Fu Chen, *The Confucian Way*, (Shih Shun Liu trans, 1986) 489
154 Legge, above n 30, 318.
155 *See* Hawkling L Yen, 'A Survey of Constitutional Development in China' (PhD Diss: Columbia University, 1911) 85
156 Legge, above n 27, 245-46.

Confucian disciple asked how a ruler should be served, the Master replied, 'Do not impose on him, and, moreover, withstand him to his face.'[157]

As a student of Confucius, Mencius vehemently advocates the ministerial restraints of the ruler. He says: 'Is it a fault to restrain one's prince? He who restrains his prince loves his prince.'[158] Mencius goes further to develop the principle of remonstrance. According to him, there are two kinds of high ministers: 'There are the high ministers who are noble and relatives of the prince, and there are those who are of a different surname.'[159] With regard to the high ministers who are noble and relatives of the prince, Mencius suggests: 'If the prince have great faults, they ought to remonstrate with him, and if he do not listen to them after they have done so again and again, they ought to dethrone him.'[160] As far as the ministers who are of a different surname are concerned, he states: 'When the prince has faults, they ought to remonstrate with him; and if he do not listen to them after they have done this again and again, they ought to leave the State.'[161] Mencius may go beyond Confucius to assert that in the case of the royal ministers, if the prince fails to follow their remonstrance, it is legitimate to dethrone him. In exceptional cases, Mencius even avers the legitimacy of a minister's banishing his ruler.[162]

In a similar vein with Confucius and Mencius, Xunzi also defends the remonstrance principle. He defined remonstrance as the capacity of a great officer or senior advisor to advance to the throne and address the lord concerning his transgression and leave if the advice is not implemented.[163] He thinks that in the case of a sage lord, remonstrance is unnecessary but it is definitely needed in the case of a mediocre lord.[164] Moreover, Xunzi considers only men capable of remonstrance to be qualified as true ministers.[165]

There are concrete requirements for practicing ministerial remonstrance. First, only the worthy ministers can reprove the prince. To say this in a negative definition, they must not be mercenaries, careerists, or pedants. According to Confucius, they must be the 'great ministers.' Mencius also opines: 'It is not enough to remonstrate with a sovereign on account of the mal-employment of ministers, nor to blame errors of

157 Ibid 285.
158 Legge, above n 30, 161.
159 Ibid 392.
160 Ibid 392.
161 Ibid 393.
162 Ibid 467.
163 See Knoblock, above n 32, *Volume II,* 199.
164 Ibid 200.
165 Ibid 199.

government. It is only the great man who can rectify what is wrong in the sovereign's mind.'[166] In fact, the 'great ministers' in the Confucian vision are politicising scholars prepossessed with moral principles and wisdom. Second, only the ministers who are in the confidence of the prince can admonish him. In the *Doctrine of Means*, Confucius is reported to have said: 'When those in inferior situations do not possess the confidence of the superior, they can not retain the government of the people.'[167] The *Analects* recorded a Confucian student as saying that 'having obtained the confidence of his prince, one may then remonstrate with him. If he have not gained his confidence, the prince will think that he is vilifying him.'[168] Finally, remonstrance should be exclusively given with respect to important matters. The ministers should avoid remonstrating paltry issues since 'frequent remonstrances lead to disgrace.'[169]

In short, remonstrance is the pivotal constitutional principle in Confucian governmental theory. The remonstrance by the ministerial clerisy is the external force that rectifies power holders in concordance with the institutional limitations established by the *li*.

Free Scholars: Spring and Autumn Annuals and Confucius as a De Facto Constitutional Judge.

The Confucian scholars, by their wisdom and virtue, may play the constitutional role without participating in the government. The ruler may 'go to see them' as a student as Mencius suggests. Lectures given by the didacticians who are knowledgeable of *li* are useful for rectification of the ruler in consonance with *li*. However, even if the ruler refuses to 'go to see them', the scholars can also insert constitutional limitations upon his practice of power by other alternatives. The constitutional importance of the *Spring and Autumn Annuals* and the role of Confucius in this classic as a de facto constitutional judge should be understood in this light.

Spring and Autumn or *Chunqiu*, one of five Confucian Classics, is a chronicle of Lu, which was arguably created by Confucius.[170] Confucius composed this lucubration after his fiasco of itinerant searching for a governmental position. Hence, he authorised the chronicle not as an official historiographer but as a free philosopher. To speak in constitutional

166 Legge, above n 30, 310.
167 Legge, above n 27, 406.
168 Id at 342.
169 Ibid 172.
170 See James Legge, *The Chinese Classics with a Translation, Critical and Exegetical Notes, Prolegomena, and Copious Indexes., Volumes V - Ch'un Ch'in [Chunqiu]* (1960) 1.

language, Confucius composed the *Spring and Autumn* to deal with the problem of arbitrary power. Explaining the reason Confucius produced the work, Mencius says: 'Again the world fell into decay, and principles faded away. Perverse speakings and oppressive deeds waxed rife again. There were instances of ministers who murdered their sovereigns, and of sons who murdered their fathers. Confucius was afraid, and made the *Spring and Autumn*.'[171]

The volumes of *Spring and Autumn* are considered to be the practical applications of the Confucian doctrine of rectification of names.[172]As Mencius says, 'Confucius completed the *Spring and Autumn,* and rebellious ministers and villainous sons are struck with terror.'[173] In application of the rectification of names, the *Spring and Autumn* together with the *Commentaries,*[174] according to Hsu's generalisation, provides four important functions, viz, giving names and definitions to phenomena; defining the fundamental principles of organisation of the state and outlining the limits of individual spheres of action in political and social organisations; passing critical judgment ('praise-and-censure') upon the actions of men; and illustrating the possible tendencies of various phenomena.[175] In fact, these functions were not separately classified in the classic. The functions are implied in the fact that Confucius used correct names to record the historical events. As mentioned above, names, according to Confucius, are more than words to identify people and things; they indicate the relationships, the roles of people and inherent values. Therefore, by accurate terminology, Confucius implicitly gave definitions to political actions, defined basic principles of organisation and operations of the government, adjudicated political actions, and showed causes and effects that demonstrate political tendencies.

It is my contention that the aforementioned functions of the *Spring and Autumn* are relatively similar to the modern functions of constitutional judges in exercising their judicial review power. Hsu states that '*Spring and Autumn* assumes the position of the chief justice of a supreme court deciding upon the actions and laws of sovereigns, princes, and ministers.'[176]

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171 Legge, above n 30, 281-82.

172 See Hsu, above n 28*,* 54.

173 Legge, above n 30, 283.

174 Because of its condensational and even Delphic style, a number of commentaries have been written to explain and expand the meanings of the *Spring and Autumn.* Most noticeable are the *Commentary of Kong-yang*, the *Commentary of Ku-liang*, and the *Commentary of Tso* which form the so-called '*Three Commentaries on Spring and Autumn Annuals*'. *See* Legge, above n 70, 22-38.

175 See Hsu, above n 28*,* 54-8.

176 Ibid 56.

Spring and Autumn's function of accuracy of terminology is analogous to the constitutional judges' function of constitutional interpretation. In addition, the role of the *Spring and Autumn* in judging political actions is seemingly equal to the function of the constitutional judges in adjudicating the constitutionality of the political institutions' actions. Hsu compares: '*Spring and Autumn* performs the function of rational judgment. To point out the good as good and the bad as bad means, in modern terminology, the final judgment as to whether or not the law is constitutional, whether or not the action is legal, or whether or not the man is criminal. It eulogizes those who obey the law and condemns those who violate it. This is rectification.'[177] Hence, it can be said that Confucius, by composing the *Spring and Autumn,* qua a free scholar, functioned as a de facto constitutional judge. The master in fact exercised the constitutional review power.

By the case of the *Spring and Autumn* and the role of Confucius as a de facto constitutional judge, it can be concluded that Confucianism widely opens the door for 'scholastic constitutionalism.' The practice of limited government may not be totally dependent on internal governmental mechanisms. By emphasis on the role of the elites, Confucianism suggests that governmental scholarship can play the role of limiting the government. The free judicious scholars can do this role by defining political terms, clarifying the foundational principles of political institutions, praising and censuring the actions of power holders on the grounds of legality, and anticipating the political tendencies that can help align the practice of pubic power and rectify the governors' malfeasances. The scholars' de facto practice of the 'constitutional review power' is constitutionally meaningful in part because it serves as the cicerone for the formal practices. When official people execute their power with a scholastic orientation, their arbitrariness can be inhibited. Moreover, 'scholastic constitutionalism' is reasonable in the sense that the scholarship may usefully raise the popular awareness of constitutionalist values which in turn helpfully popularises the constitutionalist community.

IV. Concluding Remarks.

This paper has systematically generalised the classical intellectual foundations of Confucian constitutionalism. By manifesting the Confucian intellectual reservoirs of constitutionalism, the paper wishes to draw western attention to eastern constitutional jurisprudence and advocates reorienting the promotion of constitutionalism in East Asian societies.

177 Ibid 56-7.

Can Western liberal constitutionalism provide the best solutions for East Asian societies like China and Vietnam to modernise their constitutional systems? In China, according to Professor Tong Zhiwei, the way Chinese constitutional law scholars comprehend Chinese constitutional matters 'is shaped by their understanding of an idealized constitutional system, such as that of the United State or that of Germany. They do not question whether or how such systems are relevant to China's situation. They simply import alien institutions into China's constitutional system in an ahistorical way.'[178] Similarly, in recent years in Vietnam, domestic constitutional scholars and other commentators have vehemently called for the establishment of a constitutional court in the nation.[179] It seems to me that they have simply gravitated towards heterochthonous institutions without circumspectly taking into account the autochthonous context.

David T Butle Ritchie points out that, given the history of the state in Central and Eastern Europe in recent past, it is by no means clear that the fetishisation of western liberal political concepts (which many accept uncritically) is the best way to account for continually changing conditions in contemporary pluralist and diverse societies.[180] That is because Western liberal constitutionalism can properly function under its individualist Christian cultural foundations[181] but may malfunction in other cultural contexts which do not accentuate individuals.

It is indubitable that, in the contemporary world, legal transplantation is an important means for different countries to develop their legal systems. At the same time, without the support of the local culture, transplanted institutions may not function efficaciously. As Robert Cover asserts, 'no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.'[182] In the particular field of constitutional

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178 Tong Zhiwei, 'China's Constitutional Research and Teaching: A State of the Art' in Stéphanie Balme and Michael W.Dowdle (eds) *Building Constitutionalism in China* (2009) 106.

179 See Mark Sidel, *The Constitution of Vietnam* (2009) 191-207. See also, John Gillespie, 'Juridification of State Regulation in Vietnam' in John Gillespie & Albert Chen (eds) *Legal Reform in China and Vietnam*, (2010) 89.

180 David T Butle Ritchie, 'Critiquing Modern Constitutionalism' (2004) 3(37) *Appalachian Journal of Law* 38-9

181 Carl J Friedrich, *Constitutional Government and Democracy,* 126. 'The governments of Western civiliations [have] tended toward the constitutional pattern. This tendency may justly be attributed to the Christian concern for the individual and his personal salvation.'

182 Robert Cover, 'Nomos and Narrative' in Artha Minow, Mchael Ryan & Austin Sarat (eds) *Narrative, Violence, and the Law: The Essays of Robert Cover* (1992) 95-6.

studies, scholars have proved that the success of constitutional government significantly depends on its consistency with the local culture.[183]

It is my contention that societies with non-western traditions should develop their constitutional government under their familiar foundations instead of blindly imitating western constitutional institutions. By doing this, I do not mean to imply any disparagement of the transplantablity of some notions and institutions of Western liberal constitutionalism outside the Western world because the transplants can be effective if they experience a process of indigenisation. What I really wish to propose is that since the triumph of a constitutional government depends significantly on the support of local culture, its foundations must be something hospitable to the indigenous people. Given that, it is reasonable for East Asian societies like China and Vietnam to delve into their own traditions to search for the foundations for the development of constitutionalism.

Confucianism provides such foundations. I believe that the constitutionalist ideas in classical Confucianism can be creatively transformed in the contemporary project of promotion of constitutionalism in East Asian nations like China and Vietnam. In fact, Chaihark Hahm has developed a rather similar argument. He suggests that constitutionalism should be grounded in a society's culture, and in contemporary East Asia, constitutionalism must resonate with the Confucian idea of *li (*ritual*).*[184] Conceiving constitutionalism as an educative project, he calls for a democracy in which the citizenry is educated through *li* and this will ensure that those who hold the power will spontaneously be so disciplined.[185] Hahm believes that 'once the citizens of modern East Asian countries begin to emulate their Confucian scholar-official ancestors, who first disciplined themselves with ritual propriety and then demanded the ruler's discipline, their country will become constitutionalist states.'[186] In giving too much 'educative' credit to the *li*, Chaihark Hahm pays little attention to the possibility of modern institutionalisation of the Confucian political ideas.

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183 Christopher Tiedeman, *the Unwritten Constitution of the United States: a Philosophical Inquiry into the Fundamentals of American Constitutional Law* (1974) 18; Daniel P Franklin and Michael J Baun (eds), *Political Culture and Constitutionalism: A Comparative Approach* (1995) 222; Graham Hassall and Cheryl Saunders, *Asia- Pacific Constitutional Systems* (2002) 42-3; Donald S Lutz, *Principles of Constitutional Design* (2006) 16.

184 Hahm, above n 5, 295.

185 Chaihark Hahm, 'Constitutionalism, Confucian Civic Culture, and Ritual Propriety' in Daniel A Bell & Hahm Chaibong (eds) *Confucianism for the Modern World* (2003) 53.

186 Ibid.

I propose that instead of blindly imitating western liberal constitutionalism, the Confucian nations like China and Vietnam should develop a sort of neo-Confucian constitutionalism by creatively institutionalising some constitutionalist ideas in classical Confucianism. In fact, Jiang Qing, the most prominent neo-Confucian in contemporary China, has proposed a tri-cameral parliament, which consists of the House of Confucians (*Tongruyuan*), the House of Nation (*Quotiyuan*), and the House of People (*Shuminyuan*).[187] In this project, the House of Confucians actually stems from the Confucian emphasis of the role of the wise and virtuous scholars. In quite the same vein, Daniel A Bell has suggested a plan of bicameral legislature with a democratically elected lower house and a Confucian upper house (*Xianshiyuan*) composed of representatives selected on the basis of competitive examinations.[188] Qing's *Tongruyuan* and Bell's *Xianshiyuan*, which propose the institutionalised forum for the Confucian scholars to check the law-making process, are actually the Confucian institutionalisation of what I call 'scholastic constitutionalism.'

However, Qing and Bell have just focused on the relation of Confucianism to the design of the legislature. How does Confucianism relate to a mechanism for reviewing the constitutionality of the statutes by the legislature and other political acts which have been put forward in China and Vietnam in recent years? In this regard, the possibility of the formulation of a Confucian council of constitutional protection should be considered, which will constitutionally rectify the legislature and the executive by remonstrating against statutes and political acts that are arguably unconstitutional. Further development of this idea deserves a separate treatment.

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187 For a collection of essays discussing Jiang Qing's political Confucianism, see Ruiping Fan (ed), *The Renaissance of Confucianism in Contemporary China*, (2011). For Jiang Qing's writings to be introduced in English, see Jiang Qing, *A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future*, Daniel A Bell & Ruiping Fan (eds) (Edmund Ryden trans 2012) (Forthcoming).

188 Bell, above n 141, 165-6.

The Execution of Ah Cho: Jack London's Footnote to Justice Theory

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Jack London's short story *The Chinago*[1] presents a simple tale with a foregone outcome. A perfunctory trial followed by a judge's ministerial error leads to the beheading of an innocent man. Though the mistake is discovered before the execution, inertia and indifference in the administration of justice destines the untoward conclusion. Despite this unspectacular storyline, *The Chinago* provides a quite spectacular indictment of Western culture, from the sorry moral weakness of the individual to the inglorious heritage of colonialism. The story also illustrates powerfully certain concealed and knotty aspects in the philosophical concept of justice. It is the latter I wish to address in this paper, offering some thoughts on how London's story helps reveal and unravel those knots.

I. Trial and Execution

The Chinago is set in colonial Tahiti near the turn of the twentieth century. Several cultures awkwardly intersect on the South Pacific island

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[1] Jack London, 'The Chinago' in *Tales of the Pacific* (first published 1909, 1989 ed) 16.

where a large cotton plantation dominates the economy. The colonial government is French. The cotton masters are English. A ruthless German, Karl Schemmer, serves as the plantation's overseer. Five hundred Chinese men work the fields, each indentured for five years. To the native Tahitians, these workers they call 'Chinagos' are as unwelcome as the European invaders.

The trial that starts the miscarriage of justice London unfolds concerns the murder of one of the Chinese labourers. The worker Chung Ga died following a skirmish in a barrack. He suffered two stab wounds. Hearing an altercation, Schemmer entered the barrack shortly after the murder. Five Chinese workers were present. Schemmer apprehended them all, branding two with lashes from his brutal whip.

All five of the workers nabbed by Schemmer were charged with Chung Ga's murder. One of the five was Ah Cho, the story's key figure. At the trial of the five together, Ah Cho sat quietly, bemused and disgusted. He found the French uncannily stupid. Their court procedure was pompous yet silly, decorated in formal markings yet woefully inefficient. How could they charge five men for Chung Ga's murder, he wondered. There were only two knife wounds. At most two men could have been involved. Back home in China, he reflected, the authorities would easily have determined the murderer. Torture. But the French were too weak to extract the truth that way. Instead, they employed a pretentious procedure of asking circuitous questions. It was as if they expected the defendants to tell them what had happened. Of course the five on trial knew. All of the Chinese workers knew that one among them, Ah San, had alone killed Chung Ga. And they all knew that Ah San had fled the barrack before Schemmer entered. But no one would speak, not even Ah Cho or the others on trial. For they were innocent and had nothing to fear. So they 'lied and blocked and obfuscated' in their testimonies.[2] Let the French figure out the truth by themselves.

Only the French were incapable. Their trial procedure kept the truth at bay when none of the Chinese men would play along. All the French court had was the testimony of Schemmer identifying the five defendants as being present at the scene of the crime. They each testified to no role in the killing. Yet a murder could not go unatoned. The Chinese workers had to respect the virtues and majesty of French law. They could not be allowed to think that wasting the resources of human capital owned by the English company would go unpunished. They had to bow before the rules and excellences of their European masters. So the court issued a verdict against all five of the defendants. After all, mused the magistrate, the Chinagos

2 Ibid 16.

'must learn that the law would be fulfilled in Tahiti though the heavens fell.'[3]

The defendant named Ah Chow bore the biggest scar from Schemmer's whip. That mark of infamy, though circumstantial, provided sufficient evidence for the court to deem him the most guilty. The magistrate accordingly sentenced him to death by guillotine. Schemmer's scourge had left its second most prominent imprint on Ah Cho. From that the court inferred his guilt to be second most, worthy of twenty years imprisonment. The other defendants, present at the scene but unblemished by Schemmer's whip, received lesser terms. Schemmer's whip had an uncanny knack for divining culpability.

Disbelief at the sentences shook Ah Cho out of the bemused, aloof disinterest from which he had observed the trial. No logic could support the magistrate's rulings. But then, the ways of the French, like the rest of the Europeans, struck Ah Cho as odd in every respect. He could not understand them. They were devils – inscrutable, gluttonous, intemperate, wild and beastly. Their minds moved mysteriously. They were inconsistent and unpredictable. Yet they were efficient; more than anything the white devils were terribly efficient.

Twenty years. Ah Cho was reflective and philosophical. Twenty years marked only time. He accepted his sentence without protest or distress. He would still return home to China a relatively young man, young enough to take a bride, build a garden and a family. 'The Garden of the Morning Calm' would harbor his tranquillity and repose behind a high wall. He could abide his sentence in stride.

Just a short time passed, however, before one day a jailer took Ah Cho from his prison cell. The jailer turned Ah Cho over to a gendarme, Cruchot. The two alighted in a wagon to begin the twenty-mile journey to the town of Atimaono, the commercial centre of the English cotton operation. Ah Cho felt relief, inferring that the overseer Schemmer must have determined that he could better serve his sentence labouring in the fields than languishing in prison. Yet soon it became apparent from Cruchot's rambles that Ah Cho was not destined for the fields but fated for the guillotine.

Ah Cho protested. 'It is a mistake,' he insisted.[4] Cruchot told him to be quiet. But there had been a mistake. The order for Ah Chow's execution had been brought that morning for completion to the Chief Justice of the French colonial court. Hung over from a bawdry evening, the Chief Justice scrawled the name of the condemned man less one fateful letter. Instead of

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3 Ibid 21.

4 Ibid 24.

Ah Chow, the order of execution instructed the jailer to hand over the wrong prisoner, *Ah Cho*.

The wagon laboured on toward Atimaono. Gently, Ah Cho prodded Cruchot. 'I saw you in the court room, when the honourable judge sought after our guilt,' he said. '[D]o you remember that Ah Chow, whose head is to be cut off ... – was a tall man? Look at me', Ah Cho pleaded, standing.[5] Cruchot looked and paused. He could not tell one Chinago from another. Their faces were all alike. 'But between tallness and shortness he could differentiate'.[6] He knew he had the wrong man on the seat alongside him.

Ah Cho smiled, relieved. The mistake would now be rectified. Only Cruchot was troubled. He now knew the man beside him was not the defendant sentenced to death by the magistrate. But he was ignorant of the Chief Justice's error. Perhaps it was not a mistake after all. He could not account for the ways of his superiors. A middle-aged peasant from the South of France, Cruchot was 'slow-witted and stupid' and driven by 'discipline and fear of authority'.[7] He knew his duty was to obey, not think. If he turned back to right the wrong, he risked reprimand for delaying the execution. His superior, the sergeant of the gendarmes, was awaiting his arrival in Atimaono. And the sergeant, fearsome and intolerant, 'bulked bigger in [Cruchot's] mind than God'.[8] So whipping the mules to a faster pace, he stubbornly resisted Ah Cho's pleas. Yet he did so under the distress of moral guilt:

> The knowledge that he had the wrong man did not make his temper better. The knowledge that it was through no mistake of his confirmed him in the belief that the wrong he was doing was the right. And, rather than incur the displeasure of the sergeant, he would willingly have assisted a dozen wrong Chinagos to their doom.[9]

Cruchot and Ah Cho thus continued their journey in agitated silence. The frightened and the contrite, each incapable of charting a different course, pressed on toward Atimaono. Once there, Cruchot presented Ah Cho to Schemmer and the sergeant. Schemmer – overseer, engineer, and executioner – was proudly testing the guillotine he had just constructed. The horde of Chinese workers stood by idly, awaiting Ah Chow's execution. Schemmer had given them time off to witness the event. For it shone deterrence.

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5 Ibid 25.
6 Ibid.
7 Ibid 22.
8 Ibid.
9 Ibid 26.

Ah Cho politely raised his protest. The sergeant and Schemmer both immediately saw the merit of the appeal. Schemmer cursed. The sergeant pondered the dilemma. He weighed the time it would take to return the mistake to prison and bring back the rightfully condemned. He thought wistfully of the beautiful half-caste daughter of the pearl-trader in whose arms he would tarry once this ugliness was over. Schemmer likewise weighed and thought. He weighed the time and labour he would lose by keeping the workers idle another half day just to execute the right man. He thought wistfully of his beautiful guillotine.

Ah Cho thought too. He thought of home. He imagined himself in the Garden of the Morning Calm, the high wall separating him from the world outside. He remembered maxims: 'forgive malice' seemed apt. But then again it did not. For Ah Cho realised that the white devils' vice was not malice, but indifference. He reflected:

> there was no malice to forgive. Schemmer and the rest were doing this thing without malice. It was to them merely a piece of work that had to be done, just as clearing the jungle, ditching the water, and planting cotton were pieces of work that had to be done.[10]

Indifference. Ill-will did not drive Schemmer and the sergeant in their brief deliberation. They harboured no ill-feelings toward Ah Cho. Concluding the execution was, just as Ah Cho understood, a piece of work that could not be left undone. '[W]e can't postpone this affair', Schemmer grumbled.[11] For as Ah Cho well knew, the white devils' chief attribute was efficiency. Time for them was labour wasted, profits foregone; time was happiness unfulfilled, pleasure deferred. Reassuring themselves that the wrong likely would never be discovered and if it were, others – Cruchot or the jailer – would be blamed, Schemmer and the sergeant decided to press ahead. 'They can't blame us', Schemmer reasoned. 'Who can tell one Chinago from another? We can say that we merely carried out instructions with the Chinago that was turned over to us.' The sergeant concurred; after all, 'He is only a Chinago.'[12]

Strapped to a board below the glistening blade, Ah Cho heard the sergeant shout the ultimate command. A moment later, he found repose from the world, not behind a high wall but beneath a big knife.

II. Act-Centred Theories of Justice

The execution of Ah Cho disturbs. London's story affronts our sensibilities of rightness and justice. It seems incontrovertible that Ah Cho's sorry fate,

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10 Ibid 29.
11 Ibid 28.
12 Ibid 29.

from conviction for a crime he did not commit to wrongful execution on account of juridical error and indifference, amounts to a gross miscarriage of justice. If anything falls into the category of the unqualifiedly unjust, Ah Cho's execution does.

Yet how can we account philosophically for these arguably incontestable intuitions of justice misbegotten? Tradition would have us look to theoretical systems fashioned to provide, *inter alia*, necessary and sufficient conditions for determining whether an act or course of action is just or unjust. The history of philosophy is adorned with an impressive gallery of such systems. Yet their abundance disguises a relatively few compositional styles. Two of the most prominent are consequentialist and rights or duty-based theories of justice. Consequentialist theories appeal to the highly reasonable intuition that justice is associated with good outcomes. Utilitarianism, the most plausible consequentialist approach, aligns justice with the principle of utility, the familiar moral standpoint that the rightness of an act turns on the goodness or badness of the consequences it effects.[13] To John Stuart Mill, justice stands at the heart of that utilitarian principle. Mill considered justice to be the highest requirement of social morality, an obligation fulfilled through maximising social expediency.[14] Rights-based theories of justice spurn such consequentialist considerations. Without so much as a nod to the common good, Immanuel Kant, in the case of Ah Cho, would have us ask whether he and all others concerned were accorded the basic dignity and respect owed every human being.[15] If not, no wealth of social advantages could justify the events at Atimaono.

Despite the formal appeal and aspirational power each of these act-centred systematic approaches offers, neither satisfies. For neither can give an adequate account of the tragic injustice borne by Ah Cho.

A. UTILITARIANISM

Utilitarianism stipulates that determinations of right conduct turn on the principle of maximising the common good. While utilitarian theorists often disagree over how to apply the principle of utility,[16] they share the

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13 See Rolf Sartorius, *Individual Conduct and Social Norms: A Utilitarian Account of Social Union and the Rule of Law* (1975) 1; R G Frey, 'Introduction: Utilitarianism and Persons' in R G Frey (ed), *Utility and Rights* (1984) 3, 4.

14 See John Stuart Mill, *Utilitarianism* (first published 1861, 1979 ed) 58, 62.

15 See Immanuel Kant, *Foundations of the Metaphysics of Morals* (first published 1785, Lewis White Beck trans, 1969 ed) 428-9.

16 Certain important theoretical differences have historically separated utilitarian philosophers, resulting in what has come to be seen as a few distinct forms of utilitarianism. See David Lyons, *Forms and Limits of*

conviction that the right course of action is that which 'would issue in the obtaining of the best total outcome.'[17] Everything that matters, morally speaking, receives its due measure of consideration on the scale of utility. That includes justice. Hence, while Mill praised justice as 'incomparably the most sacred and binding part, of all morality,'[18] he cautioned that 'particular cases may occur in which some other social duty is so important as to overrule any one of the general maxims of justice.'[19] The noble status he accorded justice does not exclude it, that is, from the utilitarian calculus. For utilitarianism attributes all that is moral in the concept of justice to its social expediency. Justice may 'stand higher in the scale of social utility ... [as a] more paramount obligation than any others,' yet its obligatory status – its 'character of indefeasibility' – depends entirely upon its position on that scale.[20]

So understood, the principle of utility would just as likely endorse the counter-intuitive conclusion that Ah Cho's execution was morally permissible as issue a call for clemency. To see this, it is necessary to consider separately the two distinct occurrences leading to Ah Cho's demise: the trial culminating in the false conviction of five labourers and the Chief Justice's ministerial error followed by the knowing decision to execute the wrong prisoner.

The trial would seem to withstand utilitarian scrutiny as a just legal process. The presiding French magistrate followed standard (Western) court procedure. Witnesses were called, the defendants had opportunity to speak, and the judge rendered judgment on the basis of the evidence before him. That evidence consisted almost exclusively of Schemmer's description of the murder scene, augmented vividly by two defendants bearing the brand of his tell-tale whip. The defendant Chinese workers could have set the story right. Instead, they 'lied and blocked and obfuscated,'[21] a strategy that only enhanced the weight of Schemmer's testimony. Given the facts before

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Utilitarianism (1965). Three forms predominate: act-utilitarianism, rule-utilitarianism, and utilitarian generalisation. See Sartorius, above n 13, 11-18. The characteristic features I mention are those generally associated with utilitarianism, though some are less endemic to certain forms of utilitarianism than to others. See, eg, Frey, above n 13, 5 (suggesting that certain forms of utilitarianism (rule-utilitarianism and utilitarian generalisation) are not really even consequentialist). But see Richard Brandt, *A Theory of the Good and the Right* (1979) 278-85 (critiquing utilitarian generalisation as a consequentialist theory).

17 Judith Jarvis Thomson, 'Goodness and Utilitarianism' in *Proceedings and Addresses of American Philosophical Association* (1994) 7.

18 Mill, above n 14, 58.

19 Ibid 62.

20 Ibid.

21 See London, above n 1, 10.

him, it is hard to see how the magistrate's ruling could be considered unjust from a utilitarian point-of-view. Utilitarianism endorses deterrence as sound justification for punishing criminal wrongdoing.[22] The sentences imposed by the magistrate resonated deterrence. They were designed to dissuade the five defendants from future wrongdoing (specific deterrence) while sending the unequivocal message to the rest of the Chinese workers that 'the law would be fulfilled in Tahiti though the heavens fell' (general deterrence).[23]

Now, one could take issue with the wisdom of the magistrate's deterrent foresight. It could be argued that instead of firm and certain punishment with the attendant risks of hasty and arbitrary judgment, the long-term deterrent interests of the French would have been better served by ensuring that all of the intersecting cultures in colonial Tahiti perceived the law as applied cautiously in a fair and evenhanded manner. More broadly, it could be argued that the trial procedure and court ruling should be weighed in the context of the entire political and legal system France put in place in colonial Tahiti, a system fraught with institutional injustice. Certainly such arguments can be made. And they carry substantial merit. But they do not carry the day for utilitarian analysis. For utilitarianism is intended as a rule of decision or formula for active ethical decision-making. Assessing conduct (here the trial and judicial ruling) as just or unjust from a utilitarian point-of-view requires measuring it against the alternative courses of action available at the time of the trial, given the resources, knowledge, and foresight of consequences that could reasonably be attributed to the agents involved. By our lights today, European colonialism seems (to many) a tarnished chapter of Western history marked by cruelty, economic exploitation, and invidious cultural hegemony. The injustice we intuit in Ah Cho's case reflects that attitude. But the force of utilitarianism lies not in critiquing actions and states of affairs long after the fact. Rather, the principle of utility is meant as a rule of decision to guide moral deliberation and explain to agents how one course of action they could choose is preferable, in terms of overall social consequences, compared to the available alternatives. The second counterargument here does not employ utilitarianism as a decision rule or principle for action, but only as a method of historical critique. The first does treat it as a principle of action. But the alternative reasoning it suggests does not stand out as better, in terms of foreseeable social consequences, than the deterrent reasoning of the magistrate. Hence, it does not show his ruling to be consequentially infirm or in any respect clearly unjust.

Utilitarianism can better account for our intuition that Ah Cho was treated unjustly based on the second occurrence – the set of events

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22 Jeremy Bentham, *The Principles of Morals and Legislation* (first published 1781, 1988 ed) 173-88.

23 London, above n 1, 21.

beginning with the Chief Justice's administrative error and ending in the deliberate decision by the sergeant and Schemmer to proceed with the wrongful execution. For as he approached the hastily constructed scaffold, Ah Cho did have the paramount good of justice on his side. And the interest he held was in the preservation of human life, arguably the most weighty of social goods. Yet even here utilitarianism fails to support unequivocally our intuitive distress over Ah Cho's execution. For utilitarianism notoriously underdetermines how much weight to assign the various social goods that come to be placed on the scale of utility. Every form of utilitarianism insists that in calculating the overall common good, the interests and preferences of every person must receive full weight and consideration.[24] Now, the interests of the colonial masters and their lackeys like Cruchot can certainly be discounted as lesser in kind than the life and death interest held by Ah Cho. But Ah Chow shared that interest. So did Ah San and all the other Chinese workers who hoped the rectificatory wrath of the foreign devils would fall elsewhere than on their necks. Ah Cho thus stood very lonesome on the guillotine side of the utilitarian scale. Furthermore, it is the collective weighting of all those individual interests that matters. For utilitarianism strives to maximise the general social advantage.[25] It is thus not unreasonable, all things considered, to think that the overall well-being of the French colonial society then in place in Tahiti was better served by sacrificing Ah Cho than not. For the well-being of Ah Cho seems trifling measured against the welfare and demands of justice owed the other workers, together with the colonial masters' interests in security, efficiency, and general deterrence.

B. KANT

A rights-based Kantian analysis seemingly would not so unsettle our intuitions. Contrary to the utilitarians, Kant refused to countenance considerations of social advantage as a reliable measure of right conduct. The 'best total outcome' for a society could never, on his account, render a person so picayune as to justify a sacrificial execution. For Kant posited that every person possesses intrinsic value simply by virtue of his or her humanity. This inherent worth sets an absolute prohibition against using a person simply as a means, no matter the end.[26] Hence, by his humanity-as-an-end-in-itself formulation of the categorical imperative, Kant would

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24 See Mill, above n 14, 16-17. Accord Henry Sidgwick, *The Methods of Ethics* (7th ed, first published 1907, 1981 ed) 416-17; Rolf Sartorius, 'Persons and Property' in R G Frey (ed), *Utility and Rights* (1984) 196, 197.

25 See Mill, above n 14, 11, 16, 30-3; Sidgwick, above n 24, 411, 413-16.

26 Kant, *Foundations of the Metaphysics of Morals*, above n 15, 429. See Paul Guyer, *Kant's Groundwork for the Metaphysics of Morals* 87-90 (2007); Allen Wood, *Kantian Ethics* 85-8 (2008).

appear to give solid philosophical grounding to our intuitive discomfit with the execution of Ah Cho.

Yet applying Kant's practical philosophy is not so straightforward. In the case of Ah Cho, the ethical command of the categorical imperative not to treat any human simply as a means would seem to beg the question. For as Paul Guyer convincingly argues, Kant's formula of humanity rests on tenuous philosophical footing.[27] Kant premised that formula to a great extent on our subjective perceptions. He assumed that every person sees him or herself as of intrinsic worth. From that, he inferred that as moral legislators we of necessity would convert that subjective representation into an objective principle applicable to all.[28] Yet such an objective principle cannot be deduced validly from a merely subjective principle. Kant's assertion that humans have inherent worth as ends in themselves thus is ultimately something he just presupposes.[29] While the truth of that supposition cannot be said to turn on empirical considerations, the ragtag characters in London's story do serve as counter-examples to Kant's speculative subjective premise. No one in the story manifested respect for human dignity. Everyone, European and Chinese alike, stood in hushed self-interest before the terror of Schemmer's guillotine. Even Ah Cho evinced no principled opposition to anyone, including himself, being treated simply as a means. He snickered at the French court officials for not extracting the truth by torture. Though he found the European ways odd, he breathed no opposition to Ah Chow's execution. In fact, he encouraged it to save himself, although he knew Ah Chow was equally innocent.[30]

Beyond this concern about the philosophical merit and hence practical weight owed Kant's categorical prohibition against anyone being treated merely as a means, further worries arise when we turn to his express extension of the categorical imperative to the concept of justice in *The Metaphysics of Morals*.[31] There Kant maintained that justice concerns the

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27 See Guyer, above n 26, 90-1, 103-14, 171.

28 See Kant, *Foundations of the Metaphysics of Morals*, above n 15, 429. While this provides Kant's main support for the humanity-as-an-end-in-itself formulation of the categorical imperative, it is, as many Kant scholars argue, an obscure and questionable argument. See, eg, Guyer, above n 26, 90-1; H J Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy* (1947) 176-7; Wood, above n 26, 90-3.

29 See Guyer, above n 26, 91; Wood, above n 26, 93.

30 See London, above n 1, 24-5, 28.

31 Immanuel Kant, *The Metaphysical Elements of Justice* (Part I of The Metaphysics of Morals) (first published 1797, John Ladd trans, 2nd ed, 1999). See Wolfgang Kersting, 'Politics, Freedom, and Order: Kant's Political Philosophy' in Paul Guyer (ed), *The Cambridge Companion to Kant* (1992) 342, 342-3 (discussing how Kant's political philosophy,

external, practical relations of persons, insofar as the actions of one touch upon the freedom of another. Freedom from external constraint in such relationships forms the basis of what he called the 'universal principle of justice'.[32] He defined that universal principle as stipulating that – 'Every action is just that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law.'[33]

To Kant, this universal law of justice or juridical freedom underlies the formation of civil government and justifies 'public lawful coercion'.[34] As to criminal conduct, Kant argued that justice requires punishment according to an unwavering 'principle of equality' or 'Law of retribution'.[35] Like for like, punishment must equal the crime. Any undeserved evil one person inflicts upon another is an evil the agent wills upon himself as well.[36] In the case of murder, Kant accordingly insisted that capital punishment is the only form of punishment morally justified. 'Anyone who is a murderer ... must suffer death.'[37] This follows strictly from the 'retributive principle of returning like for like.'[38] Deterrence is never a sound penal justification.[39]

Oddly, this Kantian framework confounds more than it clarifies when applied to *The Chinago*. The French magistrate and others involved in the trial, such as Schemmer, did seem committed to delivering a deterrent message. On Kant's account, that is a mistaken juridical motive. Nonetheless, the French court arguably tried to hand down a just sentence. The magistrate, consistent with Kant's principle of equality, was convinced

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including his theory of justice, is structurally interconnected with his ethical philosophy).

32 Kant, *The Metaphysical Elements of Justice*, above n 31, 230-1.

33 Ibid 230.

34 Ibid 312.

35 Ibid 332. For a sympathetic yet highly critical reading of Kant's retributivist view of punishment, see Wood, above n 26, 206-23.

36 See Kant, *The Metaphysical Elements of Justice*, above n 31, 332-4.

37 Ibid 334.

38 Ibid 332.

39 See ibid 331-3. I am not unmindful here of the recent important work by some Kant scholars suggesting that he held an integrated retributivist/deterrent theory of punishment. See, eg, Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (2009) 300-24; Thomas E Hill, Jr, 'Kant's Theory of Punishment: A Coherent Mix of Deterrence and Retribution' in *Conduct Respect, Pluralism, and Justice: Kantian Perspectives* (2000) 173-99; B Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution' in *Law and Philosophy* 8 (1989) 151-200. Like some others, however, I find those suggestions unsupported by Kant's texts. Eg, Wood, above n 26, 212-3.

that only a sentence of death could recompense Chung Ga's murder. Though the court failed to identify the actual killer, it followed an arguably fair procedure. The magistrate rendered judgment according to the evidence he had before him. By striking paradox, the fairness of the trial, or lack thereof, lay just as much if not more under the control and discretion of the defendant Chinese workers as with the Europeans. For the workers knew the truth. Had they been good Kantian moral agents, they would have ratted on Ah San. That would have fulfilled their duty under the categorical imperative to tell the truth.[40] Instead they toyed with and deliberately deceived the French court, all the while compromising both their characters and the juridical procedure. To a degree, Kant would seem even to suggest that, because of their deliberate lying, some of the blame for the false convictions should be imputed to the defendants themselves.[41]

One further paradox troubles the Kantian framework. Duty is fundamental for Kant's understanding of justice, as it is for his ethics more generally. In *The Metaphysics of Morals*, he averred that '*Duty* is that action to which a person is bound.'[42] If so, then members of a civil state have a duty to act in furtherance of its well-being, as that is a 'condition that reason through a categorical imperative obligates us to strive after.'[43] Yet in *The Chinago*, duty in this very sense becomes an excuse for injustice. Each of the Europeans who became aware of the case of mistaken identity rationalised by way of duty his refusal to intervene on Ah Cho's behalf. For Schemmer and the sergeant it was just pretence. But for the servile Cruchot it was something more complicated. A dull-witted man browbeat by life, Cruchot felt under a duty to carry out the orders of his superiors, especially

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40 See Kant, *Foundations of the Metaphysics of Morals*, above n 15, 422, 429-30. See also Immanuel Kant, *The Metaphysical Principles of Virtue* (*Part II of The Metaphysics of Morals*) (first published 1797, James W Ellington trans, 1983 ed) 429-31 (arguing that intentional untruth is the greatest violation of a person's duty to him or herself). See generally Wood, above n 23, 240-58 (discussing the high priority Kant placed on truthfulness).

41 See Kant, *The Metaphysical Principles of Virtue*, above n 40, 431, where Kant provides an example that stands as a telling analogy to the trial in *The Chinago*. Kant's example reads:

> For instance, a householder has instructed his servant that if a certain person should ask for him, the servant should deny knowing anything about him. The servant does this, but in doing so is the occasion of the master's slipping away and committing a great crime, which would otherwise have been prevented by the watchman who was sent out to take him. Upon whom (according to ethical principles) does the blame fall? To be sure, also upon the servant, who here violated a duty to himself by lying, the consequence of which will now be imputed to him by his own conscience.

42 Kant, *The Metaphysical Elements of Justice*, above n 31, 222.

43 Ibid 318.

the sergeant who 'bulked bigger in his mind than God'.[44] While he unquestionably came to realise he was transporting the wrong man to Atimaono, Cruchot convinced himself by agitated reasoning 'that the wrong he was doing was the right.'[45] In no respect was he doughty. Yet Cruchot's lack of mettle merged inseparably with his sense of duty, a sense of promissory compliance to do the bidding of his political superiors. This is a form of duty that Kant expressly endorsed.[46] Hence, in this respect too the considerable theoretic vigour of Kant's practical philosophy leads to an ambiguous analysis when called upon to come to grips with *The Chinago*.

III. Virtue-Centred Theories of Justice

The sharp knife of injustice that felled Ah Cho thus seems as well to sever his worrisome tale from philosophical analysis under standard act-centred principles of rightness or justice. Yet the concept of justice has frequently come under a different style of philosophical treatment. Since ancient times, many philosophers have treated justice as a virtue. Plato first introduced this approach in his dialogues *Gorgias*[47] and *Republic*.[48] Aristotle devoted an entire book to the virtue of justice in the *Nicomachean Ethics*[49] and addressed it further in his *Politics*.[50] The canonical natural law theorists from Thomas Aquinas into the early modern era followed Aristotle's virtue-based approach.[51] Though writing in a different and secular key, the British moral sense philosophers equally revered justice as a virtue.[52] Even Mill, as mentioned above, set justice apart in his utilitarian framework because he considered it a social virtue above all others.

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44 London, above n 1, 22.

45 Ibid 26.

46 See Kant, *The Metaphysical Elements of Justice*, above n 31, 319 ('Furthermore, if the organ of the sovereign, the ruler, proceeds contrary to the laws … the subject may lodge a complaint (*gravamina*) about this injustice, but he may not actively resist.')

47 See Plato, *Gorgias* in *Plato Gorgias and Aristotle Rhetoric* (Joe Sachs trans, 2009 ed) 503C3-511A6, 527A6-527E7.

48 See Plato, *Republic* (Francis MacDonald Cornford trans, 1941 ed).

49 See Aristotle, *Nicomachean Ethics* (Martin Ostwald trans, 1962 ed) bk 5.

50 See, eg, Aristotle, *Politics* (C D C Reeve trans, 1998 ed) 1253a14-18, 30-40, 1259b31-1260a22, 1282b14-22, 1283a37-9.

51 See Thomas Aquinas, *Summa Theologiae* in William P Baumgarth and Richard J Regan (eds), *On Law, Morality, and Politics* (first published 1265-1274, 1988 ed) Q 90 art 2, 4, Q 96, art 1, Q 97, art 2.

52 See, eg, David Hume, *An Enquiry Concerning the Principles of Morals* 20-34 (revised ed, first published 1777, 1983 ed); Francis Hutcheson, *A Short Introduction to Moral Philosophy* (first published 1747, 2007 ed) 71-4, 99-100; Adam Smith, *The Theory of the Moral Sentiments* (6th ed, first published 1790, 1976 ed) 78-91, 166-7.

Does conceiving of justice as a virtue align philosophical theory with our intuitions that the execution of Ah Cho was unjust? To answer this question we should consider the exemplar of virtue-centred understanding of justice. Aristotle.

IV. Aristotle

A. JUSTICE UNIVERSAL AND PARTICULAR

In Book V of the *Nicomachean Ethics* Aristotle distinguished two senses of justice: universal (or complete) justice and particular (or partial) justice.[53] Universal justice corresponds with what is 'lawful'.[54] It provides an evaluative measure of civil government, tracking how well a state's formal enactments, social rules, and customs produce and preserve the end of social and political happiness. It also measures the character of the citizen. There the focus is two-fold: whether an individual tends to be law-abiding (just in relation to the state) and whether he or she is virtuous (just in relation to other people). Aristotle treated justice in this universal sense as the 'highest of all virtues'[55] – 'complete virtue or excellence, not in an unqualified sense, but in relation to our fellow men.'[56]

The second sense of justice Aristotle delineated in the *Nicomachean Ethics* is particular justice. Like universal justice, particular justice concerns our relations with others. Yet its scope is narrower. Particular justice concerns only the distribution of social goods such as wealth, material things, honour, and security.[57] Aristotle perceived these goods as divisible and frequently zero-sum, insofar as when some people acquire more of one, others usually receive less. Particular justice addresses the fairness or equality of the distributions. Merit supplies the determining criterion. When the division of social goods is equal or fair in relation to the proportion each person deserves, it is just. When it is not proportionately equal or fair, it is unjust.[58]

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53 Many commentators on Aristotle employ the terms 'universal' and 'particular' to describe his two senses of justice. See W F R Hardie, *Aristotle's Ethical Theory* (1980) 185; Sir David Ross, *Aristotle* (1923) 209; J A Stewart, *Notes on the Nicomachean Ethics* (1892) vol 1, 401. The terms 'complete' and 'partial' are used by Martin Ostwald in his translation of the *Ethics*. See Aristotle, *Nicomachean Ethics*, above n 49, 1129b26-1130a3, 1130a32-5, 1130b9-16. While all quotations from the *Ethics* in this essay will be from the Ostwald translation, I will follow the more conventional nomenclature, universal and particular.

54 See Aristotle, *Nicomachean Ethics*, above n 49, 1129a32-4, 1130b10.

55 Ibid 1129b28.

56 Ibid 1129b26-7.

57 See ibid 1130b1-4.

58 See ibid 1130b30-2, 1131a10-1131b24.

In this way Aristotle brought justice, in its particular sense, within his doctrine of the mean. Like all other moral virtues, he thought justice 'is realized in a median amount,'[59] midway between the vices of excess and deficiency. Excess in the case of justice refers to having too much, ie, enjoying a disproportionately large allocation of social goods relative to what one deserves. Deficiency is having less than one's proportionate share, as determined by merit. Both states of affairs are unjust. Excess denotes acting unjustly; deficiency depicts suffering unjustly. In either case, injustice results because proportionality is violated.[60]

Aristotle was primarily concerned in the *Nicomachean Ethics* with particular justice and its singular influence on individual virtue. Universal justice is not, on his account, a moral virtue *per se*. He conceived of it as a political and legal concept – a 'communal virtue, which all the other virtues necessarily accompany.'[61] As such, it stands on a different plane from the several individual moral virtues, including particular justice, enumerated in the *Nicomachean Ethics.*[62] It is not so different, however, in terms of how it comes to be realised. In the *Politics* Aristotle expressly extended his conception of justice from 'what has been determined in those philosophical works of ours dealing with ethical issues' to justice in the legal and political realm.[63] Hence, as argued by Paul Vinogradoff, the best way to understand Aristotle's sense of universal justice is by extension from the particular.[64]

For purposes of assessing whether Aristotle's virtue-centred approach to justice can account for the injustice our intuitions so unambiguously tell us was suffered by Ah Cho, universal justice clearly is most relevant. London's story has nothing to do with the distribution of material social goods, the concern of particular justice. Rather, London offers a caustic indictment of the legal administration of justice. This is the domain of universal justice. Yet what Aristotle had to say about the individual virtue of justice remains highly pertinent, since he fashioned universal justice on that particularised structure. As noted, Aristotle conceived of particular justice in terms of proportional fairness. Inquiry into universal justice accordingly requires assessing, in terms of proportionality, the distribution

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59 Ibid 1133b35-1134a1.

60 See ibid 1131a21-1131b24, 1133b30-1134a15.

61 Aristotle, *Politics*, above n 50, 1283a39.

62 Aristotle's list of individual moral virtues includes courage, self-control, generosity, magnificence, high-mindedness, gentleness, truthfulness, wittiness, friendliness, modesty, and righteous indignation. See Aristotle, *Nicomachean Ethics*, above n 49, 1107a28-1108b10, 1115a6-1128b35. See also Aristotle, *Eudemian Ethics* (Michael Woods trans, 1982) 1220b37-1221a12.

63 Aristotle, *Politics*, above n 50, 1282b19-20.

64 See Paul Vinogradoff, *Outlines of Historical Jurisprudence* (1920) vol 2, 43-71.

of legal benefits and burdens. Further, since merit supplies the determining criterion for proportional fairness in the particular sense, so too must merit or just desert provide the basis for measuring just allocations of distributive shares in the universal realm of legal justice.

It follows that for Aristotle distributive justice obtains, in the universal sense, when a society allocates its full range of benefits and burdens so as to ensure that each person receives a share proportionate to what he or she deserves. Injustice results from any deviation from the mean of proportionality by 'admit[ting] of a more and a less,'[65] that is, by permitting allocations to some that amount to more than they deserve, while others receive less. When distributions deviate from the mean, the distributive principle gives way to its correlative, rectificatory or remedial justice.[66] The purpose of remedial justice is simple: to remedy or correct any inequities so as to restore distributive proportionality.[67]

B. DISTRIBUTIVE SHARES

Can Aristotle's virtue-centred conception of justice account for the wrong done Ah Cho? Not adequately. For two points of dissonance mar the alignment of Aristotle's theory with our intuitions regarding *The Chinago*. First, as with so many theories of justice, Aristotle treated the proportional distribution of social goods as the core of justice.[68] He thought it axiomatic to conceive of justice as proportional fairness, positioned at a contextually relative midpoint between having more than one's fair share and receiving less than one's due. That may or may not be sufficient for understanding justice in the particular sense. As to the realm of universal or legal justice, it is not. This is not to deny that fairness in the distribution of social advantages is a centrally important consideration in assessing the justice of legal institutions. John Rawls' *Justice as Fairness* demonstrates this vividly.[69] Further, as to certain types of social goods, distributive justice may well be enough. Property rights are paradigmatic. So is access to natural resources, from forest or mineral resources desired for profit to basic

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65 Aristotle, *Nicomachean Ethics*, above n 49, 1131b17.

66 Ibid 1132a3-19. Ostwald uses the term 'rectificatory' for Aristotle's second empirical principle of particular justice. See ibid 1130b34-1131a1, 1131b25. Hardie concurs. See Hardie, above n 53, 192-5. Ross calls it 'remedial' justice. See Ross, above n 53, 211.

67 Aristotle, *Nicomachean Ethics*, above n 49, 1132a7-1132b9.

68 Others who notably have considered distributive shares to be a central feature of justice include Brandt, above n 16, 306-26; J R Lucas, *On Justice* (1980) 163-84; John Rawls, *A Theory of Justice* (1971) 4-11, 60-108, 258-332. On the differences between what Aristotle and Rawls each mean by distributive justice, see Paul Ricoeur, *The Just* (David Pellauer trans, 2000) 36-8, 44-6, 52.

69 See Rawls, above n 68, 258-84.

needs like potable water sought for life. But distributive justice does not encompass the whole of legal justice. Theories that attempt to describe criminal justice on a distributive model strain credulity. Fair punishment for criminal wrongdoing often may reflect proportionality. But the decision to impose punishment in the first place cannot be justified by appeal to distributive considerations. As stated by Rawls, 'To think of distributive and retributive justice as converses of one another is completely misleading and suggests a different justification for distributive shares than the one they in fact have.'[70]

Aristotle nonetheless treated remedial justice, including rectification by way of criminal punishment, as derivative from distributive justice. The goal of remedial justice on his account is to restore distributive proportionality.[71] This, as Rawls notes, provides a misleading account of justice. *The Chinago* highlights this. Ah Cho's execution was obviously disproportional punishment. He did no wrong. Any punishment was more than he deserved. Even if his conviction and twenty-year sentence were seen to result from a fair (if misguided) trial, his beheading went beyond the magistrate's determination of a just sentence. His execution warrants condemnation as a sad mockery of justice under law. Yet to frame that condemnation in terms of distributive justice sounds hollow and irrelevant. It places an insensitive actuarial value on both human life and justice's virtue.

C. MOTIVE

The second difficulty in using Aristotle's virtue-centred theory of justice to assess *The Chinago* comes from Aristotle's insistence that acts of injustice be accompanied by a specific motive. In the *Nicomachean Ethics* Aristotle argued that a specific motive or emotion must be understood to accompany every moral virtue.[72] The motive that attends desire for social goods and hence underlies all acts bearing on particular justice is 'the pleasure that comes from profit.'[73] When that desire is properly in check and a person takes for himself and gives to others a fair share, he is just. Conversely, the person who divides goods unfairly and disproportionately is unjust. His motive is not the pleasure that attends receiving a fair profit, but *pleonexia*, a desire for gain unchecked, avarice. Aristotle wrote:

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70 Ibid 315.

71 See Aristotle, *Nicomachean Ethics*, above n 49, 1131b25-1132b12.

72 On the importance for Aristotle's doctrine of the mean that he identify a specific emotion to characterise every moral virtue, and the adequacy of his discussion of justice in this regard, see J O Urmson, 'Aristotle's Doctrine of the Mean' in Amelie O Rorty (ed), *Essays on Aristotle's Ethics* (1980) 157.

73 Aristotle, *Nicomachean Ethics*, above n 49, 1130b4-5.

> if one man commits adultery for profit and makes money on it, while another does it at the prompting of appetite ... the latter would seem to be self-indulgent rather than grasping for a larger share, while the former is unjust but not self-indulgent ... Further, we usually ascribe all other offenses to some particular wickedness, eg, adultery to self-indulgence, deserting a comrade-in-arms to cowardice, and assault to anger; but making unjust profit is not ascribed to any wickedness other than injustice.[74]

The unjust person thus violates proportionality through deliberately taking more than his fair share. Yet '[d]oing unjust things', Aristotle argued, 'is not the same as acting unjustly'.[75] Every instance of injustice implies an unjust action; but not every unjust action implies injustice.[76] Only unjust acts performed by a person of unjust character, driven by the motive of *pleonexia*, can be said without qualification to produce injustice.

This is to say that on Aristotle's account judgments going to justice and injustice address two dimensions – the outcome of the action and the character of the agent, including his motives. The first dimension identifies the broad, unfiltered category of actions that produce unfair distributive outcomes. The second dimension narrows the categorical reach of the first by taking into consideration the character of the agent and the conditions under which he acted. Aristotle thought, first of all, that injustice is realised only in unjust acts that are voluntarily performed.[77] The act must have been (i) within the agent's power to perform, (ii) done in full knowledge of the circumstances, and (iii) free of compulsion or constraint.[78] Some unjust distributions result from involuntary actions. A person acts involuntarily if he acts in ignorance (without knowledge), under compulsion (without power to do otherwise), or otherwise without choice.[79] Although involuntary acts may create unjust distributions, Aristotle did not consider them unjust, except in an incidental sense.[80] Other unjust distributions derive from actions performed not strictly in ignorance – hence not fully involuntary – yet where the agent acted without full knowledge of the consequences. Aristotle distinguished here between mishaps and mistakes. Mishaps include injuries (unjust distributions) that run contrary to reasonable expectations.[81] Mistakes are injuries that do not directly oppose

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74 Ibid 1130a24-32.
75 Ibid 1136a27.
76 See ibid 1134a31-2.
77 Ibid 1135a16-17, 20.
78 Ibid 1135a23-8.
79 Ibid 1135a31-4.
80 Ibid 1135a17-19.
81 Ibid 1135b17.

reasonable expectations, but nonetheless are not the product of intentional desire to create an unjust distribution.[82] Aristotle does not appear to consider acts precipitated by mishap or mistake to be unjust.

Further, to Aristotle the degree of injustice depends on premeditation. Some unjust acts are performed without prior deliberation. A person may, for example, be so driven by sexual desire as to knowingly bring about an unjust distribution. Because the outcome is unjust and the agent acts knowingly and by choice, the act is unjust. But Aristotle did not consider the agent, as a result of the action, to be an unjust person.[83] For while his act is unjust, it is so only incidentally. His motive is physical self-indulgence. This is to be contrasted with those unjust acts that follow deliberation motivated by desire to get more than one's due share.[84] Such premeditated acts are not only performed voluntarily (knowingly and by choice), but also for the purpose of achieving an unjust distribution.[85] To Aristotle, this last category of acts – unjust actions deliberately chosen – are wicked, and their agents essentially unjust.[86] An unjust person, that is, is one who *chooses* to act unjustly.[87] It is here that Aristotle attributed the motive of *pleonexia*. The choice the unjust person makes is purposefully to act against proportion in hopes of receiving unfair gain, more than his share, or to give to another less than he or she deserves.

Now the difficulty comes in the gradations of wrong Aristotle assigned to acts of injustice. True injustice on his account only results from actions that are unjust both in outcome and motive. The act must result in a proportionately unfair distribution of social advantages and be the product of the untoward motive of *pleonexia*. Yet as Bernard Williams argues, Aristotle's focus on *pleonexia* seems unnecessary.[88] Williams contends that no one motive should be required (or can account) for the character vice of injustice. It is enough for a person to display the disposition of 'settled indifference' to injustice.[89] While unjust acts often are accompanied by a troublesome motive, whether *pleonexia* or some other such as fear, lust, or anger, Williams maintains that such motives are unnecessary. They do not add to or take away from the essential justice or injustice of an act. Settled indifference suffices for injustice.

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82 Ibid 1135b18.
83 See ibid 1135b19-24.
84 See ibid 1135b9-10.
85 Ibid 1135b8-9.
86 See ibid 1135b24-5.
87 Ibid 1135a16-17; 1136a1-2.
88 See Bernard Williams, 'Justice as a Virtue' in Amelie O Rorty (ed), *Essays on Aristotle's Ethics* (1980) 189, 198-9.
89 Ibid 199.

Aristotle's mistake, according to Williams, came from thinking that justice could be brought within his doctrine of the mean as one among all the other character virtues. It became at best a forced fit. To make it work, Aristotle needed a specific motive to associate with acts of injustice. Yet on Williams' account, no one motive accompanies unjust action. For injustice is a vice different in kind from all others, in that it stands for a disposition that cannot be identified with any specific emotion or motive. Hence, Aristotle's insistence on the motive of *pleonexia* was bound to lead to an unsatisfying theory of justice.

Williams' argument appears sound. Yet it goes to particular justice only. Nonetheless, it bears importantly on universal justice. As noted above, Aristotle thought that justice in the legal realm should be understood by reference to the ethical notion of particular justice. It would seem to follow that injustice in the legal sense, as in the ethical, thus requires deliberation, choice, and an unseemly motive. The wrongful motive, however, need not be *pleonexia*. Since universal justice embraces all the moral virtues, it is not tied exclusively to the motive that Aristotle associated with particular injustice. Any of the motives of vice that he linked with immoral conduct could count. The point remains, though, that there must be *some wrongful or unethical motive* that prompts the deliberative choice underlying actions that would be said to constitute legal injustice.

Williams' criticism of Aristotle thus seems fully applicable to universal justice. And it exposes a serious weakness in Aristotle's theory and, more generally, with the virtue-centred approach to understanding justice. For requiring a wrongful motive and focusing on the character of those who act unjustly seems inapposite to assessing injustice in the legal realm. The injustice of Ah Cho's execution does not depend on the motives of his antagonists. Their lack of an untoward motive matters not a whit. Ah Cho noted that himself. On the scaffold he recalled the maxim: 'Forgive malice'. Yet he dismissed it, recognising its irrelevance. None of those involved in his demise – the Chief Justice, Schemmer, the sergeant, Cruchot – acted from a wanton motive or deliberate desire to harm him. 'Schemmer and the rest', Ah Cho mused, 'were doing this thing without malice. It was to them merely a piece of work that had to be done'.[90]

Within the framework of Aristotle's virtue-centred system, the execution of Ah Cho thus would count only as a most mild act of injustice. The Chief Justice did not deliberately misspell Ah Chow's name. He was not even aware of his error. An Aristotelian would classify his act as either involuntary due to ignorance or an unintentional mistake. Either way, it would sound in injustice only incidentally. Schemmer, the sergeant, and Cruchot all acted voluntarily and with knowledge that a mistake (of some

[90] London, above n 1, 29.

unknown origin) had occurred. None of them acted from prior deliberation though. None acted maliciously. Schemmer was driven by responsibility – perhaps misplaced, but a sense of duty nonetheless. He epitomised the chief attribute of the 'white devils': efficiency. The sergeant, less duty-bound, was moved by impatience and lust (self-indulgence). Ah Cho was to him an inconvenience. Yet no noxious motive directed toward Ah Cho stirred him to proceed with the execution. The only driving force, if it can be considered that, was indifference.

Williams' suggestion that settled indifference to injustice is just as worrisome as the reprobate motive of *pleonexia* thus seems borne out by *The Chinago*. Yet Williams does not state strongly enough the weakness in Aristotle's theory. For it is not just that Aristotle erred in requiring the malicious motive of *pleonexia* when settled indifference to injustice is enough. Rather, any emphasis on dispositional state or motive is misplaced. And it is unfortunate. For it marginalises the victims of injustice by treating them as mere objects. Their identities, characters, and moral desert count for nothing in evaluating the injustice of an act, even though the characters and motives of the agents of injustice do influence the assessed measure of social condemnation. Such an approach stands counter to our intuitions. The fact that the Chief Justice acted without intent does not mitigate the injustice *as to Ah Cho* caused by his mistaken scrawl. That Schemmer and the sergeant acted from settled indifference rather than malice aforethought did not lessen the sharpness of the guillotine's blade as it struck Ah Cho. Further, Cruchot did not even manifest an indifferent dispositional state. He was troubled by the wrong he helped perpetrate. He felt remorse. Yet he also felt powerless. Disturbed, he reasoned through his moral dilemma to a resolute whipping the horses to a faster gait. Neither *pleonexia* nor indifference tightened his grip on the reigns. Fear and self-preservation did. His role in the execution of Ah Cho was the product of a weak, all-too-human will incapable of rising above the sorry colonialist norms of economic exploitation, racial inequality, and cultural superiority.

Still, these considerations bearing on the dispositional states of these agents of wrongdoing do not lessen the injustice borne by Ah Cho. For as Paul Ricoeur puts it, 'The cry of injustice is the cry of the victim.'[91] We can agree with Ah Cho that Schemmer and the sergeant acted from indifference, not malice. We can and should feel sympathy toward Cruchot as a pawn in a cruel colonial world. But no such considerations diminish the outrageousness of Ah Cho's execution. If anything, they exacerbate it. For they highlight how routine injustice can become and how readily we rationalise on behalf of its casual perpetrators.

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91 Ricoeur, above n 68, 54.

V. Fallacy of Flawed Intellectualism

Whether the approach is act-centred or virtue-based, philosophic analysis of the execution of Ah Cho thus results in theoretic dissonance. Standard philosophical accounts of justice cannot align with or provide adequate theoretical explanations for the injustice that our intuitions so readily perceive. How can we account for this failure of philosophical theory? I suggest that the answer lies in what the early pragmatist philosophers characterised as the fallacy of flawed intellectualism.

The early pragmatists, particularly William James and John Dewey, put great stock in theoretical concepts. They thought abstract concepts – such as the concept of justice – possess great practical and epistemic value. Though they were robust empiricists, the pragmatists saw theoretical concepts as intellectual tools for the 'straightening of the tangle of our experience's flux and sensible variety'.[92] James declared that, 'Both theoretically and practically this power of framing abstract concepts is one of the sublimest of our human prerogatives.'[93] As Dewey put it, abstract thinking 'is necessary ... to the *emancipation* of practical life'.[94] Theoretical concepts allow us to assimilate past experiences, anticipate the future course of experience, and live and interact with one another under the orderly structure of general rules. That is, concepts begotten of 'the sensible flux of the past' provide inestimably useful knowledge for predicting in the 'future flux ... what particular thing is likely to be found there'.[95]

Yet the early pragmatists warned that concept formation can lead to abuse and error. From the time of the ancient Greeks, Western philosophy has been captivated by the notion that reality is comprised of essences, not appearances, and that there exists a realm of ideal supersensible objects accessible only through the gateway of pure thought. The pragmatists did not consider belief in essences problematic *per se*. Philosophical error arises when essences become juxtaposed to the concrete data of experience as pure, immutable, and definite structures designed to sanitise the 'muddy

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92 William James, *Pragmatism* (first published 1907, 1975 ed) 87.

93 William James, *A Pluralistic Universe* (1909) 217.

94 John Dewey, *How We Think* (first published 1910, 1991 ed) 139, reprinted in John Dewey, *The Middle Works, 1899-1924* (1978) vol 6, 289 [hereinafter references to this and other works by Dewey that are readily available in a common original edition as well as in a scholarly edition of his collected works will be by parallel citation, first to the original version, followed by the scholarly edition using the standard convention of volume and page number]; John Dewey, *How We Think: A Restatement of the Relation of Reflective Thinking to the Educative Process* in John Dewey, *The Later Works, 1925-1953* (first published 1933, 1986 ed) vol 8, 296 [hereinafter Dewey, *How We Think: A Restatement*].

95 James, *A Pluralistic Universe*, above n 93, 246.

particulars of experience'[96] that constitute our 'world of low grade reality.'[97] The error is aggravated when the relationship between concept and percept is inverted – that is, when data from the originally rich phenomena out of which an essential ideal was abstracted is 'relegated to a position inferior in every way to that of [theoretical] knowledge,'[98] and expurgated from the concept's extension as lying outside its rigid definitional boundaries.[99] James described this fallacy, which he labelled 'vicious abstractionism',[100] as follows:

> The misuse of concepts begins with ... using them not merely to assign properties to things, but to deny the very properties with which the things sensibly present themselves. Logic can extract all its possible consequences from any definition, and the logician ... is often tempted, when he cannot extract a certain property from a definition, to deny that the concrete object to which the definition applies can possibly possess that property. The definition that fails to yield it must exclude or negate it. ...
>
> It is but the old story, of a useful practice first becoming a method, then a habit, and finally a tyranny that defeats the end it was used for. Concepts, first employed to make things intelligible, are clung to even when they make them unintelligible.[101]

James deemed this fallacy of intellectualism to be 'one of the great original sins of the rationalistic mind.'[102] Dewey was convinced that it suppresses and deadens our ability to understand and develop practical responses to the realities we experience daily.[103] Abstract concepts may well hold great practical value, but they do not reveal a deeper understanding of reality or

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96 James, *Pragmatism*, above n 92, 110.

97 Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (1929) 35, reprinted in John Dewey, *The Later Works, 1925-1953* (1984) vol 4, 28.

98 Ibid.

99 See William James, *The Meaning of Truth* (first published 1909, 1975 ed) 135-6.

100 Ibid 135.

101 James, *A Pluralistic Universe*, above n 93, 218-9.

102 James, *The Meaning of Truth*, above n 99, 136.

103 See Dewey, The Quest for Certainty, above n 97, 36, *Later Works* 4:29; John Dewey, 'The Logic of Judgments of Practice' in *Essays in Experimental Logic* (1916) 436, reprinted in John Dewey, *The Middle Works, 1899-1924* (1979) vol 8, 14, 79.

truth than that found in perceptual experience;[104] nor does abstract thought amount to a 'higher type of thinking than practical.'[105] Theoretical concepts are merely 'thin extracts from perception,'[106] portraying nothing more than 'skeletonized abstraction[s]'[107] that we create 'in the interests of practice essentially and only subordinately in the interests of theory.'[108] James reproached those who think we can explain reality by way of theory alone, for in their 'imperfect and ministerial forms of being,'[109] theoretical concepts 'touch[] only the outer surface' of the experiential realm from which they were abstracted.[110] To truly apprehend reality we must 'return to empirical ground'[111] – '[d]ive back into the flux [of sensible experience] itself'[112] – for only there do we find the true domain of reality.

James and Dewey thus concurred that our practice of crafting and living according to abstract concepts must be recognised for what it is: 'an outgrowth of practical and immediate modes of thought, but not a substitute for them.'[113] So understood, theory-making can fulfil its promise as a highly worthwhile practice, one that emancipates practical life through a 'securer, freer and more widely shared embodiment of values in experience'.[114] Theories carry out this enabling function by extracting from personal and specific contexts those particular features of experience that are so salient, recurrent, and continuous as to stand out.[115] As Dewey put it, a 'theory means a system of objects detached from any particular personal standpoint,

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104 See William James, *Some Problems of Philosophy: A Beginning of an Introduction to Philosophy* (1911) 97.

105 Dewey, *How We Think*, above n 94, 142, *Middle Works* 6:291; Dewey, *How We Think: A Restatement*, above n 94, *Later Works* 8:299. Accord John Dewey, *Experience and Nature* (first published 1929, 2nd ed, 1958) 107, reprinted in John Dewey, *The Later Works, 1925-1953* (1981) vol 1, 90 (arguing that there is 'no reason for making contemplative knowledge or any other particular affair the highest of all natural ends.').

106 James, *Some Problems of Philosophy*, above n 104, 97.

107 James, *The Meaning of Truth*, above n 99, 141.

108 James, *A Pluralistic Universe*, above n 93, 244.

109 James, *Some Problems of Philosophy*, above n 104, 109.

110 James, *A Pluralistic Universe*, above n 93, 250.

111 John Dewey, 'Introduction' in *Essays in Experimental Logic* (1916) 1, 47, reprinted as John Dewey, 'Introduction to Essays in Experimental Logic' in John Dewey, *The Middle Works, 1899-1924* (1980) vol 10, 320, 349.

112 James, *A Pluralistic Universe*, above n 93, 252.

113 Dewey, *How We Think*, above n 94, 142, *Middle Works* 6:291. Accord Dewey, *How We Think: A Restatement*, above n 94, *Later Works* 8:299 (describing theorising as 'an outgrowth of thinking on practical and immediate matters, but not a substitute for it.').

114 Dewey, *The Quest for Certainty*, above n 97, 37, *Later Works* 4:30.

115 See James, *A Pluralistic Universe*, above n 93, 235.

and therefore available for any and every possible personal standpoint.'[116] Detaching and depersonalising the concrete facts of everyday experience frees us to reattach them in the 'largeness and imaginativeness' of new systematic modes of understanding.[117] Again, Dewey: 'For the purpose of day by day *action*, the sole value of a theory is the significance given to concrete events, when they are viewed in the light of the theory, in the concrete relations they sustain to one another.'[118]

VI. Symptoms of Injustice

The power of Jack London's *The Chinago* comes in how forcefully its troubling, muddy facts return us to the empirical ground of normative judgment. Perhaps David Hume was right all along – that our moral intuitions or sentiments provide the empirical ground and true measure of the right, the good, and the just.[119] For it is our moral intuitions or sentiments that declare the execution of Ah Cho to be an unblemished wrong. And it is the unwavering conviction of that intuitive judgment that makes the case of Ah Cho the very sort of salient situation that stands out as paradigmatic of injustice and strikes such a discordant note with traditional justice theory.

The failure of standard philosophic theories of justice to account for the injustice that looms so large in London's sad tale is representative of the intellectualist fallacy. Instead of providing an imaginative and widely shared embodiment of values drawn from experience, traditional justice theory – whether act-centred, like the theories of Mill and Kant, or virtue-based as with Aristotle – has become so definitionally fixed as to exclude the very 'muddy particulars of experience'[120] that provide the phenomenological basis from which the concept of justice in its various theoretical forms was first abstracted. This exclusion elevates those 'skeletonized abstraction[s]'[121] above the very structures of experience they were meant to portray. Indeed, it renders that experiential data, such as the facts of Ah Cho's mistreatment and the manifest weight of our intuitive convictions, unintelligible and irrelevant.

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116 Dewey, 'The Logic of Judgments of Practice', above n 103, 440, *Middle Works* 8:81.

117 Dewey, *How We Think*, above n 94, 139, *Middle Works* 6:289.

118 John Dewey, *Freedom and Culture* (first published 1939, 1989 ed) 78, reprinted in John Dewey, *The Later Works, 1925-1953* (1988) vol 13, 132.

119 See Hume, *An Enquiry Concerning the Principles of Morals*, above n 52, 13-16, 82-8; David Hume, *A Treatise of Human Nature* (2nd revised ed, first published 1888, 1978 ed) 455-76, 496.

120 James, *Pragmatism*, above n 92, 110.

121 James, *The Meaning of Truth*, above n 99, 141.

Avoiding these unhappy implications of intellectualism requires calling into question the theories that stand at variance to the concrete data of experience. It may be that the best way to reconcile justice theory with the Londonian counter-example would be to modify subtly one or another of the fundamental principles meant to connote the concept of justice or rarefy the conditions, necessary and sufficient, presumed to denote its extension. That is more than I can attempt here. Instead, I will risk the tentative suggestion that there are certain characteristic symptoms of injustice that, when present, serve as indicia of an unjust state of affairs. What I have in mind are familiar symptoms. Injustice is associated with social action that imposes, on one or more individuals, positive harm or suffering that bears the symptomatic marks of being (1) undeserved; (2) disproportionate; (3) random; (4) disassociated from the victim's personal ends; (5) deprivative of freedom or liberty; (6) based on characteristics over which the victim has no control; (7) contrary to overall human well-being; or (8) the product of offensive motives, incentives, or dispositional states.

The first symptom draws from the fact that, in matters of justice, moral desert matters. Suffering undeservedly is one of the most familiar indicators of injustice. It figures prominently in many theories of justice.[122] The disgust London's story stirs in our moral sentiments comes foremost from the fact that Ah Cho's suffering was entirely undeserved. The magistrate sentenced him to twenty-years' imprisonment for a crime he did not commit. That he was subsequently executed only aggravates the degree to which his punishment offends in terms of moral desert.

Second, a lack of proportionality between the consequences or effect of action on a person and his or her moral desert likewise commonly flags injustice. As discussed above, Aristotle emphasised this symptom.[123] It relates closely to moral desert, yet adds a distributive dimension. Aristotle, Rawls, and others have shown convincingly that right proportion in the distribution of social goods is a critical feature of justice. A lack of proportionality accordingly signals at least the possibility of injustice. Yet distributive justice, as Rawls notes, is different than rectificatory justice.[124] Responding to wrongful conduct through criminal punishment amounts to social action of a fundamentally different kind than the allocation of social

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122 See, eg, Aristotle, *Nicomachean Ethics*, above n 49, 1131a24-8; Geoffrey Cupit, *Justice as Fittingness* (1996) 35-63; Joel Feinberg, 'Justice and Personal Desert' in *Doing and Deserving: Essays in the Theory of Responsibility* (1970) 55-94; Kant, *The Metaphysical Elements of Justice*, above n 31, 331; Lucas, above n 68, 124-8, 137-8, 164-7, 170, 194-215; Mill, above n 14, 44; Sidgwick, above n 24, 279-83, 349-50, 445-7; Lloyd L Weinreb, *Natural Law and Justice* (1987) 10-11, 184-5, 194-209, 212-23.

123 See Aristotle, *Nicomachean Ethics*, above n 49, 1131a29-1132b9.

124 See Rawls, above n 68, 315. Accord Sidgwick, above n 24, 280-3, 290-1.

goods, whether tangible or intangible. Proportionality also, though, factors in criminal punishment as a measure ensuring that the severity of punishment corresponds with the gravity of the offense.[125] Yet even here all considerations of proportionality are inapposite in Ah Cho's case, rendered moot by the outright absence of moral desert.

A third common symptom of injustice is randomness in the infliction of social harm or the allocation of social benefits. In the words of Henry Sidgwick, '[I]n laying down the law no less than in carrying it out, all inequality affecting the interest of individuals which appears arbitrary, and for which no sufficient reason can be given, is held to be unjust.'[126] Ah Cho's initial twenty-year sentence was unjust because it imposed undeserved suffering. But it was the product of deliberate and reasoned social action. It followed a trial procedure designed with fairness in mind and justice as its purported end. His eventual execution was arbitrary in addition to undeserved. It was the product only of happenstance in the similarity of names. From an Aristotelian point-of-view, the involuntariness or mistake that led to the execution mitigates the degree of injustice. Our intuitions clamour otherwise. Randomness in the imposition of severe social harm exacerbates the degree of injustice we feel, not the opposite.

Fourth, suffering personal harm from social action done strictly to benefit others, including society-at-large, likewise signals unjust treatment. This is the Kantian symptom. As discussed above, Kant famously posited that it is morally wrong to treat a person simply as a means and not as an end as well. He extended this precept to rectificatory justice by insisting that punishment under law should be imposed only when deserved and in strict accordance with the Law of retribution. This symptom thus dovetails moral desert. It underscores why punishing undeservedly is so morally wrong. It also supplements proportionality, for the Law of retribution rests on a principle of unsparing 'equality between the crime and the retribution.'[127] Further, this Kantian consideration calls into question whether deterrence is a just basis for imposing criminal punishment. To punish for the end of preventing future wrongdoing, whether by the offender (specific deterrence) or others (general deterrence), is to use the offender merely as a means toward achieving beneficial social consequences. To Kant, this is unjust.[128] Yet his strict retributivist position is unusual. Many who have written on criminal justice consider deterrence a

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125 See, eg, Bentham, above n 22, 178-88; Kant, *The Metaphysical Elements of Justice*, above n 31, 332-4; Lucas, above n 68, 143, 147-8; Sidgwick, above n 24, 290-1.

126 Sidgwick, above n 24, 267-8.

127 Kant, *The Metaphysical Elements of Justice*, above n 31, 333.

128 See ibid 331-2. Accord Cupit, above n 122, 155-7.

legitimate basis for punishing.[129] Whether it is or not, it is unlikely that deterrence-based punishment presumptively upsets our moral sentiments. Nonetheless, given how the Kantian end-in-itself symptom complements moral desert and proportionality, it adds importantly to our ability to diagnose injustice. In the case of Ah Cho, it augments our intuitive conviction that he was treated unjustly. For his punishment was undeserved in the most abject of ways – he was selected at random to be used, in a manner to which he could not possibly give assent, as a mere means to benefit others.

A fifth common indicator of injustice is found in action that deprives a person or group of persons of basic freedoms or liberty. This is to recognise, as many have before, that the sentiment of justice can become agitated when individual rights, legal or moral, have been infringed.[130] The infringement can come through deprivation of a legal right or from legally-sanctioned withholding of a moral right (as through enforcement of an 'unjust law'). Either way, this symptom presents a cardinal sign of injustice. It is a sign that carries especial force in modern Western societies where constitutional and human rights feature prominently in political discourse. As to *The Chinago*, it unequivocally confirms our intuitions of Ah Cho's mistreatment. Yet it adds little not intuited already from the symptoms previously discussed. For regardless whether Ah Cho had a right, legal or moral, not to be treated as he was, his colonial masters' random, undeserved use of him merely as a means strikes us as grossly unjust.

Sixth, injustice often is associated with action that inflicts social harm or awards benefits on the basis of characteristics over which individuals have no control.[131] This symptom draws from the fact that, to varying degrees, discriminatory conduct offends. The offense, though, is distinctly relative. What counts as objectionable discrimination in one time and culture can be viewed as fully acceptable differential treatment in another. Hence, this symptom is less universal than many of the others. Just in the United States, immutable characteristics such as race, gender, ethnicity, age, disability, and sexual orientation that today mark off protected classes were only a century ago (or less) perfectly acceptable grounds for according differential treatment. The recurrent refrain from London's story, 'He is

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129 See, eg, Bentham, above n 22, 173-88. See also Cupit, above n 122, 155 (noting that in searching for justifications of punishment, the 'most familiar purpose is deterrence.').

130 See, eg, Mill, above n 14, 42-3.

131 See Ronald Dworkin, *Law's Empire* (1986) 374-6; Ronald Dworkin, *Taking Rights Seriously* (1977) 223-39; Rawls, above n 68, 118-61, 504-12; Weinreb, above n 122, 161-82.

only a Chinago',[132] reflects the wretched yet commonplace racial and ethnic elitism so characteristic of European colonialism. Today such dismissive rhetoric sounds a discriminatory note that offends our intuitions of justice and ratifies the sentiment declaring Ah Cho's treatment to be unjust.

Seventh, sometimes the effect of action on overall human well-being can serve as an indicator of injustice. Dewey noted that it is inherently difficult to conceive of justice without taking into consideration how actions impact human well-being.[133] The previous symptoms all go to the well-being of the individuals who personally suffer injustice. This symptom – the utilitarian factor – concerns how actions affect the well-being of society as a whole. To Mill, this factor represents the apogee of the sentiment of justice.[134] It is questionable, however, how reliable general utility actually is as a measure of injustice. For in part it seems unclear how this utilitarian consideration can lead to an understanding of justice as distinct from ethics. Moreover, as noted earlier, it at best leads to an ambiguous assessment in Ah Cho's case. The utilitarian standpoint could well suggest that the treatment accorded Ah Cho by his colonial lords of life actually satisfied justice. For Ah Cho was but a beast of burden, a cheap and beholden immigrant labourer. His presence in Tahiti was singular; he was there to serve the English agricultural concern. Utilitarianism would determine the justice or injustice of his execution by measuring his fate against the overall well-being of the colony. It would require taking into account the discrete interests of all – from the local European masters, the cotton plantation's English investors, and the French colonial administrators to the hundreds of remaining Chinese workers and the displaced Tahitian natives. Measured against this collective array of interests, Ah Cho's rights and well-being weigh faint and inconsequential. The substantial weight of general utility lay in the deterrent value of making an example of one Chinago toward the ends of law and order, profit and efficiency, together with the collective self-interest of the other workers who wanted only to be spared themselves so they could return to the fields and eventually go home to China and build their own dream-gardens of serenity and repose.

Finally, determinations of injustice can be augmented by an Aristotelian finding that the agent of an unjust act was driven by a contemptible motive. Though our moral sentiments run counter to Aristotle's claim that the motive of *pleonexia* is required for truly unjust action, a finding that offending conduct is the product of an odious motive, or even apathy or feckless disregard for others' well-being can add an

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132 See London, above n 1, 19 ('He was only a Chinago'), 25 ('It was only a Chinago'), 28 ('It is only a Chinago'), 29 ('He is only a Chinago').

133 See John Dewey, *Ethics* in John Dewey, *The Later Works, 1925-1953* (2nd ed, first published 1932, 1985 ed) vol 7, 250.

134 See Mill, above n 14, 49-54.

additional element of disgust to the sentiment of injustice.[135] Thus, the licentious impatience that drove the sergeant to sanction the beheading of an innocent man does trigger aversion. Such callousness does not, however, provide an independent basis for finding injustice. No more so can a detestable motive like avarice or hatefulness. For such factors tied to a wrongdoer's character cannot establish injustice in the first instance. The sergeant's lust-driven indifference tragically underscores how needless was the wasting of Ah Cho's life and how insignificant would have been the cost of averting it. Yet had the sergeant, along with Schemmer, been motivated strictly by firm belief in the deterrent need to achieve prompt recompense for the killing of Chung Ga, Ah Cho's execution would have been no less unjust. The moral states of the agents of injustice, in other words, are only supplementary to judgments of injustice. More than anything, they speak to the degree of punishment or social condemnation the transgressors of justice are due.

VII. Conclusion

Justifying judgments of injustice is difficult. Jack London's melancholy tale of justice scorned in an erstwhile South Pacific island paradise evokes repugnance. Intuitively, we know the execution of Ah Cho is unjust. We do not need justice theory to tell us that. Philosophy could be of service, though, if it could provide a justificatory account of that unassailable judgment. In the form of traditional justice theory, it cannot. No matter whether the approach is act-centred, as with Kant and utilitarianism, or virtue-based in the tradition of Aristotle, philosophic theories of justice fail to give adequate justificatory reasons for our conviction that Ah Cho's execution was flat out unjust. At best justice theory creates ambiguity and misgivings about the reliability of that intuitive judgment. At worst it opposes our intuition outright, casting a hesitating shadow of theoretic approval over the sequence of gnarly events leading to Ah Cho's untimely demise.

Like the early pragmatists, I find that the best response to such incongruence between philosophic theory and empirical life is to look with apprehension at the discordant theories. I have argued that the mismatch between justice theory and the empirical data of our moral sentiments is attributable to the fallacy of flawed intellectualism. Justice is a concept by which we measure our mistreatment of one another. It derives from shared sentiments of approbation and outrage, admiration and disgust. The function of justice theory is to embody and reinforce – or perhaps even to

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135 See, eg, Mill, above n 14, 50-1. Cf Kant, *The Metaphysical Principles of Virtue*, above n 40, 460 (observing that vices evincing a hatred of humankind, such as malice, are 'the direct opposite of loving one's neighbor, which is incumbent upon us as a duty.').

improve upon – the values found experientially in our sense of justice, abstracting from those somewhat chaotic particulars an orderly structure of general social precepts. The lesson that comes from London's doleful tale is that traditional justice theory, in the interest of theoretic neatness and definitional clarity, has distanced itself from the muddy empirical ground where our intuitions of justice kick about. Ah Cho's mistreatment seizes our intuitions with a revulsion that justice theory just cannot grasp.

Instead of labouring with this intellectualist tension, I have suggested that we can best make sense of our intuitions regarding Ah Cho's story by focusing on several symptoms of injustice. The symptoms I identified, eight in number, are characteristic signs that commonly accompany states of affairs we judge to be unjust. The presence of several in the case of Ah Cho provides a compelling basis for our intuitive judgment. His execution was entirely undeserved, inflicted randomly, against his human entitlement not to be treated simply as a means, and in violation of his moral right not to be punished on account of an immutable trait, his ethnic identity. Further, the miscreant agents of his abuse acted not out of substantial need but only from impatience and cold indifference. In combination these symptoms make the tumult Ah Cho's story rouses in our sentiment of justice readily understandable.

Still, the symptoms I have identified do not define injustice. Their presence, any one or all, does not establish a state of affairs as necessarily unjust. Nor does the absence of one or even all prove that justice is satisfied. For symptoms are merely hints. In terms of physical health, symptoms provide evidence of the possible presence of disease. In social life, they furnish reasons to support a finding of social disease, such as injustice. Ah Cho's execution details a story where the administration of law succumbs to acute infection. Yet it is not the symptoms that show Ah Cho to have been treated unjustly; our sentiment of justice does that. The symptoms supply reasons that allow us to understand why we intuit as we do. In that respect they perform the same justificatory role as traditional justice theory. Only the justification they provide is descriptive, not explanatory. And unlike justice theory, the symptoms cannot contravene our intuitions. For they are not fixed conditions meant to demarcate the boundaries of the just and the unjust and against which our intuitions are tested and measured, but factors that serve as indicia and describe the operation of those intuitions.

Philosophically speaking, framing justice as I have in terms of a loose collection of symptoms is less than fully satisfactory. A set of symptoms pitched as conditions supposed to be disjunctively necessary and conjunctively sufficient would provide a more robust demarcation of the boundaries of justice. But as we should have learned by now from Wittgenstein, most central concepts (and normative concepts perhaps most

of all) do not lend themselves to such rigid boundary lines.[136] This holds, I would argue, for the vague and unsettled frontiers of the just and the unjust. The concept of justice can only accommodate hazy boundaries. Efforts to enclose it within a rigid theoretical border, in the fashion of traditional justice theory, threaten reducing our intuitions to fleeting and unreliable instincts, however palpable they may appear beyond the shadowy light of justice theory. And they expose victims of injustice like Ah Cho to maltreatment readily rationalised and excused under the higher interests of theoretical consistency. Hence the lesson of *The Chinago* and the poignant footnote Jack London adds to justice theory.

136 See, eg, Ludwig Wittgenstein, *Philosophical Investigations* (G E M Anscombe, P M S Hacker, & Joachim Schulte trans, first published 1953, revised 4th ed, 2009) [68-71, 76-7, 84].

Dealing with Judicial Rhetoric: A Defence of Hartian Positivism

FÁBIO PERIN SHECAIRA[†]

I. Introduction: Hartian positivism as an error theory

Hartian positivism has been characterised as an (objectionable) error theory about judicial interpretive practice and, thus, as a theory that has to overcome a significant presumption of falsehood before it is able to compete on an equal footing with alternative accounts of judicial interpretive practice. In this paper I will argue (i) that Hartian positivism is not to be characterised as an objectionable, presumptively false, error theory; and that (ii) Hartian positivists have good reason to suppose, as they distinctively do, that judicial interpretive practice is governed by rules. In this introduction I will explain more carefully what is meant by the claim that Hartian positivism has been characterised as an objectionable error theory and will summarise the arguments that will be developed in the other sections of the paper.

In *Law's Empire* Ronald Dworkin claimed that legal positivism could not provide a plausible account of the phenomenon of 'theoretical disagreement' in law.[1] It is fairly clear that Dworkin had in mind something like H L A Hart's version of legal positivism, that is to say, a version of positivism endorsing what is arguably Hart's main insight, namely, that the content of the norms which compose a legal system is determined by the convergent practices[2] of officials – ie judges, legislators, and executive

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1 Ronald Dworkin, *Law's Empire* (1986), ch 1.

2 It is well known that, for Hart, these convergent practices are accompanied by certain normative attitudes: officials behave uniformly *and* regard themselves as having reason to behave as they do. Whenever I refer to the convergent practices of officials in the text, I mean practices that are not only uniform in their external, behavioural aspect, but which involve a

officers.[3] According to Dworkin, judges in countries like the US argue frequently, and disagree deeply, about the content of the law. They argue not only about how to apply legal norms to particular disputes which may be peculiarly elusive, but they also argue, more fundamentally, about the proper strategy for discerning the meaning of legal provisions (eg should one read a statute literally or in light of the intentions of its authors?). But, Dworkin asked, how can one insist that the content of the law is based on an official consensus when judges, who form an important subset of the officials whose actions are supposed to determine legal content,[4] disagree deeply about legal content?

Let me be more precise about the nature of Dworkin's objection to Hartian positivism. The objection suggests that the problematic instance of disagreement about legal content consists in disagreement about adequate interpretive methodology.[5] Indeed, judges who look to the same source of law – a constitutional provision or a statutory norm or a report of an authoritative judicial decision – may derive different norms from that source if they employ different interpretive strategies. For instance, the literal meaning of a legal text may not coincide with the meaning intended by its author(s), and both meanings may also diverge from an interpretation that is based, say, on considerations regarding the objective rationale of the text. This does not preclude the possibility that judges who agree about the proper source and also agree about the proper interpretive methodology will

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consensus among officials with respect to the desirability of the relevant behaviour.

3 H L A Hart, *The Concept of Law* (1961), ch 5 and 6.

4 Dworkin may believe that judicial practice *alone* determines the content of the law. Nothing in my argument really hinges on this issue although I am partial to the view that the Hartian rule of recognition (the rule specifying the fundamental criteria by which valid law is to be identified in a legal system) is constituted by the practices of 'senior officials of all branches of government' (Jeffrey Goldsworthy, 'The Myth of the Common Law Constitution' in Douglas Edlin (ed), *Common Law Theory* (2007) 235).

5 To be sure, this is not the only sort of disagreement that fits Dworkin's broad notion of theoretical disagreement as disagreement about the 'grounds of law'. Indeed, Dale Smith, 'Theoretical Disagreement and the Semantic Sting' (2010) 30 *Oxford Journal of Legal Studies* 635, 641-2, distinguishes several types of theoretical disagreement. For instance, theoretical disagreement may concern what sources of law (statutes, precedents, etc) judges are to look to as well as what methods they are to employ in the interpretation of agreed-upon sources. I focus on the latter sort of theoretical disagreement for two reasons. Not only is it the sort of disagreement that Dworkin himself seems most interested in (see Brian Leiter, 'Explaining Theoretical Disagreement' (2009) 76 *University Chicago Law Review* 1215, 1216-9), but it is also the sort of disagreement which, as I point out in the text below, other critics of Hartian positivism have recently emphasised.

still disagree or have doubts about how to solve a number of concrete cases. Take Hart's famous example of a rule prohibiting 'vehicles' from entering a public park. Judges may agree that this rule is the relevant legal source and also that it must be interpreted literally, and yet they may be unsure whether a bicycle, say, should be permitted in the park. Linguistic vagueness, in this case, not disagreement about whether literal meaning should be enforced, is responsible for generating uncertainty. It should be kept in mind that this sort of uncertainty is not especially problematic for Hartian positivism; what Dworkin is questioning is that theory's capacity to account for disagreement about which interpretive methodology is adequate (is 'vehicle' to be understood literally or not?). It is on this sort of disagreement that I will be focusing throughout the paper.

Other legal philosophers have recently articulated objections to Hart's version of positivism that can be understood as belonging to the same family of objections as Dworkin's: Hartian positivism cannot account plausibly for the fact that judges disagree about proper interpretive methodology.[6] It should be clear that the philosophers who present objections of this sort to Hartian positivism do not necessarily claim that it is incapable of providing any explanation whatsoever of the phenomenon of judicial argument about interpretive methodology. What they claim is that the explanation that Hartian positivists can provide is implausible. For Hartian positivists need to say that if judges disagree about interpretive methodology, then the law is simply indeterminate.[7] It follows from this view that a judicial decision about the meaning of a legal norm, in the face of judicial disagreement about interpretive methodology, amounts not to a declaration about what the law is (and already was prior to the decision) but to a determination of what the law, theretofore indeterminate, ought to be.

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6 These are the critics I have in mind: Mitchell Berman, 'Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law' in Matthew Adler & Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (2009); Stefan Sciaraffa, 'The Justificatory View and Theoretical Disagreement' (forthcoming in *Problema. Anuario de Filosofia y Teoria del Derecho*); and Scott Shapiro, 'What Is the Rule of Recognition (And Does It Exist)?' in Matthew Adler & Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (2009).

7 Like 'the' critics of Hartian positivism (namely, Dworkin and the authors cited in the previous footnote), I am focusing on cases where disagreement about interpretive methodology actually leads to disagreement about legal outcome, ie about how to adjudicate the cases at issue. Later in the paper I will discuss the hypothesis that easy cases in law may often be cases where judges just happen to arrive at the same decision in spite of their disagreement in respect of interpretive methodology; but that issue can be bracketed for the moment.

A major problem that the critics of Hartian positivism see with this is that judges who disagree about proper interpretive methodology typically present (according to the critics) their public decisions as declarations about what *is* legal, not as determinations of what ought to be legal. Judges, it is claimed, do not typically admit to creating law but purport to apply existing law. In view of this, it seems that all that is left to Hartian positivists is the claim that judges in contexts of disagreement about interpretive methodology are either knowingly masking the creative character of their activities or they are victims of self-deception who fail to appreciate the real nature of their enterprise. In any case, the rhetoric judges employ (ie 'law-applying' rhetoric) does not accurately represent what they are actually doing.

The critics of Hartian positivism are not sympathetic to such charges of insincerity and self-deception in respect of judicial behaviour. The fact that the charges may suggest disrespect for judges, or hubris on the part of theorists who purport to know more about legal practice than the individuals who actually engage in it, is not the only thing that troubles the critics. Perhaps a more philosophical reason for resisting the charges is based on the relatively widespread notion that error theories, theories that attribute systematically mistaken beliefs to a group of individuals, are to be presumed false. The presumption is rebuttable, but the burden of argument is assigned to the proponents of the error theory. For why would a systematically flawed sort of discourse or mode of argument appear and persist? A similar question might be posed about theories that portray the rhetoric of a group of individuals as systematically insincere. The critics believe Hartian positivists have to do a lot of work if they wish to get away with accusing judges of being disingenuous or misguided about important aspects of their trade.[8]

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[8] Consider some instances of the critics' complaint, some more caustically phrased than others: Berman, above, n 6, 275 (footnotes omitted): 'Hartians respond that the rhetoric and phenomenology mislead, that participants who genuinely believe there to be law in hard cases are mistaken and that others know there is no law but falsely claim otherwise to serve personal or systemic ends. That could be. But claims of widespread error or disingenuousness come with a heavy burden of proof, so we ought not toss aside these objections to Hart too readily'; Dworkin, above n 1, 41 (considering two alternative defences of legal positivism, the latter of which he describes as 'insulting', albeit more sophisticated): 'The crossed-fingers defense show judges as well-meaning liars; the borderline-case defense shows them as simpletons instead'; Sciaraffa, above n 6: 'A plausible positivistic response in this context would be suspicion of the court's self-presentation. Understandably, a court may seek to preserve its legitimacy by presenting itself as discerning the law's meaning when it is actually making

One of my main ambitions in this paper is to raise doubts about the view, explicit in the critics' objection to Hartian positivism (see footnote 8), that the assignment of error or lack of sincerity to judges in circumstances of disagreement about interpretive methodology creates a significant presumption against the truth of Hartian positivism and, thus, a special burden of argument that positivists need to discharge if they are to compete on an equal footing with legal theorists that do not assign error or insincerity to judges. I will not dispute the general point that error theories have to carry a special burden of argument. This is not to say that the point is not disputable: indeed, one might reasonably object that there should be no allocation of burdens or *a priori* presumptions of falsehood in philosophy. I grant the critics' assumption, however, because I think that, even if error theories in other areas of philosophy (eg metaethics) have to carry a special burden of argument, Hartian positivism is not similar enough to such theories that it deserves to be assigned an analogous burden.

In particular, I argue in section 2 that, as assigned by Hartian posistivism, judicial error and insincerity are not common and that, in addition to being infrequent, they tend to happen in politically sensitive cases where judges are understandably worried about appearing activist. To say that judges avoid appearing activist in sensitive cases is arguably still to attribute a lie to them; but this is a type of lie with which we can sympathise, rather than an insulting one. In section 3, I argue that judicial error (when it occurs, ie exceptionally) can partly be explained by reference to the difficulty that common law judges may experience in perceiving the creative nature of their work when the changes they make to the law are incremental. Again, the suggestion here is that there is nothing insulting or uncharitable about attributing to judges an honest mistake, one which we flag from a privileged point of view, where we can see more clearly the significant difference between the beginning and the end of the process of incremental change in which common law judges are absorbed. The picture that results is one in which judge may lie and make mistakes but only exceptionally and for reasons that should not diminish our respect for them. With this picture in place, I go back in section 4 to a crucial assumption made by the critics in the formulation of their objection to Hartian positivism, namely, the assumption that judges present their arguments in circumstances of disagreement about interpretive methodology as arguments about what the law already is, not about what the law ought to

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or constructing it. Or, courts may simply be confused about what they are doing in these cases. However, we should only reach such conclusions if there is no other equally plausible characterization of legal practice that fits with the court's self-presentation and seeming self-understanding;' Shapiro, above n 6, 249, footnote 50: 'as a methodological matter, any theory that flouts the principle of charity so brazenly should be severely penalized.'

be. I submit, however, that judicial discourse in these circumstances is often quite elusive, and that if judges are not clearly claiming to discover existing law, then the whole idea that judges are lying or making mistakes (even within a limited set of cases) is rendered dubious.

In section 5, I offer a more positive argument in favour of Hartian positivism: I present evidence (based on more systematic analyses than those offered by the critics) suggesting that judicial interpretive practice in mature legal systems like that of the US are, in an important sense, rule-governed and thus not as unrestrainedly argumentative as the critics suggest. Broad interpretive rules (which vary slightly but significantly from one jurisdiction to another) give defeasible priority to textualist methods of interpretation and thus guarantee interpretive uniformity in all but exceptionally technically complicated and morally or politically controversial cases.

To be clear, nowhere in the paper do I attempt to refute the positive accounts of judicial interpretive practice provided by the critics as alternatives to Hartian positivism. After all, the critics favour very different positive accounts, the thorough assessment of which would require another paper: Shapiro rejects Hart's version of positivism but not positivism entirely; Dworkin is clearly a non-positivist; Sciaraffa and Berman also defend versions of non-positivism but they do not understand themselves as Dworkinians. Of all these, it would be particularly challenging to refute Dworkin's positive account of judicial interpretive practice. For Dworkin does not diverge from Hartian positivism only in his answers to empirical questions about judicial practice (eg how often do judges engage in theoretical disagreement? Why might judges be motivated to mislead us? How clearly do they present themselves as arguing about what the law already is? Do judges abide by interpretive rules in most cases?). More fundamentally, Dworkin treats law as an 'interpretive' concept and thus rejects Hartian positivism's non-normative approach to jurisprudence. But be that as it may, Dworkin's challenge to Hartian positivism does hinge on the empirical questions discussed in this paper: for instance, Hartian positivism is only insulting to judges on the assumption that it must answer those questions as Dworkin claims it does. So, even if my answers to the empirical questions do not serve to refute Dworkin' theory of law as integrity, they should serve to shield Hartian positivism from Dworkin's attack.

In light of this, I focus on the critics' criticisms (ie on their negative cases against Hartian positivism) and argue (i) that Hartian positivism is not an objectionable error theory; and (ii) that Hartian positivists have good reason to suppose that judicial interpretive practice is governed by rules. In

a word, my ambition is to defend Hartian positivism from the critics, not to refute their various alternatives to Hartian positivism.

Before moving on, let me emphasise a point suggested earlier in this introduction. I do not set out to defend Hart but only Hartian positivism broadly conceived. Although I defend what is possibly Hart's principal thesis – that the content of the law depends upon the convergent practices of legal officials concerning the proper sources of law and the proper methods used in their interpretation – I am not committed to all the specifics of Hart's theory. Is there one single, highly complex rule of recognition or actually some number of interacting rules of recognition? Is the rule of recognition a conventional rule?[9] Can the notion of a rule of recognition be replaced by, or reduced to, the proximate Hartian notion of a rule of change?[10] Granted that officials accept the rule of recognition, must not this acceptance be, *pace* Hart, of a moral nature? I do not attempt to answer these important questions, nor do I need to here. Even if Hart's theory wants development, refinement and qualification, the crucial Hartian insight should remain: the content of the law depends upon official consensus.

II. How widespread and mysterious is the error?

As I said earlier, I do not want to dispute the claim that error (or insincerity) theories have a presumption of falsehood to overcome. But it must be noted at the outset that the weight of the presumption should vary in accordance with a number of factors among which are the pervasiveness and representativeness of the error or insincerity at issue.[11] Accusing most judges of being mistaken or insincere most of the time is quite different from accusing some judges of being mistaken or insincere some of the time.

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9 For a critical assessment of Hart's shift from a non-conventional to a conventional account of the rule of recognition, see Kevin Toh, 'The Predication Thesis and a New Problem about Persistent Fundamental Legal Controversies' (2010) 22 Utilitas 331, 333–337.

10 For an argument to the effect that at most we need rules of change but not rules of recognition, see Jeremy Waldron, 'Who Needs Rules of Recognition?' in Adler & Himma, (eds), above n 6.

11 This seems to be the assumption made in analogous discussions of error theory in the field of metaethics. See, for instance: J L Mackie, *Ethics: Inventing Right and Wrong* (1997), 35: 'But since this is an error theory; since it goes against assumptions ingrained in our thought and built into some of the ways in which language is used, since it conflicts with what is sometimes called common sense, it needs very solid support'; and Richard Joyce, *The Myth of Morality* (2001), 135: 'A proponent of an error theory – especially when the error is being attributed to a common, familiar way of talking – owes us an account of why we have been led to commit such a fundamental, systematic mistake.

And it is not just a matter of frequency. It is also important to consider whether insincerity and error tend to occur in special circumstances, and whether we can plausibly postulate a causal link between such circumstances and the increased likelihood of error and insincerity.

As I said earlier, the critics of Hartian positivism have based their objection on the examination of legal cases in which judges argue about proper interpretive methodology. The examples to which the critics appeal are almost always cases adjudicated by appellate courts, and quite frequently cases pertaining to the interpretation of constitutional provisions. The question that needs to be asked at this early stage is whether an examination of the practices of high appellate courts, particularly when they are deciding constitutional cases, provides a safe ground on which to base an argument about the nature of judicial argument in general. I think that it does not and here are my reasons.

Of all disputes that result in a lawsuit, only a minority goes to trial (as opposed to being settled prior to trial); of all cases that go to trial, only a minority are appealed; of all cases that are appealed, only a tiny fraction reaches the highest appellate court of a given legal system. This is a trend which one observes in many legal systems, including the US legal system, to which the critics of Hartian positivism usually turn for inspiration.[12] It is also worthy of note that within an appellate court it is often the case that only a minority of opinions are actually published;[13] and of those published, only a minority involve dissent. Thus, to the extent that the critics are focusing on published, non-unanimous decisions of high appellate courts, it is safe to say that they are drawing from a sample of cases of very limited statistical significance. [14]

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12 See, for illustrative statistics on the caseload of the US federal judiciary, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/front/IndicatorsMar09.pdf. In a 12-month period ending March 31 2009, 238,640 cases were terminated in the US district court system, while only 60,358 cases were filed in the US court of appeals system (roughly a ratio of four to one).

13 For information regarding the number of opinions published in the US court of appeals system, see: http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table205.pdf.

14 It is worth noting that I am not, by any means, denying the political and cultural significance of these cases. I am currently arguing that they are infrequent and will in a moment be arguing that their infrequency affects the views of those who want to compare Hartian positivism to objectionable error theories that characterise a familiar discursive practice as systematically flawed.

More important than their reduced statistical frequency, however, is the apparent incapacity of such cases to represent the routine legal dispute. Political scientists have made a good case for the claim that disputes that climb up the judicial hierarchy are not selected randomly from the larger pool of disputes but that they only move up by virtue of possessing special characteristics one of which is precisely their controversial nature. Cases that are litigated and appealed tend to be cases in which each party – pursuer and defendant – believes that they have good arguments to present in their favour. Arguably, the existence of a clear and hardly disputable solution to a legal case works as a disincentive (which is not always overriding but is still quite influential) for the disfavoured party to pursue litigation.[15]

The facts of limited statistical importance and lack of representativeness should at the very least make one suspicious of the argument being mobilized by the critics (namely, an argument likening Hartian positivism to objectionable error theories). High appellate courts tend to deal with particularly controversial cases whose contested nature stems not only from the indeterminacy of positive law but also from its dealing with politically consequential matters which tend to divide public opinion (in fact, political controversy is capable of affecting the prima facie determinacy of positive law in a way which will become clear later on, when I discuss the defeasibility of formalist interpretive arguments). This is especially evident in cases of judicial disagreement about the meaning of provisions which are part of the US Constitution, for such provisions are not only frequently open-ended in their language but also tend to regulate issues which are highly politically charged.

Assuming that the points I have made about pervasiveness and representativeness are on the right track, this is the picture of judicial practice at which we arrive: instead of the suggestion made by the critics of Hartian positivism that it must, in order to remain true to the view that the content of law is determined by official consensus, accuse judges of systematic error or insincerity, we should think that the sort of disagreement

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15 For a couple of important empirical studies, the first one being especially influential, see George L Priest & Benjamin Klein, 'The Selection of Disputes for Litigation' (1984) *13 Journal of Legal Studies* 1, and Leandra Lederman, 'Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle' (1999) 49 *Case Western Reserve Law Review* 315. For philosophical papers containing helpful discussions of the so-called selection effect, see Frederick Schauer, 'Easy Cases' (1985) 58 *South California Law Review* 399, Frederick Schauer, 'Judging in a Corner of the Law' (1988) 61 *South California Law Review* 1717, Lawrence Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1988) 54 *University Chicago Law Review* 462, and Leiter, above n 5.

which creates the occasions for misleading judicial rhetoric is not pervasive and that it usually concerns controversial issues which are politically important. Cases whose adjudication has important political consequences tend to be more closely followed by political analysts, the media, and often the general public. Judges, who are hardly unaware of this, would be expected to be very careful in the way they articulate their decisions so as to avoid the flak which tends to be elicited by the perception that judges are interfering in political matters which, according to a widespread opinion in modern democracies, ought to be regulated by majoritarian institutions. In a word, Hartian positivists need not present a dark or cynical picture of judicial behaviour according to which judges typically act creatively but disguise this fact or deceive themselves into thinking they are just applying existing law. Hartian positivists need only claim that judges are exceptionally faced with cases that are not determinately settled by existing law, and that they find the need to proceed very carefully so as to avoid making their discretionary decisions too explicitly political, for they could be bitterly criticised for this. There is nothing disrespectful or hubristic about this view of judicial practice: if judges are lying, they are lying exceptionally and for understandable reasons. (Consider the contrast between Hartian positivism thus described and error theories in metaethics, which characterise the moral assertions that pervade ordinary discourse as systematically false or otherwise flawed).

I need to be clear about the limitations of the argument made in this section. My appeal to statistics and the selection effect is meant to weaken the analogy between Hartian positivism and objectionable error theories.[16] But Dworkin, in particular, does not focus exclusively on the fact that Hartian positivism is an error theory; he also seems to believe that cases where theoretical disagreement occurs, however statistically exceptional, are somehow revealing of a deeper truth about judicial practice (Dworkin, *supra* note 1, 40-3).[17] That being the case, Dworkin would not give in when

16 And I will continue to challenge the analogy, although on different grounds, in sections 3 and 4.

17 I should emphasise that Dworkin's critique of Hartian positivism has *two* aspects. Consider the following statement: 'The borderline defense [i.e. a defence of positivism that Dworkin deems relatively sophisticated] is worse than insulting, moreover, because it ignores an important distinction between two kinds of disagreement, the distinction between borderline cases and testing or pivotal cases.' (Dworkin, above n 1, 41) Dworkin thinks the defence of positivism, which portrays judges as misguided about the nature of their arguments in cases of theoretical disagreement, portrays them as 'simpletons' and is therefore insulting. This is one reason to be suspicious of the borderline defence of positivism, according to Dworkin. The other reason, to which I turn in the text below, has to do with the distinctive value as test cases of disputes involving theoretical disagreement.

confronted with statics: theoretical disagreement may be infrequent (and this may indeed serve to weaken the analogy to objectionable error theories), but its occurrence supposedly reveals the existence of a fundamental lack of consensus among judges, a lack of consensus that does not become manifest in routine cases for the merely contingent reason that judges' alternative interpretive strategies tend to yield identical solutions to (technically and morally) uncomplicated legal questions.

Let me state without ado that Dworkin provides no evidence to establish that judges in his unrepresentative sample of cases are having a sort of disagreement which only contingently fails to become manifest in routine cases. Dworkin neither amasses data about routine cases nor analyses judicial decisions randomly selected from the general pool of disputes. In section 5 I will argue that the available evidence suggests, *pace* Dworkin, that legal systems like that of the US seem to contain a broad interpretive rule constraining judicial interpretation and obligating judges to employ a uniform interpretive strategy in most cases (as opposed to being allowed different strategies contingently leading to the same results). Disagreement about interpretive methodology arises often under the penumbra of this interpretive rule, where judges can reasonably disagree about which interpretive strategy the rule recommends. So in Dworkin's sample cases, I will argue, judges do argue about fundamental problems of interpretation, but they only do so because the interpretive rule that otherwise constrains their interpretive approach has exceptionally run out.

But this argument will have to wait. In the meantime, there is a preliminary point to be made which raises doubts about the tenability of the suggestion that routine cases may be cases where theoretical disagreement occurs without becoming manifest. The point involves an attempt to turn Dworkin's objection on its head. One of Dworkin's main concerns has been to avoid the implausible, insulting implications of a theory that characterises judicial discourse as misleading. But the question must be asked whether the view that results from the suggestion that theoretical disagreement is present even in routine cases is any less insulting than Hartian positivism. Judges approach routine cases as cases concerning disputes to which the law provides a clear solution. They do not characteristically present their decisions in such cases as decisions in which they disagree about fundamental principles of interpretation but chance to arrive at the same result. To put it in more concrete terms, the prototypical routine case is not one in which judges write concurring opinions converging on the outcome but diverging in their rationales. But if that is true, would it not also be true (if Dworkin is right about what actually happens in routine cases) that judges often mislead us by deliberately concealing or honestly ignoring the precarious nature of their agreement –

an agreement which obtains in spite of differences with respect to fundamental matters of interpretation?

The upshot is that the critics of Hartian positivism ought to be careful about what they say about routine cases. In particular, they should not be too quick to accept the hypothesis that theoretical disagreement silently pervades judicial practice, for that could lead to a view which violates the very principle of charity they are so eager to promote. It is better to hold that in routine cases theoretical disagreement does not usually occur. To be sure, this does not entail the claim that I ultimately want to make, namely, that what guarantees uniformity with respect to interpretive methodology in routine cases is the operation of a general rule constraining judicial interpretation: it could conceivably be that judges just happen, for no particular reason, routinely to employ the same interpretive strategy. Again, the issue of interpretive rules will only be addressed in section 5. Even if my attempt to turn Dworkin's objection on its head is not found persuasive, I trust that in section 5 stronger reasons will be given as to why one should not insist that lack of consensus with respect to proper interpretive methodology pervades judicial practice.

III. Further explanation of the error

In section 2 I raised worries about the critics' choice of examples on which to base their objection to Hartian positivism. These examples do not seem representative of the legal disputes with which judges routinely have to deal. Indeed, an examination of the ways in which the critics' sample cases are peculiar (ie they tend be technically complicated and politically controversial) can help to explain why judges would sometimes be motivated to employ misleading rhetoric. There is an additional factor to be considered in this section that may also help to explain why judges would speak as if they were applying existing law when no such law in fact exists. This factor is illuminated by a result of the comparative studies of Patrick Atyiah and Robert Summers.

Their basic claim is simple '[c]ommon law judges often find it unnecessary to draw a clear line between what ought to be and what is.'[18] The tendency of judges in common law systems to gloss over the 'is-ought' distinction with regard to law is explained by the authors as resulting from the 'slow process of distillation'[19] which underlies legal change in such systems. In contrast, in legal systems where law reform is predominantly legislative, legal change is typically conceptualised in terms of 'sharp breaks with the past.'[20] This difference in conceptualisation between systems where legislative or judicial legal reform prevail could have been inferred simply from the plausible general assumption that

18 P S Atyiah and R S Summers, *Form and Substance in Anglo-American Law* (1987) 148.

19 Ibid 149.

20 Ibid 149.

incremental change (ie the sort associated with common law reform) is less clearly perceived *as change* by those who observe it or engage in it. But if this were the only ground Atyiah and Summers provided for their contention, then it would seem very speculative, albeit plausible. Fortunately, the authors have more to say in defence of their thesis. In comparing England and the US, they observe how differently law reform is conceptualised in these two countries even when they concern very similar transformations in respect of legal content. Atyiah and Summers suggest that between the '40s and '70s England and the US witnessed analogous changes with regard to their contract and tort laws, yet the changes were generally implemented by different means (by legislation in England and by judicial decision-making in the US),[21] and this is apparently the only factor that can explain the diverging conceptualisations.[22]

All this is to say that there is a further reason – apart from the aforementioned fear of flak – why judges would employ a rhetoric of law application when in fact they are engaged in law reform, that is, why they might tend to speak in terms of 'is' when it would be more accurate to speak in terms of 'ought' The reason is simply that legal change is not readily perceived as such when it occurs through an incremental, case by case process. This is a possibility which does not rest on futile speculation but on a comparison of methodologies of law reform and the discourse that accompanies them in existing legal systems. Judges may be making a mistake when they fail to recognise that they are introducing changes in the law, but they are making an honest mistake which is all too easily denounced by those who, like us, benefit from looking at things from a detached perspective and after the facts.

IV. Getting judicial discourse right

I would now like to turn to a different set of reasons for doubting the soundness of the critics' case against Hartian positivism (namely, the case that presents Hartian positivism as an objectionable error theory). I have been implicitly assuming up to this point that the critics provide an accurate account of judicial rhetoric in the limited set of cases involving disagreement about proper interpretive methodology. All I have claimed so far is that the rhetoric at issue is exceptional and that its underlying motivations can be explained plausibly and respectfully. But now we should consider some reasons for doubting whether such rhetoric is indeed

21 Ibid 134-137.

22 Atyiah and Summers advance a thesis whose sophistication I would not like to understate. They are careful enough (more than I have been in the text above) to explain that 'causal influences in these respects do not run solely in one direction' (Ibid 4). The shape of legal institutions may affect the way in which law is conceptualised, but it is also the case that the dominant conceptualisation can reinforce the institutional tendencies that generated it. If one were to insist that, historically, the conceptualisation actually comes before the institutions, I would not really want to quibble. For my purposes it is not necessary to know which comes first, egg or hen.

dominant even within the limited and atypical sample of cases which concerns us. My ambition in this section is to introduce shades of complexity in the black-and-white account of the critics.

The critics frame their debate with Hartian positivists in a way that suggests that the latter take judges to be employing a rhetoric of 'law discovery' and 'law application' when they could only really, accurately, talk of 'law reform' or 'law creation'. But nothing in the positivist's theory commits him to saying that, as a matter of fact, judges typically and unambiguously speak of discovery and application in such contexts. The latter is an assumption made by the critics and imputed to Hartian positivists. To my mind, a more plausible characterisation of judicial discourse in contexts of disagreement about interpretive methodology consists in the claim that judges tend to blur the distinction between discovery and reform, not that they always simply speak in terms of the former instead of the latter. The critics' characterisation of judicial rhetoric is misleading not only in this respect but also in that it fails to account for the occasional cynical reactions of judges themselves to the rhetoric of some of their peers. I will consider these two issues in turn.

There may be more than one way to blur the 'discovery-reform' distinction in law, but perhaps the most conspicuous way to do it involves a judicial tendency to cumulate different kinds of argument in hard (ie technically complicated and politically sensitive) cases – including more formal or legalistic arguments and more substantive or overtly moral ones – when judges find that different arguments can support their preferred outcome.[23] This procedure is sometimes implemented in what has been

[23] This is one of the theses defended in Neil MacCormick & R S Summers (eds), *Interpreting Statutes: A Comparative Study* (1991), a collection of papers by scholars from nine different legal systems who attempt to describe and compare the interpretive practices of high courts of appeal and review in their systems. One conclusion to which they come in unison is precisely that judges tend to cumulate arguments based on different interpretive materials (eg literal meaning, legislative intention, statutory purpose, policy effects) when they see this as a possible move. Consistent with my claims about the circumstances of disagreement about legal content is the authors' assessment of what leads to cumulation: 'Judicial resort to cumulative argument is motivated by such factors as doubt about the justificatory force of any single argument, *the social importance of the issue or issues being resolved*, *a desire to relieve a possible concern that the court might be exceeding its proper role*, a felt need to provide a justification commensurate with a substantial burden being imposed on the losing party, a felt need to take account of arguments of counsel, and foreclosure of appeals.' (R S Summers & Michelle Taruffo, 'Interpretation and Comparative Analysis' in MacCormick & Summers (eds), note 23, 479 – 480, emphasis added).

derisively described as a 'shotgun' fashion, whereby the judge will 'canvass all possible arguments in support of a position, repeat them for emphasis, and present them all without any regard for how they actually hang together as a coherent, principled position.'[24] Judges sometimes begin with a legalistic argument for their decision (eg an argument to the effect that the decision is derived from the language of a statute or precedent) and then add to this that their preferred outcome is also required by considerations of policy or moral principle. To be sure, frequently judges will try to show that such considerations of policy and principle are not entirely independent of positive law, but that they in fact constitute the underlying rationale of the relevant statute, precedent, constitutional norm, etc. This latter move makes the appeal to substantive considerations sound more legalistic than it would otherwise have sounded; but it nevertheless opens the door to arguments about the merits of positive law, which many judges will intimately regard as arguments not about what the law is but about what it ought to be (unless, of course, one were to assume, without any apparent justification, that judges were generally adherents to natural law theory and thus believed that the moral merit of the law is one of the fundamental determinants of its status as law).

The point I wish to make by making reference to the cumulation of arguments by judges is that the critics of Hartian positivism ignore an important feature of judicial discourse which adds complexity to the black-and-white, discovery-or-reform picture. The added complexity is important because it detracts from the view that judges typically speak of discovery when they should be announcing reform or creation, and it suggests instead that judges may not be so clear about what they are doing. What is clear is that they appeal to formal authorities (eg statutes, precedents) and also refer to public policy, justice and so on. Should this not bring pause to those who believe judges are clearly trumpeting their attempts to discover what the law is? To be sure, it would be tendentious to simply assume that appeal to public policy, justice and so on is to be equated with appeal to extra-legal considerations, for that seems to follow from the contentious view (rejected by non-positivists and arguably accepted only by positivists of the 'exclusive' type) that only conventional legal materials can indeed be *legal*. But, on the other hand, it would also be question-begging to assume that when judges refer to public policy, justice and so on they are in fact regarding such references as part of the larger enterprise of law discovery. The point is that, unless one reads their theoretical preconceptions into judicial rhetoric, cumulation makes judicial self-understanding quite elusive

[24] Leiter above n 5, 1233. Leiter convincingly argues that such a strategy was employed by the majority in *Riggs v Palmer*, [1889] 115 NY 506, 22 NE 188, precisely one of the cases which Dworkin famously takes to present difficulties for the Hartian positivist.

– indeed, much more elusive than the critics of Hartian positivism have acknowledged.

As I indicated earlier, there is a further aspect of judicial discourse which the critics of Hartian positivism have not adequately addressed. This is the fact that sometimes judges will react with hostility to the rhetoric of their peers, and will accuse the latter of attempting to reform the law by stealth. This reaction is quite common among judges that champion formalist approaches to adjudication. The application of interpretive methodologies based on the literal meaning of legal texts or on the specific intentions of law-making authorities are examples of such formalist approaches.[25] They are formalist insofar as they reject recourse to substantive considerations regarding the purpose of the applicable legal sources or the merits of the result generated by the application of those legal sources. And what motivates their formalism is usually the belief that having recourse to substantive considerations gives judges undue freedom of choice or liberty to have recourse to personal moral convictions.[26] Justice Antonin Scalia of the US Supreme Court is a good example. He is well known, not only for his defence and use of textualism, but also for regarding alternative interpretive approaches like intentionalism as means for furtively implementing legal reform.[27]

But this sort of reaction is also voiced by non-formalist judges. Richard Posner is an important example in this regard. Posner describes his own approach as 'pragmatist', and while he is not shy about avowing that

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25 Not everyone regards interpretive methods relying on legislative intentions (even specific ones) as formalist (see below n 27). But see Larry Alexander & Emily Sherwin, *Demystifying Legal Reasoning* (2008), for a defence of intentionalism that sensibly portrays it as a formalist method of interpretation.

26 On the connection between formalism and the restriction of choice see Frederick Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509.

27 See *Pennsylvania v Union Gas Co*, [1989] 491 US 1 at 29-30: 'it is our task, as I see it, not to enter the minds of the Members of Congress ... but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.' Scalia's reasons for rejecting appeal to legislative intent, which he has called a 'handy cover for judicial intent', are summarised as follows: 'The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field' (Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Amy Gutmann (ed), *A Matter of Interpretation* (1997) 17-18).

judges like himself exercise discretion regularly, he is critical of those judges who attempt to mask this fact about judicial practice.[28] Indeed, Posner can be seen as an heir to the legacy of legal realism, a somewhat amorphous school of legal thought which was quite successful in the US in the first half of the twentieth century, and one of whose few genuinely shared goals consisted in giving emphasis to the pervasiveness of legal indeterminacy and to the fact that this important phenomenon remained largely veiled under the rhetoric of American judges. One of the main sources of indeterminacy, according to the realists, was precisely the fact that the same legal source could often be interpreted in different ways, yielding different solutions to the case at hand.[29] It is worthy of note that when realism became popular many judges in the US expressly adhered to it.

So, attacks on misleading rhetoric come from diverse groups within the judicial milieu. It comes from formalist judges who think that what the law is cannot be determined by appeal to substantive considerations, and it also comes from realist and pragmatist judges who tend to think that recourse to substantive considerations is unavoidable. What this shows is that the charges of insincerity or error which the critics attribute to Hartian positivists are in fact also made by insiders to judicial practice. There are judges who find their own peers disingenuous or mistaken about the nature of their trade.

I have presented no argument as to the typicalness (within hard cases) of the features of judicial discourse described in this section, namely, that judges blur the 'discovery-reform' distinction by cumulating legalistic and substantive arguments, and that there are judges who publicly denounce their peers' misleading rhetoric. I cannot prove that decisions exhibiting these characteristics are more frequent than decisions where, like the critics of Hartian positivism suppose, judges consistently and uniformly speak in terms of discovery. Indeed, settling this question would require empirical studies which I have not had the opportunity to conduct. I surmise,

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28 Richard Posner, *How Judges Think* (2008) 2: 'most judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is), and often to believe it, though it does not describe their actual practices.'

29 The classic statement of this view is in Karl Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3 *Vanderbilt Law Review* 395. For an argument to the effect that Llewellyn's position is representative of the realist account, and for a discussion of the relation between realism and positivism, see Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' in Brian Leiter (ed), *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy* (2007).

however, that elusive cumulation of different types of arguments, as well as complaints about veiled activism, are common occurrences in the technically complicated and politically sensitive type of cases which the critics study and in which disagreement about interpretive methodology tends to arise. For these cases are apt to prompt uncertainty and ideological tension, feelings that are expressed by some judges in ambiguous discourse and by others in political denunciation.

V. Rules constraining judicial interpretation

To recapitulate: Hartian positivists are committed to the view that the content of the law is determined by the convergent practices of officials. Thus, official consensus should determine not only what sources of law (eg constitutional and statutory provisions and authoritative judicial rulings) are valid but also what interpretive methods should be used for deriving content from those sources.[30] Recent critics of Hartian positivism have said that judges often disagree about how to derive content from valid legal sources and that Hartian positivists have no choice but to characterise such disagreement, not as disagreement about what the law is, but as disagreement about what the law ought to be. The problem with this characterisation, say the critics, is that judges themselves do not speak as if they were advancing theses about what the law should be, how its gaps should be filled or how existing law should be modified. Judges speak instead as if they were discovering and applying the law as it already is. It is therefore up to the Hartian positivist to admit to characterising judicial rhetoric as misleading and to accept the burden of argument that comes along with an accusation of this kind.

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30 To be sure, this is not exactly a matter of consensus. As Berman notes (above n 6, 273, footnote 13), there are those who believe that, for Hart, all that the rule of recognition (this concept will be explained shortly) does is indicate valid sources of law, not proper interpretive procedures: official consensus does not necessarily reach that far. I will say a few words about why this controversy does not worry me here. For one thing, I tend to believe that the specification of interpretive procedures by the rule of recognition is necessary if that rule is to adequately perform the guidance function which I am convinced we should assign to it. (I am not, by saying this, committing myself to the view that this is the only or the primary function of the rule of recognition, but I do think that guidance is one of its important functions). But more importantly, the critics of Hartian positivism with whom I am concerned here share the view that the rule of recognition should specify, in addition to sources, interpretive procedures. Thus, holding this assumption does not beg any question against my interlocutors. Quite the contrary, it makes one of the possible routes for avoiding their criticism unavailable to me.

In the previous sections I attempted to show that the burden is not as heavy as the critics of Hartian positivism presume, and that Hartian positivists can indeed carry it. Examples of disagreement about adequate interpretive methodology are usually taken from a small and unrepresentative sample of legal disputes. Judges dealing with such cases are under tighter public scrutiny and thus tend to be very careful in how they phrase their decisions. The fact that, unlike legislators, they decide concrete cases (as opposed to issuing broad and abstract norms) might also make them less aware of the important part they play in legal creation and reform. It was also emphasised that although judges in contexts of disagreement do tend to blur the distinction between discovering valid law and contributing to its development and transformation, it is not at all evident that they typically go as far as disguising their creative contributions in an unambiguous rhetoric of 'law discovery and application'.

It is now time to fulfil a promise made in section 2. Assuming that judicial interpretive disagreement about how to derive legal content is exceptional, that the rhetoric which accompanies it is not so clearly misleading, and that its motives are understandable, it is time to show how Hartian positivists ought to argue for a rule-based account of judicial interpretive practice.

Hart believed that a legal system's unity depends on the existence of a norm which specifies the criteria that other norms of the system need to satisfy in order to be binding within the system. The norm at issue was called 'rule of recognition'; the criteria it contained, 'criteria of legal validity'. The existence and content of the rule of recognition depends on a convergent practice of officials, or, as I have sometimes put it, on official consensus. The rule of recognition of, say, the US legal system is supposed to tell us what sources of law are valid in the US (or better yet, what criteria a putative legal source must satisfy in order to be legally valid) and it must also specify the interpretive procedures for deriving content from valid sources. For Hart, then, the content of the rule of recognition of the US legal system would depend on the practices of US officials; these practices would determine what sources of law are valid in the US and what procedures can be used for identifying the content of those sources. In view of this, a couple of questions remain for those who are committed to Hartian positivism and who believe that this theory can explain the judicial practices of existing legal systems: is there an official consensus in such systems which determines not only what sources of law are valid but which also specifies admissible procedures for the derivation of content from those sources? Can the Hartian positivist describe this consensus in a way which captures the complexity and variability (across court levels and subject

matters) exhibited by judicial practice? I believe both questions can be answered affirmatively.

Let me begin with a general point. There is a truism which played an important part in Hart's theory of law, '[i]f it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognise as law could exist.'[31] The idea is that one of law's functions is to guide behaviour, of officials as well as citizens, and that it can only do so by issuing fairly precise prescriptions which will allow individuals to discern – 'without further direction' – what kinds of behaviour are permitted, required, or forbidden in most circumstances of ordinary life. By claiming that this is one of law's functions I do not mean that it should be one of law's aspirations, but that, as a matter of fact, it is something that existing legal systems typically (if not invariably) achieve. A similar way of bringing out this feature of existing legal systems consists in the claim that the ordinary legal case is easy, not hard.[32] Excessive focus on controversial disputes adjudicated by appellate judges should not blind us to the fact that most of the issues (the relationships we maintain, the transactions we engage in) which have the potential to generate legal disputes are clearly and determinately settled by existing law. The explanation that the Hartian positivist can provide for this fact is as follows: the rule of recognition of a legal system determines which sources of law are valid and how to interpret

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31 Hart, above n 3, 121.

32 For works emphasising the importance of 'easy cases', see the philosophical pieces cited above n 15. See also, for a short but forceful commentary, Ken Kress, 'Legal Indeterminacy' (1989) 77 *California Law Review* 283, 296-297. I have been told that my formulation of Hart's truism is question-begging, ie that it is only a truism to those who already accept the view that language does all the work when it comes to guiding the action of legal subjects and officials. I disagree. All the truism says is that legal directives guide action without further direction. It does not say that language, or conventional linguistic meaning, guides action, nor does it explain exactly how language does the job. The claim I want to make, that language indeed has a crucial role to play in law's capacity to guide action, is substantiated in the text below in a series of steps. First, I suggest a hypothesis that might explain the guiding capacity of law: it is admittedly a hypothesis that assigns a central role to the determinacy of legal language. The hypothesis yields a prediction regarding judicial behaviour. The prediction is then corroborated by empirical evidence. Notice that my view of the role of language in judicial reasoning is based *on the testing of a hypothesis designed to explain Hart's truism*. The truism itself says very little about language and its role. To be sure, we know that Hart also assigned a crucial role to language, and it may be the case that *he* made an unwarranted leap from his truism to his conclusions about the role of language; but I make no such leap here.

those sources. Judges agree with regard to both issues (for it is precisely their agreement that determines the content of the rule of recognition) and thus, on the assumption that judges employing a uniform interpretive strategy tend to reach the same result, they agree as to how most legal cases should be solved.

This explanation of the pervasiveness of easy cases is not one that Hartian positivists need to accept by default; indeed, they can produce independent evidence for it, and fortunately the evidence is not limited to a superficial examination of atypical judicial rhetoric. Let us begin by considering the truism discussed earlier. Hart's truism prompts the following question: how can the law 'communicate general standards of conduct, which multitudes of individuals could understand, without further direction?' Language figures prominently in what seems to me the most plausible answer to this question. The law typically communicates its standards by means of written documents the meaning of which, with regard to most of its concrete applications, is clear and uncontroversial. Law-makers presumably know the standard meanings of the words they employ and they also know that the addressees of their directives are aware of these standard meanings. The fact that law-makers often use technical words – legal or otherwise – does not detract from these points, for law-makers presumably use *standard technical* meanings which they know to be shared by their addressees, who in such cases are usually groups with specialised training – lawyers, administrators, employees of regulatory agencies, etc. The addressees of laws, whether in the capacity of law-appliers or simply law-followers, look first and foremost to the words used in the laws. It could hardly be otherwise, given that the words of the law are the most conspicuous and reliable materials to which addressees can have recourse when aiming to comply with legal directives. With regard to conspicuousness, it should be pretty clear that text and background linguistic conventions are readily available in a wider range of cases than alternative interpretive materials like historical evidence of authorial intent, persuasive arguments relating to purpose or policy considerations, and so on. Words are also more reliable because the legal norms that any given addressee must heed are so numerous and varied that the costs (in terms of time and attention) of inquiring regularly into alternative materials would be prohibitive. Add to these facts the widespread opinion that it is up to majoritarian bodies to issue general laws whose meaning should be protected from whimsical or self-serving distortion by law-applying officials and the picture we need is complete.

These perhaps apparently innocuous facts about legal communication provide grounds for predicting a very general pattern of procedures by means of which the content of the law will normally be identified. Any legal system which does not differ significantly from the typical legal

systems of modern Western democracies will likely instantiate this general pattern: standard linguistic meaning will have a pervasive influence in legal interpretation; the circumstances in which linguistic meaning will be discarded in favour of alternative materials will vary somewhat from system to system but these variations should fall within the range of possibilities set by the following standards: (1) linguistic meaning will naturally fail to be decisive when a legal text is irremediably ambiguous, vague or otherwise indeterminate (making appeal to alternative materials unavoidable); and (2) when indeterminacy is not an issue, linguistic meaning will only be displaced if the alternative materials clearly point in a different direction and if they ground arguments which seem particularly cogent (in that they refer to particularly pressing and socially relevant concerns) to interpreters who want to avoid the charge of acting on whim or out of self-interest.

Before discussing the evidence which is supposed to corroborate this prediction, let me pause to repeat why delineating a pattern in the way judicial interpretation takes place is important for one who wishes to substantiate the Hartian account of legal practice. This account, to recapitulate, states that what explains agreement with regard to solutions to routine legal cases is the fact that judges (and other officials) agree not only about what the valid legal sources are but also about the interpretive procedures for deriving content from these sources. But if this is the case, then the Hartian positivist should be able to describe the procedures which judges generally accept as adequate for deriving content from valid legal sources. So far in this section I have attempted to show that typical legal systems, just by virtue of possessing certain features related to the importance of legal language, are expected to exhibit an interpretive practice which, very roughly, gives defeasible precedence to interpretive arguments based on the standard linguistic meaning of legal texts. This interpretive practice is supposed to be a convergent practice of legal officials. In Hartian terminology, it constitutes part of the rule of recognition, that specific part which determines interpretive procedures for the identification of legal content.

Now I should try to provide evidence for the view that the aforementioned pattern is indeed present in existing legal systems, and in doing so I will also try to show that the circumstances in which linguistic arguments are defeated can be described more precisely. *Interpreting Statutes – A Comparative Study*[33] is the only work I am aware of where scholars from many different countries come together to compare the interpretive practices of their systems and arrive in unison at many significant conclusions. Their inquiries are limited to statutory

[33] See above n 23.

interpretation but, interestingly, they focus on the practices of courts at the ultimate stage of appeal or review.

One of *Interpreting Statutes'* most important findings is that 'linguistic' or textualist arguments are more decisive than all other kinds of interpretive arguments.[34] They are available in a wider range of cases, and their presence shifts the burden of proof to the interpreter who wishes to displace standard meaning in favour of an alternative material.[35] To carry the burden created by the presence of a determinate linguistic argument, an interpreter must show that linguistic meaning is *clearly* inconsistent with, say, authorial intent or with the statute's explicit or 'plainly implicit'[36] purpose. For instance, if there is controversy about legislative intent (due perhaps to the incompleteness, complexity or inconsistency of special committee reports or records of parliamentary debates) or about the purpose of the statute (due to the fact that the norm in question elicits morally or politically controversial issues), then arguments based on these materials, and pitted against linguistic arguments, will tend not to prevail. More overtly substantive arguments – such as an argument to the effect that a given application of a statute generates an unjust or politically deplorable result – only prevail when they can command the agreement of interpreters who find them particularly pressing. This is a pattern which exists in spite of all the differences among the jurisdictions compared. Different systems may, among other variations, accord different weights to precedent, be more or less accepting of explicit resort to legislative history, be more or less resistant to the use of overtly substantive arguments; but they invariably exhibit the following pattern: the presence of linguistic arguments shifts the burden of proof, which can only be met by arguments that supply persuasive evidence that consideration of alternative materials (which compose a limited list: eg legislative intention, purpose, policy effects) points in a different direction.

So, *Interpreting Statutes* provides evidence which corroborates to some extent the prediction based on general facts about the role of conventional linguistic meaning in legal communication. Even high appellate courts, which tend to concentrate controversial cases, and thus should display more instances of genuine interpretive disagreement about how to derive legal content, are not forums where argument about adequate interpretive methodology is completely unregulated. There seem to be rules

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34 Summers & Taruffo, above n 23, 481–487.

35 And the burden is not supposed to be light: in the authors' words the linguistic aspect of interpretation has 'extremely strong *prima facie* force.' Neil MacCormick & R S Summers, 'Interpretation and Justification' in MacCormick & Summers (eds), above n 23, 533.

36 Summers & Taruffo, above n 23, 484.

of interpretation, or perhaps *standards* of interpretation,[37] which at the very least identify a range of admissible interpretive methods (eg methods based on standard linguistic meaning, intended meaning, implicit or explicit purpose, substantive considerations of justice and policy effects) and which assign defeasible (but not easily defeated) precedence to one or a few of those methods – the linguistic method invariably being at the top of the list.

There is further, and more focused, evidence to be presented in favour of the view that judicial interpretation is an activity regulated by norms endorsed by officials, that is, norms corresponding to criteria of validity specified in the rule of recognition. If we consider some of the cases on which the critics have relied, not in isolation as they have, but as part of a larger series of analogous cases, then we will see that a pattern similar to that delineated in *Interpreting Statutes* suggests itself.[38] In *Riggs v Palmer*, for instance, the Court of Appeals of New York did not allow the defendant, Palmer, to inherit under the will of his grandfather whom he had murdered. The court made this decision in spite of the fact that the plain meaning of the relevant statutes did not invalidate the grandfather's will. Plain statutory meaning, in this case, was arguably displaced by the substantive principle that 'no man may profit from his own wrong'. What can we infer from this decision that might affect the central question of this paper? Not much really; *Riggs* shows us only that plain meaning can be defeated in American judicial practice (or at least that it could be at one point in the history of the American legal system), but it tells us nothing about whether such practice is (or was) structured and regulated by official interpretive norms. But perhaps we can learn something useful by taking a step back and examining the larger picture:

> We can find numerous examples of courts allowing killers to take property that became available to them solely because of their own culpable actions, including cases involving a killer of the testator who was found not guilty by reason of insanity, a killer of the testator who was convicted of voluntary manslaughter, murderers whose acts of murder caused property to pass to their children although not directly to themselves, a

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37 On the difference between rules and standards, the former being more specific – and thus less vague – than the latter, see, for a succinct presentation, Frederick Schauer, 'The Convergence of Rules and Standards' (2003) *New Zealand Law Review* 303, 307-309. The difference I have in mind is not logical; it is merely one of degree, albeit important.

38 My argument here finds inspiration in Schauer's assessment of *Riggs v Palmer* and *Henningsen v Bloomfield Motors*, *Inc*, [1960] 32 NJ 358, 161 A.2d 69. See Frederick Schauer, 'The Limited Domain of Law' (2004) 90 *Virginia Law Review* 1909, 1937–1938.

> murderer convicted of being an accessory after the fact but not of actually wielding the murder weapon, a murderer who did not kill a "testator" but instead as remainderman killed the holder of the life estate... In all of these cases, all falling only slightly short of first and second degree murder, courts have allowed culpable killers to inherit, and have treated the *Riggs v Palmer* principle, whether embodied in a statute or in the common law, as an exception to be construed narrowly, notwithstanding the broad potential implications of the "no man may profit from his own wrong" principle.[39]

Obviously, I cannot prove conclusively that the interpretive norms (if any) being followed by American judges in the resolution of *Riggs* and analogous cases follow the pattern indicated in *Interpreting Statutes*. But it is hard to avoid the plausible suggestion that the judges who were involved in these cases were willing to apply plain meaning in all but the most exceptional circumstances. Only when a particularly pressing argument appeared on the other side – how could we possibly allow the murderer of the testator to inherit?! – was it possible to ignore the language of the relevant statutes.

VI. Conclusion

Let me bring the strands together in conclusion. Misleading judicial rhetoric (which, in fact, is not always clearly misleading) in contexts of disagreement about interpretive methodology is atypical and understandable. The claims present in this fairly long-winded sentence were defended explicitly in sections 2 to 4. In section 5 I argued in favour of a rule-based account of judicial interpretive practice. The account is fairly simple. The officials of modern legal systems (judges included, of course) converge on general norms for the interpretation of legal texts. These norms give priority to standard linguistic meaning but allow for its displacement in special circumstances. Exactly what circumstances allow for such displacement will vary somewhat from system to system, but generally they include cases where current standard meaning is clearly incompatible with legislative intent or clearly unjustifiable in the light of the norm's underlying purpose or grossly unjust or in some other way severely suboptimal. Cases of conflict between legal language and purpose or between legal language and considerations of political morality will be more concentrated in high level courts, where the issues are not only technically more complicated but also more politically charged.

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39 Ibid 1937-1938 (footnotes omitted).

Notice that these interpretive norms are fairly broad or open-ended. This could be regarded as a problem for my account of how Hartian positivism can explain judicial interpretive practice. It could be said, for instance, that these interpretive norms are not specific enough to serve as components of a rule of recognition, that is, a rule one of whose functions is to provide guidance and eliminate normative uncertainty.[40] But the guiding capacity of the rule of recognition should not be overstated.[41] Hart admitted that there may be uncertainty with regard to the meaning of the rule of recognition. Like any social rule whose content can be formulated in a natural language, the rule of recognition has a penumbra of uncertainty – it is vague, if not actually, potentially. A rule of recognition containing an

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[40] This objection is not to be confused with the sort of objection offered by Berman, above n 6, 277-282. Berman claims that he is not troubled by the vagueness of the rule of recognition but with its incapacity to live up to the task (that Hart ascribed to it) of providing criteria for the *conclusive* validation of norms. So it seems that Berman's point is about the defeasibility – not the vagueness – of interpretive norms. I have trouble seeing how this could create a problem for Hartian positivism. The interpretive norms I believe exist in most legal systems specify that linguistic arguments have defeasible priority and indicate the broad conditions for its displacement. This sort of defeasibility cannot be what worries Berman, for it consists in *legally prescribed* defeasibility, given that it is rooted in official practice. What about the defeasibility of the very interpretive norm which assigns defeasible precedence to linguistic arguments? Well, this norm is not defeasible in the legal sense (since there is no official practice determining its defeasibility under certain conditions) although it is clearly subject to transformation, given that it is dependent on official practice, which is by no means a perpetually fixed phenomenon. Berman's claim that 'novel legal arguments cannot be ruled in or out by existing practice' (Ibid 280) is puzzling. Some novel arguments – which are novel merely in the sense that they have never been articulated before in a court of law – will indeed be ruled out or in by the interpretive norms I have delineated (eg arguments appealing to obscure sources of evidence for authorial intent are ruled out). Others will not be ruled in or out, and thus their use by a court will consist in a supplementation of established practices. More generally, Berman's argument seems to be problematically motivated by excessive focus on 'a large portion of cases that reach the [US] Supreme Court and engage the attention of constitutional theorists' (Ibid 275). Indeed, it may be hard to find a clear pattern of argumentation within a court that decides a tiny amount (relatively to all courts of its legal system) of cases which are usually highly politically charged. In such conditions penumbral cases should certainly abound (the notion of a penumbra will be introduced in the text below). Under the penumbra of the rule of recognition there is indeed few rules to go by; that is something the Hartian positivist admits, although he urges us to keep heeding the bigger picture.

[41] See Wil Waluchow, 'Defeasibility and Legal Positivism' in J Beltran et al (eds), *Essays on Legal Defeasibility* (forthcoming).

interpretive norm that, say, requires application of standard linguistic meaning except in cases of highly negative policy effects will certainly have a fuzzy area, for 'highly negative' is not an entirely precise notion (although it is precise enough to allow judges to dispose easily of routine cases). If one judge thinks the policy effects of literal interpretation are quite negative but not highly negative, then he will stick to literal meaning; but if a different judge on the same panel thinks it is negative enough, he will depart from plain meaning and resort to substantive considerations instead.

Notice that this sort of disagreement, which the critics might be quick to describe as evidence of pervasive and unrestrained judicial disagreement about interpretive methodology, can in fact be explained as disagreement about the applicability of a shared interpretive rule whose meaning is sometimes dubious with regard to particular cases. I surmise that many of the examples that the critics explore involve disagreements that occur under the penumbra of a rule that tells judges which interpretive procedures have priority and what sort of argument must be formulated if a judge wants to defeat the presumption in favour of the standard procedures.[42]

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[42] Let me give an example. *Riggs v Palmer* has been suggested as a clear instance of utterly unrestrained disagreement about interpretive methodology, since while the majority allowed the norm flowing from the plain meaning of the statutes to be overridden by a substantive principle, Judge Gray, the author of the dissenting opinion, stated clearly that 'the legislature has, by its enactments, prescribed exactly when and how wills may be made, altered and revoked, and, apparently, as it seems to me, when they have been fully complied with, has left no room for the exercise of an equitable jurisdiction by courts over such matters' (Ibid 519). I am tempted to classify this as a dispute about whether the circumstances in *Riggs* were grave enough to allow for defeat of the linguistic argument. Scepticism about this account may be motivated by Gray's apparent defence of indefeasible literalism in the quoted passage. I should encourage the sceptics, however, to redirect their scepticism to Gray's rhetoric, whose sincerity is far from certain. As Leiter points out, in *Bockes v Temple*, a case handed down on the very same day as *Riggs*, Gray seems to have abandoned his literalism: 'It is an elementary rule that statutes are to be interpreted according to their intent. The intention of the legislature is undoubtedly the great principle which controls the office of interpretation'; and he qualifies that by saying that '[i]t is only where the literal acceptation of the words used will work a mischief, or some absurd result, or where some obscurity in the sense compels it, that we need resort to extrinsic aids of interpretation' (cited in Leiter, above n 5, 1433). It is, thus, either the case that Gray had inconsistent views about interpretation or that he accepted the defeasibility of language in very special circumstances and simply did not think that *Riggs* provided such circumstances. The latter option finds some support in

In conclusion, let me state the aims of this paper in the most concise way possible. Essentially, it makes two related cases. The first case (sections 2 to 4) is meant to show that the critics are wrong insofar as they want to penalise Hartian positivism for being an error theory of an objectionable sort: for unlike error theories in, say, metaethics, Hartian positivism assigns error to judges in a frugal, plausible and respectful fashion. The second case (section 5) is meant to show that there is evidence suggesting that the occasional occurrence of disagreement about interpretive methodology is not a threat to those who believe judicial interpretive practice to be rule-governed. This type of disagreement does occur but typically under the penumbra of the rules governing judicial interpretive practice.

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the fact that Gray states in *Riggs* that 'public policy' did not mandate a ruling against Palmer, since he was already being punished for his crime (*Riggs v Palmer*, above n 17, 519). This suggests that Gray simply did not see the result in favor of Palmer as absurd or mischievous.

Clarifying the Natural Law Thesis

JONATHAN CROWE[†]

The core claims of natural law jurisprudence have been expressed in many different ways. One useful way of understanding the tradition, however, is through reference to what Mark Murphy has called the natural law thesis: law is necessarily a rational standard for conduct.[1] The natural law thesis holds that a norm or system of norms that does not serve as a rational standard for conduct is necessarily invalid or defective as law. Proponents of natural law jurisprudence characteristically affirm the natural law thesis, while legal positivists characteristically deny it.

The natural law thesis, then, provides a useful way of encapsulating what is at stake between natural law theorists and legal positivists. However, something that goes unremarked in many discussions of natural law is that the thesis comes in a range of distinct versions. Some important work has recently been done by authors such as Murphy and Robert Alexy in identifying different versions of the natural law claim, but these discussions have tended to focus on certain ambiguities while neglecting others.[2] Further work is needed in systematically clarifying the natural law

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1 Mark C Murphy, 'Natural Law Jurisprudence' (2003) 9 *Legal Theory* 241, 244; Mark C Murphy, 'Natural Law Theory' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 15. Compare Mark C Murphy, *Natural Law in Jurisprudence and Politics* (2006) ch 1. For an overview of the core themes of contemporary natural law scholarship in ethics, politics and jurisprudence, see Jonathan Crowe, 'Natural Law Beyond Finnis' (2011) 2 *Jurisprudence* 293.

2 See, for example, Murphy, 'Natural Law Jurisprudence', above n 1; Murphy, 'Natural Law Theory', above n 1; Murphy, *Natural Law in Jurisprudence and Politics*, above n 1, ch 1; Robert Alexy, *The Argument from Injustice* (2010); Robert Alexy, 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281; Robert Alexy, 'The Dual Nature of Law' (2010) 23 *Ratio Juris* 167; Robert Alexy, 'An Answer to Joseph Raz' in

thesis and distinguishing the different versions that appear in the philosophical literature.

The present article aims to contribute to this project. It begins by identifying four distinct ambiguities in the natural law thesis and clarifying the different possible formulations that arise from them. The article then examines three routes to the natural law thesis that appear in the literature and considers which versions they are best understood as targeting. I argue that the versions of the natural law thesis endorsed by some of its leading proponents are not always a good fit with their chosen arguments.

1. Clarifying the Thesis

According to the natural law thesis, a norm or system of norms that is not a rational standard for conduct is necessarily invalid or defective as law. The thesis can therefore be presented as follows:

> NL: A rational defect (R) in a norm or system of norms (N) necessarily renders it invalid or defective as law (L).

We will see below that natural law authors affirm different versions of this claim. For example, some hold that a rational defect in a norm or system of norms renders it legally invalid, while others hold that a rational defect in a norm or system of norms renders it legally defective. However, all natural law theorists affirm that it is, in some sense, a necessary property of law that it serves as a rational guide for action. This is the core claim that unites natural law views and differentiates them from legal positivism.

The above claim is ambiguous in at least four important ways. The first ambiguity concerns whether the thesis is understood as a claim about the *concept* of law, the *nature* of law or the linguistic *meaning* of the term 'law'. The second ambiguity concerns what counts as a *rational defect*; the third, what it means for a norm to be *invalid or defective as law*; and the fourth, whether the thesis concerns *individual norms or normative systems*. The following sections examine each of these issues in turn.

A. CONCEPTS, KINDS AND TERMS

The first ambiguity in the natural law thesis is not obviously drawn out by the formulation offered above, although it might be viewed as pertaining to

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George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (2007) 37.

the meaning of 'necessarily' in NL.[3] The natural law thesis is a claim about what makes a norm a law or a normative system a legal system. However, this type of claim can be understood in three ways.

The first way to understand the natural law thesis is as a *conceptual* claim. On this view, a rationally defective norm or normative system falls outside the concept of law. The concept of law under examination is sometimes taken to be the concept held by members of the community and sometimes the concept held by legal officials. This conceptual approach to jurisprudential questions has largely dominated the field since H L A Hart adopted it in *The Concept of Law*.[4] The framework also has prominent natural law adherents, most notably John Finnis in *Natural Law and Natural Rights*.[5]

A second way to understand the natural law thesis is as a claim about not the *concept* of law held by members of the community or legal officials, but the *nature* of law as a phenomenon. One way to describe this approach is to say that it treats law as a kind, roughly in the sense employed in the natural sciences. A kind is an ontological category that does not depend purely on convention, but can be described in terms of its essential properties. We might call this a *metaphysical* approach to legal theory. This is the understanding of the natural law thesis endorsed by Michael Moore.[6]

The two forms of enquiry described above are far from unrelated, although the connection between them is often left unexplained. Joseph Raz has argued that analysis of the concept of law is best understood as a means of exploring the nature of law.[7] The concept of law, on this view, serves as a bridge between the meaning of the linguistic term 'law' and the nature of law as a social institution. Complete understanding of the concept would involve complete understanding of the phenomena to which it applies. Alexy makes a related point, arguing that concepts are conventional constructs that claim to describe the nature of the world.[8] An enquiry that seeks an adequate concept of law therefore aims at a full understanding of the nature of law.

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3 Compare Michael S Moore, 'Law as a Functional Kind' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (1992) 198-200.

4 H L A Hart, *The Concept of Law* (2nd ed, 1994).

5 John Finnis, *Natural Law and Natural Rights* (1980) ch 1.

6 Compare Moore, above n 3, 204-6. See also Michael S Moore, 'Law as Justice' (2001) 18(1) *Social Philosophy and Policy* 115.

7 Joseph Raz, 'Can There Be a Theory of Law?' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 324, 324-8.

8 Alexy, 'On the Concept and the Nature of Law', above n 2, 290-2.

Likewise, it seems plausible that any enquiry into the nature of law must identify its object by making at least preliminary use of the associated concept. Frank Jackson has made this point about the role of conceptual analysis in metaphysics generally.[9] The difference between the conceptual and metaphysical frameworks is therefore perhaps best regarded as one of emphasis, rather than kind. Nonetheless, I will argue later that whether a natural law argument is couched in conceptual or metaphysical terms can make a difference to the standards used for evaluating it.

A third topic that regularly arises in jurisprudential discussions concerns the *meaning* of the linguistic term 'law'. No natural law theorist, to my knowledge, has ever been exclusively or primarily concerned with this issue: legal theorists are not lexicographers.[10] However, natural law theorists have sometimes advanced claims about the meaning of 'law' alongside claims about the concept or nature of law.[11] In some cases, the questions are explicitly linked. For example, Moore presents his theory of the nature of law as yielding an account of the meaning of 'law' when combined with the Kripke-Putnam direct theory of reference.[12] Nonetheless, it is possible to endorse either a conceptual or metaphysical version of the natural law thesis without also endorsing the thesis as a claim about linguistic meaning.[13]

B. THE NOTION OF A RATIONAL DEFECT

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9 Frank Jackson, From Metaphysics to Ethics: A Defence of Conceptual Analysis (1998) 30-1.

10 Raz has made this point in a number of places. See Joseph Raz, *The Authority of Law* (1979) 41; Joseph Raz, 'The Problem About the Nature of Law' (1983) 21 *University of Western Ontario Law Review* 203, 207; Raz, above n 7, 325. See also Scott J Shapiro, *Legality* (2011) 7-8.

11 See, for example, Moore, above n 3, 204–6; Finnis, above n 5, 6, 9-10, 26-7, 233-7, 363-6.

12 See, for example, Moore, above n 3, 204–6. For the Kripke-Putnam theory of reference, see Saul Kripke, *Naming and Necessity* (1980); Hilary Putnam, 'The Meaning of "Meaning"' (1975) 7 *Minnesota Studies in the Philosophy of Science* 131.

13 It might be thought that if *X* is the concept of law, then *X* must be one meaning of the term 'law'. However, it could be that 'law' has a univocal meaning in a range of contexts (legal, religious, scientific and so on) that is neither exhausted nor partially constituted by the concept we use to connect the term with legal institutions. For example, 'law' in all these contexts might mean something like 'rules of a certain strength, permanence and generality'. The term might then be linked to legal institutions by a more specific concept, but that does not make the concept part of the term's meaning. See Raz, above n 7, 325.

The second ambiguity in the natural law thesis, which is clearly drawn out by NL, concerns what qualifies as a rational defect. This question holds important implications for the robustness of the natural law claim. A wide notion of rational defectiveness would potentially call into question the legal status of a diverse range of different norms or normative systems, while a narrow version would have less fundamental consequences.

On one possible account of rational defectiveness, a norm is rationally defective if it requires a person to perform an action that she is not rationally required to perform; that is, if the norm is not backed by decisive reasons for compliance. Let us call this the *strong* version. According to some leading accounts of legal and political obligation, many positive laws may not be rationally binding.[14] This view of rational defectiveness therefore potentially yields a robust version of the natural law thesis.

Importantly, the strong view does not hold that a positive law must be backed by decisive reasons *independently of its legal status* to avoid being rationally defective. Part of what makes a norm rationally binding may be that it is required by law. Some positive laws are backed by independent moral or prudential reasons for compliance, but others gain rational force at least partly by supplying subjects with reasons they would not otherwise have. A positive law that is backed by reasons in either of these ways will not be rationally defective on the strong view.[15]

On another possible view, a norm is rationally defective only if it requires a person to perform an action that she is morally obliged not to perform; that is, if the action is morally prohibited. Let us call this the *weak* construction, since it yields a less robust version of the natural law thesis. According to the weak view, norms are not rationally defective whenever they lack decisive reasons for compliance, but only when they require injustice. We can summarise these alternative constructions as follows:

> R^S: *N* is rationally defective if it requires a person *A* to perform an action that *A* is not rationally required to perform.

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14 See, for example, Raz, *The Authority of Law*, above n 10, ch 12; A John Simmons, *Moral Principles and Political Obligations* (1979); Leslie Green, *The Authority of the State* (1990); M B E Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale Law Journal* 950.

15 A positive legal norm that requires a person to have two witnesses in order to be legally married will therefore not be rationally defective on the strong view, assuming that the legal status of the requirement (along with the legal and social benefits of having one's marriage legally recognised) supplies sufficient reason to comply with it.

> R^W: *N* is rationally defective if it requires *A* to perform an action that *A* is morally obliged not to perform.

C. LEGAL INVALIDITY AND DEFECTIVENESS

A third issue arising from the natural law thesis concerns the meaning of *invalid or defective as law*. On one possible view, a rational defect in a norm renders it legally invalid, such that it is not properly regarded as a law at all. Let us call this the *strong* view of the idea. On another possible account, a rational defect in a norm renders it merely legally defective. Let us call this the *weak* view. We might summarise the distinction as follows:

> L^S: A rational defect in *N* renders it legally invalid.
>
> L^W: A rational defect in *N* renders it legally defective.

This kind of distinction has been drawn by a number of natural law authors. Finnis argues in *Natural Law and Natural Rights* that the best construction of the natural law thesis is that a rationally defective standard still counts as law, but only in a weak or qualified sense of the term.[16] He therefore endorses the weak view outlined above. More recently, the distinction has been noted by Murphy, who uses it to differentiate strong and weak versions of the natural law thesis.[17] Murphy, like Finnis, favours the weak construction, although he takes the strong alternative seriously. Other natural law authors, such as Moore, have defended the strong view.[18]

Alexy, meanwhile, adopts a hybrid position. He distinguishes what he calls classificatory and qualificatory connections between law and morality.[19] This corresponds to the dichotomy between invalidity and defectiveness employed above. He then argues that a rational defect in a norm may have either classificatory or qualificatory implications for its legal status, depending on whether it crosses a threshold of 'extreme injustice'.[20] He therefore combines the strong and weak views on this issue.

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16 Finnis, above n 5, 363-6. For criticism of Finnis's view, see Jonathan Crowe, 'Five Questions for John Finnis' (2011) 18 *Pandora's Box* 11, 16-17.

17 Murphy, above n 1, ch 1. See also Moore, above n 3, 198.

18 Moore, above n 3, 198. See also Philip Soper, 'In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All' (2007) 20 *Canadian Journal of Law and Jurisprudence* 201; Crowe, above n 16, 16-17.

19 Alexy, *The Argument from Injustice*, above n 2, 26; Alexy, 'On the Concept and the Nature of Law', above n 2, 289.

20 Alexy, 'The Dual Nature of Law', above n 2, 176-7; Alexy, 'On the Concept

The strong and weak positions outlined above are primarily ontological claims about whether something counts as non-defective law. However, it is natural to view them as holding practical implications. The strong claim that a rationally defective norm is legally invalid may seem to imply that legal actors should recognise that the norm is not law and decline to follow it. Similarly, the weak view that a rationally defective norm is legally defective might seem to suggest that the norm loses some, but not all, of the weight it would otherwise hold in legal deliberation. It might be thought, on this basis, that the strong view necessarily yields more robust practical outcomes than the weak view. However, this assumption should be resisted.

Natural law authors would typically agree that a norm that is legally invalid or defective due to a rational defect loses at least some of its weight in legal decisions. However, the extent to which such a norm remains salient depends primarily on the nature and extent of its rational defectiveness, rather than its precise legal status. Alexy's view entails that a norm's level of rational defectiveness determines whether it is legally invalid or merely legally defective, but most authors separate the two issues. Finnis, for example, makes it clear that some positive norms confer no practical obligations, even though they still count as law in a weak sense of the term.[21]

The two distinctions that I have so far outlined, concerning the meaning of rational defectiveness and the notion of legal invalidity or defectiveness, together yield four possible versions of NL:

> NL^1: *N* is legally invalid if it requires *A* to perform an action that *A* is not rationally required to perform. (R^S + L^S)
>
> NL^2: *N* is legally invalid if it requires *A* to perform an action that *A* is morally obliged not to perform. (R^W + L^S)
>
> NL^3: *N* is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform. (R^S + L^W)
>
> NL^4: *N* is legally defective if it requires *A* to perform an action that *A* is morally obliged not to perform. (R^W + L^W)

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and the Nature of Law', above n 2, 287-90.

21 Finnis, above n 5, 359-61.

These positions all figure in the recent literature on natural law theory. As we will see in more detail later in this article, Moore argues for NL^1, while Finnis and Murphy favour NL^3. Alexy, on the other hand, endorses NL^2 with respect to laws that exceed a threshold of 'extreme injustice' and NL^4 with regard to laws that fall below that threshold.[22] Alexy's view illustrates that the versions of NL set out above are not all mutually exclusive. Various combinations are possible. As a further example, it would be possible to consistently defend both NL^2 and NL^3, holding that a norm is legally invalid if it requires *A* to do something *A* is morally obliged not to do and legally defective if it requires *A* to do something *A* is not rationally required to do.

D. NORMS AND NORMATIVE SYSTEMS

The reference to a *norm or system of norms* reveals a fourth ambiguity in the natural law thesis. The thesis can be understood as a claim about the impact of rational defects on the legal status of individual norms or as a claim about the effect of rational defects on the legal status of overall normative systems. The latter claim has further variations, depending on what proportion (one, some, many, all) of the norms that comprise a system must be rationally defective for the system as a whole to lose its legal status.

For example, the thesis called NL^3 in the previous section could be understood in the following ways:

> $NL^{3(I)}$: An individual norm is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.
>
> $NL^{3(S)}$: A normative system is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.
>
> $NL^{3(P)}$: A normative system is legally defective if a certain proportion (some, many, all) of the norms that comprise it require *A* to perform an action that *A* is not rationally required to perform.

The other versions of NL identified previously can be interpreted in similar ways. Once again, it bears noting that the resulting claims are not all mutually exclusive. For example, one might combine NL^1 or NL^2 about norms with NL^3 or NL^4 about normative systems. This would entail that a rational defect in a specific norm renders the norm legally invalid and the system of which it is a part legally

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22 Alexy, 'The Dual Nature of Law', above n 2, 177; Alexy, 'On the Concept and the Nature of Law', above n 2, 287-8.

defective. This seems to be Alexy's view of legal systems containing one or more extremely unjust norms: the norms are legally invalid ($NL^{2(I)}$), while the system is legally defective ($NL^{4(S)}$).[23]

2. Three Routes to the Thesis

Natural law theorists have offered a variety of arguments for their preferred versions of the natural law thesis. The most prominent arguments can be placed into three categories. The first route presents law as a *hermeneutic concept*: its role is to explain and justify normative social practices, which it can only do if it holds moral force. The second treats law as a *functional* concept or kind: its distinctive function is to direct human action through a particular method or towards a specific end, so anything that fails in that function fails as law. The third treats law as a form of *speech act*, which is deficient unless it lives up to the claims it presents to its subjects.

The following sections will consider each of these routes in turn. My aim will be to identify the versions of the natural law thesis advanced by the leading proponents of each approach and to ask whether the routes lend themselves better to some versions of the claim than to others. In some cases, I will argue that the version of the claim defended by a specific author is a poor fit with the chosen line of argument. I will also ask whether natural law authors whose views appear to conflict may sometimes be talking at cross purposes, because their arguments target subtly different claims.

A. THE HERMENEUTIC ARGUMENT

Some natural law theorists treat law as a *hermeneutic concept*: its role is to explain and justify normative social practices, which it can only do if it holds normative weight. This is the view set out by Finnis in the opening chapter of *Natural Law and Natural Rights*.[24] We will see below that it also plays a key role in the work of other authors.

Concepts, kinds and terms

Finnis's argument for the natural law thesis centres on an account of the focal meaning of 'law'.[25] His discussion of this issue is framed largely as a response to the legal positivist theories of Hart and Raz. Hart famously criticises earlier legal positivists, notably John Austin, for not paying sufficient attention to the 'internal view point of view': the perspective of

23 Alexy, *The Argument from Injustice*, above n 2, 66-8.
24 Finnis, above n 5, ch 1.
25 Ibid 9-11.

those who consider themselves bound by legal norms.[26] Finnis endorses this criticism and turns it back on Hart, attacking the thinness of his normative outlook.[27]

Finnis, then, accepts Hart's methodological focus on law as a normative social concept. This gives his natural law theory a primarily conceptual emphasis. Finnis also offers some remarks about the linguistic meaning of 'law'. We have seen that Finnis's hermeneutic argument centres on an appeal to the focal meaning of 'law'. The focal meaning of 'law' is a philosophical refinement of the ordinary meaning of 'law'.[28] In relation to the focal meaning of 'law', Finnis endorses the following claim:

> $NL^{3(FM)}$: The focal meaning of 'law' is such that *N* is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.

This version of the natural law thesis is not, however, a claim about the everyday meaning of the term 'law'. It is best viewed as a conceptual claim, since the focal meaning of 'law' represents Finnis's gloss on the social concept of law, rather than an attempt to capture the term's linguistic meaning. $NL^{3(FM)}$ is therefore equivalent to the following:

> $NL^{3(C)}$: The concept of law is such that *N* is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.

Indeed, Finnis's comments on the ordinary meaning of 'law' suggest that he doubts whether it consistently tracks the natural law thesis. His view is rather that the term 'law' is used in multiple senses, at least some of which can properly be used to pick out rationally defective norms.[29] He can therefore be understood as making the following claim, which is logically consistent with the conceptual thesis outlined above:

> $\sim NL^{(M)}$: The linguistic meaning of 'law' is such that a rationally defective norm or normative system may nonetheless still be 'law'.

Rational defectiveness

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26 Hart, above n 4, 89-91.

27 Finnis, above n 5, 11-18. For a critique of Finnis's argument, see Murphy, above n 1, 26-8. For a response, see Jonathan Crowe, 'Natural Law in Jurisprudence and Politics' (2007) 27 *Oxford Journal of Legal Studies* 775, 782-5.

28 Finnis, above n 5, 9-10, 277, 279.

29 Ibid 6, 9-10, 26-7, 233-7, 363-6. Compare Hart, above n 4, 81.

Let us turn next to the issue of rational defectiveness. The question here is what understanding of the natural law thesis is required for the concept of law to play its hermeneutic role. The weak understanding of rational defectiveness discussed above entails that a norm's legal status is affected if it requires injustice. However, this view threatens to both underexplain and underjustify law's normative significance.

In order for law to fulfil its role as a set of binding social rules, people must have reason to do as law requires. This demands more of law than merely that it refrains from requiring people to commit wrongs. People must have positive cause to comply with its dictates. The hermeneutic argument therefore fits most naturally with a strong understanding of rational defectiveness. Indeed, this is clearly Finnis's position.[30]

Legal invalidity or defectiveness

I noted in the first part of this article that Finnis endorses a weak conception of legal invalidity or defectiveness. Norms or systems that have some features of the central case of law (that is, the case picked out by the focal meaning of 'law') but lack others are law only in a weak sense. This analysis applies, for example, to positive laws that are not rationally binding. Finnis therefore holds the following version of the natural law thesis:

> NL^3: *N* is legally defective if it requires *A* to perform an action that *A* is not rationally required to perform.

The hermeneutic argument seems to lend itself to a weak view of legal defectiveness. The point of the argument is to construct a theory of the concept of law that explains and justifies its normative significance. It considers the attributes of law that are necessary to explain the way it is understood by holders of Hart's 'internal point of view'.[31] Any plausible theory of this sort seems bound, like Finnis's, to refer not only to the moral point of legal rules but also to their social sources and the sanctions associated with them. This links naturally with the idea that legal enactments that fail to confer obligations are nonetheless laws in a sense. They possess some, but not all, of the key attributes laws are conventionally taken to have.

Norms and systems

30 See, for example, Finnis, above n 5, 276-7.

31 Hart, above n 4, 89.

We have seen that Finnis's hermeneutic argument assesses the legal status of institutions by their correspondence to an ideal type.[32] It therefore admits of degrees of legal defectiveness: a norm or normative system may be more or less defective depending on the extent to which it promotes the common good.[33] A normative system that contains one rationally defective norm will therefore be defective as law, but a system that contains many defective norms will depart even further from the ideal type.

This is arguably a necessary feature of the hermeneutic view, for similar reasons to those canvassed in relation to legal defectiveness. A positive legal system that generally lacks rational force will still exhibit some features of the central case of law. It will therefore qualify as law in at least a weak sense. The hermeneutic view can therefore establish a rational test for legal defectiveness, but it cannot obviously sustain the view that a system that is rationally defective can become, by that fact, legally invalid. This is because the reasonableness of law is only one part of the apparatus the theory employs to explain and justify the normative role of the concept.

B. THE FUNCTIONAL ARGUMENT

Some natural law theorists have argued that law is a *functional* concept or kind: its characteristic function is to direct human behaviour either through a distinctive method or towards a distinctive end, so anything that fails in that function is defective as law. Moore and Lon Fuller both advance versions of this argument.[34] Murphy also endorses this approach, as well as supporting the speech act strategy discussed below.[35]

The versions of the functional argument advanced by these authors differ somewhat in their details. For example, they give different accounts of law's distinctive function. Moore argues that law's function is to coordinate action in the name of some distinctive good, perhaps (although he equivocates on this) what natural law theorists often call the common good.[36] Fuller contends that law's function is to direct human action in accordance with rules.[37] Finally, Murphy argues that one of law's

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32 Finnis, above n 5, 9.
33 Compare ibid 279-80.
34 See, for example, Moore, above n 3; Lon L Fuller, *The Morality of Law* (rev'd ed, 1969).
35 Murphy, above n 1, 29-36.
36 Moore, above n 3, 223-4.
37 Fuller, above n 34, 96.

characteristic functions is providing dictates backed by decisive reasons for action.[38]

Concepts, kinds and terms

Are the above authors primarily making claims about the concept of law, the nature of law or the meaning of 'law'? Moore provides the most direct answer. He makes it clear his argument is about law as a kind, not concepts or linguistic meanings. According to Moore, the natural law thesis is 'metaphysically necessary', in the sense that it is 'only dependent on how the world is and not upon the conventions of human language use'.[39]

Murphy's position is more complex. He notes the distinction between conceptual and metaphysical arguments in jurisprudence, but goes on to question the exclusivity of these approaches.[40] An adequate hermeneutic account of the concept of law, Murphy argues, must also be capable of playing a role in a descriptive theory of legal institutions. The two strategies should therefore be viewed as mutually supporting. Murphy then goes on, correctly in my view, to note that neither the hermeneutic nor the metaphysical strategy has necessary implications for linguistic meaning.[41]

How, then, does Murphy understand his own methodological outlook? The answer seems to be that he offers his account of law as playing both a conceptual and a metaphysical role. He rejects Finnis's version of the hermeneutic strategy as unmotivated,[42] but he does not mean to deny that his own account of law has hermeneutic force. At the same time, he seeks to provide a theory of law that can play a useful role in social scientific analyses of legal institutions. Murphy therefore appeals to two intertwined explanatory standards in motivating his line of argument.

Fuller, on the other hand, does not directly consider the distinction between conceptual, metaphysical and linguistic arguments. He does, however, make some comments that suggest he understands his argument as falling into the second category. For example, he stresses at one point that he is not offering a 'conceptual model' of law akin to Hart's theory, but rather is describing 'social reality'.[43] Fuller does not identify the central point of law by examining conventional understandings, but rather by examining law's structure as a social institution. His methodology is

38 Murphy, above n 1, 32-6.
39 Moore, above n 3, 200.
40 Murphy, above n 1, 16-17.
41 Ibid 17-18.
42 Ibid 26-8.
43 Fuller, above n 34, 219.

therefore similar to that adopted by Moore, although it is far less clearly expressed.

There is also reason to think that Fuller does not intend to endorse a linguistic version of the natural law thesis. For example, he notes in one passage that the term 'law' is often used to mean 'any official act of a legislative body', regardless of its procedural defects.[44] In a later passage, he argues that ordinary applications of the term 'law' do not admit of degrees, but shortly goes on to dismiss the relevance of this type of linguistic analysis to enquiries into law's distinctive structure and functions.[45]

Rational defectiveness

A common strand in functional arguments is that law has the characteristic function of directing human action in some distinctive way. If the function of law is to direct human action in some way, this suggests a putative legal norm is likely to be defective if it does not supply adequate reason to do as it requires. In other words, it is defective if it directs a person to perform an action she is not rationally required to perform. A person might lack adequate reason to comply with a norm even though it does not require her to break a moral obligation. The functional argument therefore seems most consistent with the strong understanding of rational defectiveness:

> M^S: *N* is rationally defective if it requires a person *A* to perform an action that *A* is not rationally required to perform.

As it happens, Moore and Murphy both construe the notion of rational defectiveness in this way.[46] Fuller's view is more elusive, but a good case can be made that he, too, adopts the understanding of rational defectiveness outlined above. Fuller argues that the legal validity of a norm depends upon its minimal compliance with a series of procedural standards. These procedural standards are not guarantors that the norm will be morally sound, but he argues they tend to guard against serious injustice.[47]

It might appear at this point that Fuller adopts a weak conception of rational defectiveness, according to which a norm is rationally defective only if it results in injustice. However, this is too weak, for it is possible for a norm to fail Fuller's procedural test without resulting in a wrong. The

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44 Ibid 91-2.

45 Ibid 122.

46 Moore, above n 3, 197; Murphy, above n 1, 8.

47 Fuller, above n 34, ch 4; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 648-57.

discouragement of unjust laws may be a consequential benefit of Fuller's standard of rational defectiveness, but it does not lie at the heart of his theory. Rather, Fuller argues his procedural test for legal validity is necessary if law is to fulfil its central purpose of directing human action.

Fuller's argument, then, begins with the premise that law's characteristic purpose is to enable humans to order their behaviour. A norm that fails to satisfy certain procedural conditions will be difficult or impossible to follow and will therefore fail in this characteristic aim. A putative legal norm is rationally defective, for Fuller, if its procedural defects mean it cannot be followed. This is close to the strong sense of moral defectiveness discussed above: a procedurally defective norm may be intended by its enactors to guide human behaviour, but it fails to supply reasons for action.

The main question for Fuller here is why he confines his focus to procedural defects.[48] What of norms that fail to direct human action for other reasons, such as failing to comply what Fuller calls the 'external morality' of law?[49] The foundations of his view, however, seem to be closer to the strong view of rational defectiveness than the weak version. The leading proponents of the functional argument for the natural law thesis are therefore more or less united in their approach to this issue.

Legal invalidity or defectiveness

We saw previously that Moore endorses the strong view of legal invalidity or defectiveness, according to which rationally defective norms are legally invalid.[50] Murphy, by contrast, argues for the weak approach, on which rationally defective norms are merely legally defective.[51] Does the functional argument give reason to prefer either view? Murphy defends his stance by appealing to other examples of entities that fail in their distinctive function.[52] He offers an alarm clock as a plausible example of a functional kind. What, then, is the status of broken alarm clocks that fail to go off in the morning? Murphy argues that they are still alarm clocks, albeit defective ones.

If Murphy were offering a purely hermeneutic argument here, his analysis would be persuasive. The social concept of an alarm clock makes

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48 Compare Hart, above n 4, 207; H L A Hart, 'Book Review: *The Morality of Law*' (1965) 78 *Harvard Law Review* 1281, 1288.

49 Fuller, above n 34, 44-5.

50 Moore, above n 3, 198.

51 Murphy, above n 1, ch 1.

52 Ibid 57.

reference to its distinctive function, but a broken alarm clock is still recognisable as an instance of the concept. We might use Finnis's terms here: a broken alarm clock falls outside the focal meaning of 'alarm clock'. It has, nonetheless, some of the essential features an alarm clock is conventionally taken to have, so it remains an alarm clock in a weak or partial sense.

However, Murphy is not offering a solely hermeneutic argument. He is also making a claim about the nature of law. His argument seems weaker when considered in this light. He asserts that 'a broken alarm clock is an alarm clock; it is just a defective alarm clock'.[53] However, in the absence of further argument, this has limited weight. Moore could concede that people naively believe that broken alarm clocks are alarm clocks, but argue this naive view is false: the best available theory of the structure and function of alarm clocks shows a broken alarm clock is no alarm clock at all.[54]

Murphy therefore fails to show that a metaphysical version of the functional argument does not support a strong view of legal invalidity. He does give hermeneutic reason to think that we should not endorse the strong view. However, as we have seen, an adherent of Moore's position might accept that the weak understanding of legal defectiveness accurately captures the social concept of law, but nonetheless contend that a rationally defective norm is, in metaphysical terms, no law at all.

We saw previously in this article that the conceptual and metaphysical approaches are best viewed as differing in emphasis, rather than kind. This is because conceptual analysis in jurisprudence commonly has the ultimate aim of uncovering essential properties of law, while metaphysical analysis of law must at least start with the associated concept. This continuity between the two approaches suggests there is at least a weak presumption against holding the view described immediately above. If an account of the concept of law is hermeneutically justified, then good reason must be given for rejecting that theory at a metaphysical level.

The underlying point here is that metaphysics needs compelling reasons for rejecting commonsense. This presumption is widely accepted. As David Lewis puts it, 'a credible theory must be conservative': it loses

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53 Ibid.

54 Murphy also notes that to break one's arm in a skiing accident 'is not to lose an arm in a skiing accident': ibid. However, this elides some complex issues about the distinctive function of an arm. An arm that, although temporarily broken, is still part of a healthy and functioning body has arguably not ceased to fulfil its distinctive function. The example therefore tells us little without more argument.

plausibility if it rejects too much of what we previously believed.[55] However, the presumption can be overcome by other desiderata of metaphysical theories, such as simplicity, coherence and explanatory power. Lewis's own metaphysics notoriously embraces the startling thesis of modal realism (the existence of an infinite plurality of worlds) by invoking its explanatory advantages in a range of different philosophical contexts.[56]

Murphy, then, might charge that Moore fails to adduce sufficient reasons for rejecting the weak view of legal defectiveness, given its hermeneutic appeal. However, the objection is far from decisive. Moore advances his view in the context of a general theory of functional kinds. He claims that the best theory of a range of objects and practices, such as mowers, hearts, sleep and law, identifies their essence by reference to their function.[57] Moore can therefore be read as arguing that any hermeneutic advantages to regarding rationally defective norms as laws are outweighed by the economy and unity of his overall theory. The resolution of this issue depends on weighing the explanatory merits and drawbacks of each account.

Fuller, meanwhile, endorses versions of both the strong and weak views. On his view, a norm or system that exhibits 'total failure' in one of its procedural dimensions is legally invalid;[58] norms or systems that are procedurally defective without exhibiting total failure are merely legally defective.[59] This scheme makes sense within Fuller's theory. A norm or system that totally fails to direct human action in accordance with rules, due to procedural breakdown, is no law at all. A norm or system that directs human action poorly, due to procedural defects, is thereby rendered legally defective. The reason, however, why norms and systems can direct human action despite procedural defects is that they retain their reason giving character. The question therefore arises, once again, as to why Fuller fails to emphasise factors other than procedural issues that may prevent law from fulfilling its function.

Norms and systems

What of the issue of norms and normative systems? The functional argument potentially works at both levels: it can be an argument about the function of particular norms or the function of normative systems. We noted

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55 David Lewis, *On the Plurality of Worlds* (1986) 134.
56 Compare ibid 133-5.
57 Moore, above n 3, 208-13.
58 Fuller, above n 34, 39.
59 Ibid 122, 198-200.

above, however, that the systemic claim itself admits of two different versions. The first holds a normative system to be legally defective or invalid if any of the norms within it are rationally defective, while the second holds a system to be legally defective or invalid if a proportion (some, many, all) of the norms that comprise it are rationally defective.

Fuller's view is instructive in this regard. We have seen that Fuller provides a distinctive (albeit flawed) account of when a putative legal norm fails in its moral function. He then goes on to apply his theory to the existence conditions of legal systems. However, Fuller does not claim that a system is legally invalid as soon as a single norm fails his procedural test. Rather, it is only when there is a 'total' or 'drastic' failure to respect the procedural standards that the existence of a legal system is called into question.[60] Moore takes an analogous view, suggesting that a 'sufficiently unjust system' will lose its legal status.[61] However, he does not discuss the issue at length.

There is a connection worth noting here between the issue of legal invalidity or defectiveness and the different systemic versions of the natural law thesis. The view that a normative system that fails in its function becomes legally invalid suggests there must be a point at which the system ceases to hold legal status. Legal defectiveness, by contrast, potentially admits of degrees. A normative system (or, indeed, an individual norm) might be more or less legally defective depending on its level of moral defectiveness. This, as we have seen, is Fuller's view in relation to legal norms and systems that partially fail in their function of guiding human action.

C. THE SPEECH ACT ARGUMENT

A third group of theorists, including Alexy and Murphy, has argued that legal norms are a form of *speech act*, which is invalid or defective unless it lives up to the claims it makes on its subjects.[62] Alexy and Murphy suggest different versions of this argument. Alexy argues that all legal systems necessarily claim moral correctness; a norm or system that fails to make good on this claim is therefore either invalid or defective as law, depending on the level of injustice it involves.[63] Murphy, by contrast, portrays the act

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60 Ibid 39-41.

61 Moore, above n 3, 224.

62 Alexy, *The Argument from Injustice*, above n 2; Alexy, 'The Dual Nature of Law', above n 2; Alexy, 'On the Concept and the Nature of Law', above n 2; Murphy, above n 1, 37-56.

63 Alexy, 'The Dual Nature of Law', above n 2, 177; Alexy, 'On the Concept and the Nature of Law', above n 2, 287-8.

of legal enactment as a form of demand. He argues that a demand that is not backed by decisive reasons for action is defective as an illocutionary act, so a law that is not backed by decisive reasons is defective as law.[64]

Concepts, kinds and terms

Murphy's methodological strategy was considered in the previous section. We saw that he makes both a hermeneutic and a metaphysical argument. He presents these strategies as mutually supporting, which leads him to draw on both routes at various points in his work. However, this weakens his ability to directly counter competing metaphysical views that place less weight on hermeneutic considerations.

Alexy also sees his arguments as playing both a conceptual and a metaphysical role. He argues that conceptual analysis in jurisprudence has a twofold character: it attempts to both capture conventional understandings of law and generate an adequate theory of law's nature.[65] The substance of Alexy's argument, however, heavily stresses hermeneutic factors. He draws a distinction between two perspectives: the participant's perspective and the observer's perspective.[66] The former perspective is that of a person who lives within a legal system and has a direct interest in its rulings. The latter is the perspective of one who is not interested in the correctness of a legal system's decisions, but merely wishes to describe how it operates.

Alexy's argument for the natural law thesis is conducted from the participant's standpoint. Indeed, he argues that, from the observer's perspective, legal positivism is true.[67] It is only from the participant's perspective that law issues claims to correctness. It therefore appears that Alexy is advancing a primarily hermeneutic argument. The natural law thesis forms part of the best account of the concept of law, because it explains and justifies the hold legal norms have on their subjects.

Rational defectiveness

Alexy and Murphy differ in their understandings of rational defectiveness. We saw above that Murphy adopts the strong view of the notion, according

64 Murphy, above n 1, 44-7.

65 Alexy, 'On the Concept and the Nature of Law', above n 2, 290-2.

66 Alexy, *The Argument from Injustice*, above n 2, 25; Alexy, 'On the Concept and the Nature of Law', above n 2, 297. As Alexy notes in the former passage, this mirrors Hart's distinction between internal and external points of view.

67 Alexy, *The Argument from Injustice*, above n 2, 37; Alexy, 'On the Concept and the Nature of Law', above n 2, 297; Alexy, 'An Answer to Joseph Raz', above n 2, 45.

to which a norm is rationally defective if it requires a person to perform an action she lacks decisive reason to perform. Alexy, on the other hand, views a putative legal norm as rationally defective for the purposes of the natural law thesis only if it involves injustice.[68] This aligns him with what we have previously called the weak view of rational defectiveness:

> M^W: *N* is rationally defective if it requires *A* to perform an action that *A* is morally obliged not to perform.

Now, it is clear why Murphy adopts a strong view of rational defectiveness. He argues that a legal enactment is defective as a demand if it is not backed by decisive reasons. It is less clear why Alexy opts for a weak view. He contends that law claims moral correctness. This claim depicts law as holding legitimate authority over its subjects, since it serves higher ideals or values.[69] However, in order to be satisfied, such a claim would require more than a lack of legally sanctioned injustice; it would require that law is backed by positive reasons for compliance. Alexy's understanding of rational defectiveness therefore seems a poor fit for his argument.

Could there, nonetheless, be a version of the speech act argument that validly incorporates a weak view of rational defectiveness? There is no logical contradiction in such a view. However, it would need to be supported by an appropriate account of the speech acts of legal officials: one that makes it a non-defectiveness condition of legal norms that they refrain from injustice, but not that they are backed by positive reasons for action. Alexy's theory does not supply us with such an account.

Legal invalidity or defectiveness

Alexy and Murphy diverge again on their views of legal invalidity or defectiveness. It is convenient to focus first on individual norms. We have seen that Murphy adopts the weak view of legal defectiveness, according to which a rationally defective norm is legally defective, rather than legally invalid. Alexy's view is more complex. He distinguishes between unjust norms that fall above and below a threshold of 'extreme injustice'.[70] Unjust norms that fall below this threshold are legally defective, while norms that

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68 Alexy, *The Argument from Injustice*, above n 2, 67; Alexy, 'The Dual Nature of Law', above n 2, 177; Alexy, 'On the Concept and the Nature of Law', above n 2, 287-8.

69 Alexy, *The Argument from Injustice*, above n 2, 33-4; Alexy, 'The Dual Nature of Law', above n 2, 168-71; Alexy, 'An Answer to Joseph Raz', above n 2, 49-50.

70 Alexy, 'The Dual Nature of Law', above n 2, 177; Alexy, 'On the Concept and the Nature of Law', above n 2, 287-8. See also Robert Alexy, 'Effects of Defects – Action or Argument?' (2006) 19 *Ratio Juris* 169, 172-3.

exceed the threshold are legally invalid. Alexy argues that this position strikes the right balance between the factual and critical dimensions of law.

Does the speech act argument lend itself more naturally to a weak or a strong understanding of legal invalidity or defectiveness? Murphy supports his preference for the weak view by drawing an analogy between law and other kinds of speech acts.[71] A lie, he argues, is a defective form of the speech act of assertion, but it would be incorrect to claim that a lie is no assertion at all. Similarly, a law that is not backed by decisive reasons for compliance is a defective demand, but it would be wrong to conclude from this that it is no law at all. It is, rather, defective as law.

Murphy's strategy here is similar to the one he adopts in aligning his functional argument with a weak view of legal defectiveness, insofar as it involves an argument by analogy. I argued earlier in this article that while Murphy's functional argument is intended as a claim about the nature of law, its link with the weak view is tightest if we see it as primarily a hermeneutic argument. That was because his rejection of the strong view rested on an appeal to conventional understandings. Murphy's speech act argument, by contrast, is anchored to the weak view through an analogy with the structure of other illocutionary acts. The connection therefore seems to come through at a metaphysical level. A demand not backed by decisive reasons is, it seems, still a demand, albeit a defective one.

Alexy's argument, on the other hand, relies heavily on hermeneutic considerations. His distinction between extremely unjust and less unjust norms is meant to capture what he calls the 'dual nature of law': namely, that law has both a factual dimension, represented by the need for legal certainty, and a critical dimension, represented by its claim to correctness.[72] This appears to be primarily an attempt to describe the concept of law as it is understood from the participant's point of view.

Norms and systems

Alexy presents an unusually complex view of the relationship between rationally defective norms and normative systems. On his view, a putative legal system that does not claim moral correctness is legally invalid.[73] A

71 Murphy, above n 1, 57-8.

72 Alexy, 'The Dual Nature of Law', above n 2, 176-7; Alexy, 'Effects of Defects', above n 70, 172-3; Alexy, 'An Answer to Joseph Raz', above n 2, 52-3.

73 Alexy, *The Argument from Injustice*, above n 2, 34; Alexy, 'The Dual Nature of Law', above n 2, 168-9; Robert Alexy, 'On the Thesis of a Necessary Connection Between Law and Morality' (2000) 13 *Ratio Juris* 138, 144.

system that claims correctness, but fails to satisfy that claim will normally be legally defective, but not completely invalid. This is because even a system with extremely unjust components will usually also contain a sufficient proportion of reasonable norms to prevent the whole system from collapsing. It will only be where the unjust components of the system completely undermine its effectiveness that the system as a whole will be invalidated.[74]

One way of presenting Alexy's view is that making a claim to correctness is an existence condition of a legal system, while fulfilling that claim is normally a non-defectiveness condition of such a system. His view on the first issue is similar, though not identical, to Raz's thesis that law necessarily claims legitimate authority.[75] The question, for present purposes, is whether this aspect of Alexy's position is properly understood as an endorsement of the natural law thesis. There is reason to doubt it.

The natural law thesis holds that law necessarily serves as a rational standard for conduct. However, Alexy's account of the existence condition of a legal system does not invoke the system's rational status. As Alexy himself notes,[76] a legal system could be fundamentally unjust while still claiming correctness. His view that legal systems necessarily claim correctness is therefore not itself a natural law view, just as Raz's account of law's claims does not make him a natural law theorist.[77]

This is not to deny that Alexy holds a version of the natural law thesis with respect to legal systems. As we saw above, he holds that a legal system that fails to satisfy its claim to correctness is legally defective. Meanwhile, individual norms that fail to satisfy the claim may be either legally defective or legally invalid, depending on their level of injustice. The claim to correctness therefore forms a central part of Alexy's natural law argument, but the proposition that law necessarily claims correctness is not enough by itself to sustain the natural law thesis. That requires the further contention that a norm or system is invalid or defective if the claim is not fulfilled.

3. Conclusion

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74 Alexy, *The Argument from Injustice*, above n 2, 66-8.

75 Raz, *The Authority of Law*, above n 10, ch 2.

76 Alexy, *The Argument from Injustice*, above n 2, 33-4.

77 For discussion of the significance of Raz's claim for natural law theory, see Murphy, above n 1, 52-6; Crowe, above n 27, 785-6, 790-1. Compare Jeffrey D Goldsworthy, 'The Self-Destruction of Legal Positivism' (1990) 10 *Oxford Journal of Legal Studies* 449.

This article has sought to do two things. Its first aim was to draw some important distinctions between different possible versions of the natural law thesis. In particular, I argued that proponents of the thesis may differ on their understandings of four key issues: whether the thesis targets conceptual, metaphysical or linguistic conclusions; the notion of rational defectiveness; the idea of legal invalidity or defectiveness; and the application of the thesis to individual norms and normative systems.

The article's second aim was to examine the versions of the natural law thesis endorsed by leading natural law authors and assess whether those versions are a good fit with their respective arguments. In some cases, the arguments of leading theorists are undermined by suboptimal choices about which versions of the thesis to defend. Scholars examining natural law arguments should take care to clarify which version is being advanced, since natural law positions may seem stronger or weaker depending on which claim they are understood as targeting.

On the other hand, my analysis also suggests that different versions of the natural law thesis could work together in an overall account of the natural law position. Many of the versions are not mutually exclusive. It may well be that the most plausible overall account of natural law jurisprudence draws on multiple strategies and targets multiple claims. There is more work to be done by natural law theorists in articulating and defending the most plausible combination of the various possible views discussed above.

Conceptual Foundations of the Universal Declaration of Human Rights: Human Rights, Human Dignity and Personhood

THOMAS FINEGAN[†]

Introduction

This article examines the meaning of three philosophical concepts which lie at the heart of the Universal Declaration of Human Rights (UDHR): human rights, human dignity and personhood. That human rights lie at the heart of the UDHR is obvious, as is the claim that one of the key innovations of the Declaration is its hugely influential emphasis on human dignity. No adequate analysis of the philosophical underpinnings of the UDHR could exclude these concepts. The reason why personhood is examined over other relevant concepts, say equality, is twofold: it has hitherto been largely neglected in this context, and its eidetic similarities with human rights and human dignity provides a novel insight into the content of other concepts often associated with human rights theory, such as universality, inherency and equality. Via an examination of the UDHR text and its drafting history a list of essential characteristics common to all three of these concepts is compiled. These essential characteristics are then employed as an interpretive lens through which to clarify the debates on the precise philosophical meaning of these three concepts. In one part a textual and originalist analysis of the relevant UDHR concept is undertaken to ascertain its essential characteristics, while the proceeding two parts examine the main competing views of the concepts in question to see which coheres best with the version endorsed by the UDHR. In the case of human rights, an analysis of their essential characteristics helps resolve the dispute over whether 'constructivist' accounts of rights or 'natural rights' accounts best cohere with the meaning of human rights as espoused by the UDHR. With

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regards to dignity, its essential characteristics according to the UDHR help clarify whether what shall be termed the 'extrinsic' or 'intrinsic' interpretations of the concept is more relevant to the human rights paradigm. Likewise with personhood and whether the 'Lockean' or 'Boethian' traditions best fit the meaning of the term in the context of the UDHR. Finally, an attempt is made to sketch the relationship between dignity and personhood in the UDHR, a relationship which is at once subtle and also important for the overall coherence and meaning of the UDHR.

An important part of the following analysis will focus on the work of Johannes Morsink. Not only has Morsink written the authoritative work on the drafting of the UDHR, but he has also written extensively on its philosophical underpinnings. While Morsink's scholarship in this area is invaluable, this article takes issue with his arguments in support of moral intuitionism as the true philosophical foundation of the UDHR. By challenging Morsink's views on moral intuitionism this article will hopefully provide a corrective to the one major deficiency of Morsink's human rights scholarship as well as helping to support the thesis on the true UDHR meaning of human rights.

While the following discussion is primarily intended as a contribution to human rights theory, with the section on personhood offering a relatively new line of investigation in this field, it is also hoped that some elements will prove of interest to those operating in other fields. Specifically, the sections on dignity may well be of interest to those working on the sharp increase in prominence of dignity as a constitutional value. The debate concerning the constitutional meaning of dignity in jurisdictions as diverse as the United States, Germany, Ireland, India and South Africa has much to gain from analysis of the UDHR since this document has had and continues to have a profound influence on constitutional values relating to privacy, free speech, equality and autonomy. The sections dealing with personhood have obvious application to the world of bioethics where use of the concept far outweighs sustained reflection on its meaning. As human rights principles are increasingly applied to the sphere of bioethics, witness the recent emergence of human rights biolaw charters, it is safe to predict that interest in concepts that straddle both areas will grow.

A final introductory note is required. Philosophers approaching the meaning of the UDHR may be inclined to think that the preeminent public statement on such an important and contested area for moral philosophy was drafted with a philosophical sophistication becoming of such a topic. Yet while there certainly were moments during the drafting process when philosophical themes were broached and argued over, the fact remains that the drafting process resembled a political auction more than a seminar on moral theory. For the most part those who advocated in favour of human

rights during the drafting process were content to assume the truth of the great human rights tradition without either explicitly defending its axioms or addressing its critics. No doubt the exceptions to this rule (referred to in this article) prove highly instructive for understanding the deep meaning of the UDHR. Yet even the most philosophical of the drafters, Charles Malik, became aware that too much focus on philosophical debate threatened the goal of delivering a political as well as a moral document. Hence this article attempts to clarify the meaning of the UDHR by not only inquiring into its text and drafting history, but also into the competing philosophical genealogies most prominent in debates over rights, dignity and personhood – genealogies that were mostly only tacitly engaged with during drafting but whose very existence the drafting and text of the UDHR undoubtedly presuppose.

1. Essential characteristics of human rights

From the UDHR, and especially its preamble, it is possible to abstract a number of essential characteristics of human rights.[1] The first preambular paragraph to the UDHR tell us that human rights are both *equally possessed* by all members of the human family and *inalienable* to all members of the human family, 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' Equal possession means that no member of the human family has a greater claim to human rights as against any other, whereas inalienability means that human rights can never be taken away from a member of the human family, neither by government, judges nor anyone else.[2]

Linked to the notion that human rights are equally possessed by all human beings is the idea of their *universality.* By June 1948 the commissioners working on the draft declaration had begun referring to it as a 'universal' rather than 'international' declaration. This change in title became official in December 1948 and was of no little significance. René Cassin, who proposed the change, would later write that the edit signified a moral document binding on all concerning the rights of all and at all times,

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1 The following list is not proposed as exhaustive. It is instead a minimal list of the essential characteristics shared by human rights, dignity and personhood within the UDHR. It is possible that one or more of these terms possesses essential characteristics not mentioned in this article, or that all three terms share extra essential characteristics not mentioned in this article.

2 'Inalienable' is almost synonymous with the term 'imprescriptible', the only difference being that in the present context the former debars both the giving and taking away of rights, whereas the latter is confined to the impossibility of the taking of rights only.

instead of a political document by governments and for governments only for so long as they felt bound by it.[3] By interpreting the UDHR as a whole, the word 'universal' in its title can be said to have a triple, mutually re-enforcing sense: universally binding due to the universal truth of universal human rights, a sense reinforced by the preamble's invocation of the UDHR 'as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance....'

Article 2 of the UDHR affirms that human rights are *irreducible to accidental characteristics or distinctions* of the human being by proclaiming that everyone is entitled to them regardless of their 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[4] The equal possession of human rights by the entire human family, the inalienability and universality of human rights, and the fact that human rights are irreducible to accidental characteristics of the human being, all point to the final essential characteristic of human rights: that they are *inherent in human nature*. Article 1 of the UDHR asserts that 'All human beings are born free and equal in dignity and rights.' The key term indicative of the inherency of human rights in human nature is 'born'. Article 1 began as a joint French and Philippine proposal which unmistakably acknowledged the 1789 French Declaration of the Rights of Man and the Citizen's own Article 1, 'Men are born and remain free and equal in rights.' An examination of the drafting process reveals that delegates understood the term 'born' to refer to human rights as inherent in the human being rather than as conferred by an exterior organ.[5] Thus 'born' in Article 1 has a metaphysical and moral meaning, rather than a socio-economic[6] or a socio-physical[7] meaning.

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3 René Cassin, *La Pensée et l'Action* (1972) 114.

4 Inseparable from the equality, universality and irreducibility of human rights is the mention of the term 'everyone' throughout the UDHR, a term which was intended to be taken literally. See Johannes Morsink, 'Women's Rights in the Universal Declaration' (1991) 13 *Human Rights Quarterly* 229, 255-6.

5 See Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent* (1999) 290-5.

6 Which the word 'birth' has in Article 2 of the UDHR.

7 Birth is a social as well as a physical event. Logically, human rights cannot inhere in the human being *qua* human being if they are literally only endowed at birth; nor do they belong to 'all human beings' if they exist only from birth onwards.

But what is the nature of the human being in whom human rights are said to inhere? Article 1 further states that human beings 'are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' The principal defender of the inclusion of the phrase 'endowed with reason and conscience' in the drafting process was the Lebanese Charles Malik, a student of both Martin Heidegger and Alfred North Whitehead, and a member of the core group of drafters. According to Malik, it was important that the qualities which essentially characterised man were mentioned somewhere in the Declaration.[8] Hence human rights inhere in human nature, a nature which is characterised by reason and conscience. An important clarification is necessary: many of Malik's fellow drafters were uneasy about specifying the essential characteristics of human nature as they were well aware of how adept the Nazi ideology was of creating the category of sub-human for those they did not deem to fit the requirements for being 'fully' human.[9] Thus the correct way to understand 'reason and conscience' in Article 1 is as potential in human nature rather than as actual in human experience. Otherwise 'all human beings' would not be 'endowed with reason and conscience' and the door would be left open for a repeat of Nazi eugenics and experimentation involving the handicapped, terminally ill, comatose and children. As a Thomist philosopher Malik would have had understood 'reason and conscience' in the inclusive sense: essential to each and every human being as a potential without always being actual in each and every human being.[10]

2. Can constructivism explain the essential characteristics of human rights?

These essential characteristics of human rights in the UDHR (*equal* possession by all human beings, *inalienability, universality*, *irreducible to*

8 U.N. Doc. E/CN.4/SR.50/p. 13.

9 See Morsink, above n 5, 296-9.

10 Of note also is the fact that Malik was responsible for the insertion of the terms 'inalienable' and 'inherent' into the first preambular paragraph of the UDHR, 'A Conversation with Habib Malik about the Crucial Role of his Father' <http://www.lebaneseforces.com/malikconversationwithson.asp> accessed 7 March 2012. As such, this lends further support to the conclusion that he viewed the natural kind (ie human being) and its essential potentialities, rather than the actualisation of the potentialities of the natural kind, as relevant to dignity and rights in the context of the UDHR. For inherent dignity and inalienable rights to apply to 'all members of the human family' they would have to apply universally to all individual human beings and not just to the activities of paradigmatic members of the human family. Also, dignity cannot be inherent nor can rights be inalienable if they rely on a contingent activity for their instantiation, instead of being sourced in the subject (substance) upon whom any contingent activity depends.

accidental characteristics of the human being, and *inherent in human nature* – which is a rational nature capable of conscience) are important for determining which philosophical orientation provides the true theoretical underpinning of the UDHR, and thus international human rights law generally. Broadly speaking, attempts to theoretically justify human rights can be placed in two categories: constructivist accounts and natural rights accounts.[11] This is not to say that all constructivist accounts are methodologically similar (or likewise that all natural rights accounts are methodologically similar), as proponents of constructivism hail from ideological camps as diverse as comprehensive liberalism and critical theory, or that they are equally as plausible as each other. It is to say that constructivism and natural rights, both broadly construed, are the two main alternatives when it comes to justifying human rights and that the explanatory successes of one usually points to the concomitant failures of the other.

Beginning with constructivism, its core relevant claim is that human rights are the products of a process of linguistic, social and/or political agreement (or convention, custom, construction etc.) rather than objective moral truths about human beings and human activity. Constructivist accounts of human rights have a number of prominent and well-respected advocates. According to Richard Rorty, a leading exponent of analytic post-modernism, human rights are nothing more substantial than a cultural phenomenon, '...the question whether human beings really have the rights enumerated in the Helsinki Declaration is not worth raising ... nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, cultural facts.'[12] For John Rawls, one of the most influential liberal theorists of the twentieth century, human rights are a political doctrine compatible with the politics of 'liberal peoples' and 'decent hierarchical peoples', but which are not based on a particular comprehensive moral view of the nature of the human person.[13] Jürgen Habermas, probably the most prominent critical theorist of the

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11 Others have adopted more extensive categories for classifying alternative approaches to human rights theory. For example, Marie-Bénédicte Dembour suggests four categories: 'natural scholars', 'deliberative scholars', 'protest scholars' and 'discourse scholars' in Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' (2010) 32 *Human Rights Quarterly* 1. According to the schema adopted in this article, natural scholars clearly fit within natural rights accounts, whereas deliberative and discourse scholars fit within constructivist accounts. Protest scholars may fit with either, depending on their theoretical convictions, as their main interest is with the practical task of redressing injustice.

12 Richard Rorty, 'Human Rights, Rationality, and Sentamentality' in *Truth and Progress* (1998) 170.

13 John Rawls, *The Law of Peoples* (1999) 78-82.

twentieth century, considers that all systems of rights, whether human rights or any other kind, are sourced in democratic participation via rational discourse directed towards comprehensive agreement. Aside from 'the discourse principle, which is built into the conditions of communicative association in general', nothing else is prior to the 'citizens' practice of self-determination', including natural or human rights.[14] Finally, Jack Donnelly, a renowned human rights theorist, defends what he calls 'functional, international legal, and overlapping consensus universality', but argues that 'anthropological and ontological universality are empirically, philosophically or politically indefensible.'[15] For Donnelly, the former group are only contingently and relatively universal;[16] their universality is not a statement of objective moral truth but of widespread agreement in the social, political and legal value of human rights (however well-intentioned or otherwise such agreement among the various relevant actors may be).

How compatible is constructivism with the essential characteristics of human rights outlined earlier in this article? Constructivism is a thoroughly pragmatic approach to moral and legal theory, and is unable to accommodate the irreducibly metaphysical and moral realist characteristics of human rights as articulated in the UDHR. Due to their philosophical presuppositions, constructivists cannot logically accept the principle that human rights are actually, independent of consensus, *inherent in human nature* (which is a necessarily *rational nature*). Not only would they see understandings of human nature as themselves constructs, but inherence as a concept loses all meaning if it is contingent upon social, political or cultural consensus for its actualisation. The same holds true for the rest of the outlined essential characteristics of human rights. Human rights as *inalienable*, *irreducible to accidental characteristics of the human being*, *equally possessed* and *universal* are not intended as constructs but as objective moral truths knowable by reason. Human rights could not be inalienable if they were contingent upon political or judicial consensus: a breakdown in consensus in human rights, or the forming of a consensus hostile to human rights would then deprive human beings of their hitherto 'inalienable' human rights. Human rights could not be universally existent and binding if they were founded upon society or culture: they are not accepted by all societies and cultures today, never mind 300 years ago. Even Donnelly's procedural universality is limited to the customary law

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14 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 128. Habermas' 'discourse principle' states that 'just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses', ibid 107.

15 Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, 281.

16 Ibid 289.

sense of universality, in that none of what he calls 'international legal' universality, 'functional' universality or 'overlapping consensus' universality are universal in either of the trans-historical or moral realist senses. Donnelly's affirmation of human rights universality is limited to numerical agreement; whether such agreement does or ever will exist in a genuinely 'universal' sense is a moot point. That human rights are equally possessed by all human beings, and that they are irreducible to accidental characteristics of the human being, makes little sense if they are solely socio-political assertions since the UDHR was intended and reads as an enumeration of pre-political rights morally binding on all states and political systems, including those that had so egregiously denied both the equality of all humans and the irrelevance of accidental characteristics of human beings to fundamental moral considerations.

3. Can the natural rights tradition explain the essential characteristics of human rights?

Historically and logically natural rights emerged from within the natural law tradition. Aristotle's discussions on the naturally right way to live, and his distinction between natural justice (*to physikon dikaion*, with *ius* being the Latin equivalent of *dikaion*) and conventional justice (*to nomikon dikaion)*, were prefigurements for the Stoic doctrine of natural law.[17] Stoic natural law doctrine considered the entire cosmos to be pervaded by providential reason, and viewed man's ability to reason as providing him with knowledge of the cosmos' natural law.[18] Though originating in Cyprus with Zeno of Citium, Stoicism exerted a profound influence upon Roman lawyers. The most famous articulation of Stoic natural law came from the Roman philosopher and lawyer Cicero who, via the mouth of Laelius in Book III of his *De Re Publica*, defined natural law as universal, eternal, unalterable, divinely ordained, independent of political enforcement, and knowable through human reason.[19] Though undoubtedly an over-simplification, it is possible to draw a fairly clear line of natural law transmission from the Stoics, to the 2nd and 3rd century Roman jurists such as Gaius and Ulpian, onto Isidore of Seville and his *Etymologiae* in the 7th century, from there to Gratian's *Decretum* in the 12th century, and from

17 According to John M Kelly discussion of natural law can be traced back as far as the 'immutable unwritten laws of heaven' in Sophocles' *Antigone,* John M Kelly, *A Short History of Western Legal Theory* (1992) 19-20.

18 Leo Strauss classifies 'classic' natural law into three categories: Socratic-Platonic-Stoic, Aristotelian and Thomistic. See Leo Strauss, *Natural Right and History* (1965) 146.

19 Indeed, for Cicero the 'true law', ie natural law, is right reason in agreement with nature.

there again onto both the Medieval glossators of the *Decretum* and the philosopher and theologian Thomas Aquinas.

Yet although natural law in Roman culture was considered perfectly compatible with objective right (ie it is right that one does not harm others), no Roman or pre-Roman thinker ever derived a doctrine of subjective rights (ie *I* have a right not to be harmed) from it. This is important for the present discussion because human rights clearly fit into the category of subjective rights. *Ius* for the Romans (and for Aquinas) was limited to meaning an objectively right relationship or a moral or legal precept (ie *it* is right that he not be harmed) which, although clearly consistent with the idea of a subjective right and even foundational for it, is nonetheless not the idiom of human rights. It was not until Gratian and the Medieval decretists that rights were explicitly referred to in the subjective sense, as *potestas*, *facultas, dominium* etc.[20] At the outset the canon law idea of natural rights was not based specifically on Christian revelation but on 'an understanding of human nature itself as rational, self-aware, and morally responsible.'[21]

From this Medieval source of natural rights the nominalist William of Ockham, in the context of the 14th century Franciscan poverty dispute, articulated a distinction between natural and positive rights. The same juridical source, allied to the natural law of Thomas Aquinas, also proved the inspiration for Francisco de Vitoria, Bartolome de Las Casas and Francisco Suarez (members of the 'second scholastic' movement) to argue on behalf of the natural rights of native American Indians in the face of colonial exploitation in the 16th and 17th centuries.[22] And it is from this same juridical source again that Hugo Grotius appropriated the idiom of natural rights for the slightly more secular culture of 17th century Protestant Europe. Indeed, in this respect at least Grotius was the bridge over which natural rights were carried from the Medieval canonists and post-Reformation second scholastics to Modern Protestant political theorists.

The absorption of natural rights discourse into the American colonies in the 18th century had momentous practical and theoretical effect. The natural rights theories of Samuel Pufendorf, Hugo Grotius, Jean Jacques

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20 Brian Tierney's scholarship has shown how it is inaccurate to hold that the subjective concept of right began as late as Gerson (against Richard Tuck) or Ockham (against Michel Villey), Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (1997).

21 Ibid 76.

22 On Vitoria and especially Suarez as contributing to Grotius' understanding of natural rights and international law see Antonio García y García, 'The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights' (1997) 10 *Ratio Juris* 25.

Burlamaqui, Christian Wolff, Emer de Vattel and the grand theorist of liberalism John Locke[23] – all broadly[24] consonant with the tradition just outlined – were encapsulated in the American Declaration of Independence of 1776 which, after mentioning the 'Laws of Nature and Nature's God', goes on to declare: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.' The philosophy of natural rights was to the fore in that other great 18th century precursor to the Universal Declaration of Human Rights, the French Declaration of the Rights of Man and the Citizen of 1789. The key drafter of the American Declaration, Thomas Jefferson, had a role in the drafting of the French Declaration as it was he who advised Marquis de Lafayette on the drafting of the first model for the Declaration.[25] The final text of the French Declaration, influenced in part also by the Virginia Bill of Rights of 1776, invoked the 'natural, inalienable, and sacred rights of man' and 'under the auspices of the Supreme Being' enumerated the 'natural and imprescriptible rights of man' as 'liberty, property, security, and resistance to oppression.'

4. Natural rights and human rights: one and the same

23 Himself significantly indebted to the Anglican theologian Richard Hooker. For a synopsis of the philosophical influences on 18th century American revolutionary and natural rights talk see James H Hutson, 'The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey' (1994) 39 *American Journal of Jurisprudence* 185, 213-20. Neither Thomas Hobbes nor Jean Jacques Rousseau fit coherently within the natural rights tradition outlined in this article, even though both make considerable mention of 'natural rights'. Though space prevents an in-depth treatment of the issue, suffice to say that, in the case of Hobbes, any theorist who founds natural rights upon fear, uses the doctrine to justify violence towards others, and extols the virtues of absolutist government cannot be seen as a logical continuum of the natural rights tradition. The same applies for Rousseau who founds natural rights not on human nature and reason but on sentiment and political concord ('general will'), and who again displays marked absolutist tendencies as regards the sovereign's power.

24 By 'broadly' it is meant broad enough to describe these theorists as contributing towards natural rights doctrines as distinct from constructivist doctrines. There are, however, important differences between how natural law and natural rights are understood by the Aristotelian-Thomist, Stoic, Liberal and Rationalist traditions.

25 See Lynn Hunt, *The French Revolution and Human Rights: a Brief Documentary History* (1996) 13-15, 71-73.

From this brief synopsis of the natural rights tradition there is already evidence to support the view that human rights may be legitimately seen as a synonym for natural rights. An important buttress to this view is that the original framer of the all-important preamble to the UDHR, René Cassin, looked to the preamble of the 1789 French Declaration for inspiration.[26] When the UDHR was adopted in Autumn 1948 its drafters' speeches made repeated reference to natural rights forerunners to the UDHR, the 1776 Declaration of Independence and the 1789 French Declaration.[27] The composition of the very first draft of the UDHR also alludes to the natural rights connection: two of the most important documents used as templates in the drafting procedure by the Canadian jurist John Humphrey, the 'Pan American' declaration and a study sponsored by the American Law Institute, both drew heavily from the constitutional natural rights tradition.[28] None of this should cause surprise as thirty-seven out of the fifty-eight UN member states at the time belonged to the Judeo-Christian tradition whence – to a large extent – the natural rights tradition sprang.

Aside from the historical and cultural connection between natural and human rights, philosophical analysis shows that human rights approximate extremely closely if not altogether identically to natural rights (and certainly far more closely than constructivist accounts of rights). It is possible to establish the same five essential characteristics of natural rights as outlined above for human rights. As the name suggests natural rights *inhere in human nature*, a nature which, as the long tradition of natural rights testifies to, is *rational*. Humans by their very nature as rational beings possess natural rights (which themselves are knowable through the use of human reason). As natural rights inhere in human nature they are *irreducible to accidental characteristics of the human being*. They are also *universal* in the triple, mutually re-enforcing sense as outlined above with relation to human rights: it is universally true (for all human beings at all times) that universally possessed (by all human beings at all times) natural rights are universally binding (on all human beings at all times). Natural rights are *inalienable* in that no law, political concord, social agreement, judicial decision, monitoring committee or dictator can alienate from the human being the nature upon which their natural rights are founded. Finally, natural rights are *equally possessed* by all human beings in that no human being's natural rights are more valuable than the natural rights of others.[29]

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26 See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2003) 66-7.

27 See Johannes Morsink, *Inherent human Rights: Philosophical Roots of the Universal Declaration* (2009) 18-9.

28 Glendon, above n 26, 57.

29 This is not to say that the natural rights tradition has always fully

5. Morsink on natural rights

Despite this Johannes Morsink, in two important works on the drafting and philosophy involved in the UDHR, has argued that the UDHR does not refer to natural rights – either explicitly or implicitly.[30] Morsink is the leading authority on the drafting of the UDHR, so in order to properly defend the claim that natural rights are essentially the same as human rights his challenge must be met.

Morsink places great emphasis on the fact that the phrase 'all men are endowed *by nature* with reason and conscience' was eventually deleted by the drafters from Article 1 in order to support his view that natural rights are not compatible with human rights in the UDHR.[31] His analysis of the debates surrounding Article 1 and the Preamble[32] show that the reference to nature was deleted in order to appease those who supported the insertion of 'God' into Article 1. At first glance this seems strange: although natural rights are not necessarily tied to either theism or deism the tradition of natural rights has often found support in a broadly Judeo-Christian worldview. But what Morsink does not make so clear is that many of the drafters (and especially the Brazilian delegation that proposed the insertion of 'God' into Article 1) understood nature not in the sense of the natural law or natural rights tradition but in the materialist sense of the word, ie nature as a synonym for materialism. Thus it was possible that God and nature could indeed be in opposition – unlike in the 1789 French Declaration for instance. Hence the deletion of the phrase 'by nature' did not constitute an explicit disavowal of the doctrine of natural rights.

The reason Morsink is so keen to divorce natural rights from human rights is his aversion to the 'essentialism' he associates so closely with natural rights. This essentialism is dangerous for Morsink because, according to him, when one posits a human essence and then bases a doctrine of rights upon that essence, any human who is viewed as not sharing in that essence is necessarily deprived of the corresponding rights.[33] Yet Morsink is still insistent upon the need to understand human rights as metaphysically inherent within the human being. Although his stress on inherence is consistent with human rights in the UDHR, it also poses problems for the consistency of his own argument as it is precisely the tradition of natural rights (against positivism, utilitarianism and historicism) which transmitted

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acknowledged the logical implications of natural rights for equality. Infamously, the French Declaration of 1789 omitted both women and slaves from its explicit protection. Yet where natural rights take root the branch of equality almost invariably follows and in the historical examples of where this did not happen (or did not happen quickly enough) this was to the detriment of the coherence and foundations of natural rights themselves.

30 Though he does not deny the *historical* reality that the natural rights tradition gave rise to the notion of human rights.

31 Morsink, above n 5, 283; Morsink above n 27, 30.

32 Morsink, above n 5, 284-302.

33 Morsink, above n 27, 32-4.

the idea of inherent rights into the domain of early twentieth century rights discourse.

Another problem with Morsink's critique of essentialist natural rights is that he himself relies on essentialist concepts, specifically in regard to human nature. In response to Tore Lindholm's claim that there is no connection between *human nature* and human rights Morsink states that such a denial 'goes against what is in the text [of the UDHR] and all through the supporting archival material.'[34] He approvingly quotes Article 1 of the 1998 Universal Declaration of the Human Genome and Human Rights as giving us the 'biological basis' of the UDHR: 'the human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity.'[35] Against Jack Donnelly's constructivist account of human nature Morsink counters, 'unlike Donnelly we draw a line between the way the world with human nature in it is and the conceptions or constructions cultures use to interpret that world.'[36] Aside from these examples it is impossible to construe inherent human rights as Morsink does without some understanding of the essence of humanity, or indeed of human rights as essential to the human being. Any way in which natural rights are brought into disrepute by essentialism applies equally to human rights.

Morsink's issue with essentialism, that it can alienate certain types of human beings from human rights protection, is overstated. Because of his suspicion of essentialism Morsink interprets Article 1's mention of all human beings being 'endowed with reason and conscience' epistemologically, ie reason and conscience are how we come to know of our human rights, rather than metaphysically, ie reason and conscience are part of what makes a human being a human being.[37] This interpretation not only runs against both a plain reading of Article 1 as well as the drafting history of the article (and Malik's key role therein), it is also unnecessary from the point of view of preventing discrimination against certain classes of human beings. The aforementioned distinction between actuality and potentiality allows human rights (and natural rights) to specify not only to whom such rights belong (human beings, essentially) but also to identify such beings via their essential characteristics *without* discriminating against any particular class of such beings (children, women, elderly, homosexuals, Jews etc). Morsink himself does seem to accept this point, '[i]f we accept as criterion that to be members of the human family people need to have these characteristics [reason and conscience] only potentially and not (necessarily) actually, then this is a defensible position.'[38]

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34 Morsink, above n 5, 294.

35 Morsink, above n 27, 46.

36 Ibid 142.

37 I do not want to suggest that there is no room for an epistemological reading of 'reason and conscience' within the framework of the UDHR, only that there is no room for an exclusively epistemological reading of these terms. The orders of knowing and being are intimately interlinked, and just as one cannot reason without being a reasoning being, one must reason in order to know one is a reasoning being.

38 Morsink, above n 5, 296.

He does go on to mention[39] that it may still be possible for an ideology such as Nazism to claim that certain classes of human beings do not reason 'properly' – and as such imply these classes of human being are of lesser value – but neglects to mention that an incomplete actualisation of an essential potential, such as reason, does not negate the essence itself. (Of course, the Nazi ideology was more interested in will-to-power than reasoning about basic human goods.)

Morsink's distrust of essentialism and natural rights is founded to some extent at least on an erroneous understanding of the natural rights tradition. For instance, he claims that the Medieval natural law doctrine is incompatible with inherent rights as it is necessarily tied to political feudalism – a barely supported claim that is false both historically and philosophically.[40] More serious is his claim that natural rights are tied to 'Cartesian essentialism'[41] and that natural rights are based on 'deductive argumentation of the type found in the Western rationalist tradition'.[42] Morsink seems to be trading on a caricature of the natural rights tradition here as neither of these claims is accurate. The kind of essentialism found in the natural rights tradition is usually the Aristotelian kind rather than the more philosophically problematic Cartesian kind. Presumably by 'Western rationalist tradition' Morsink means the deductive *a priori* systems of Descartes, Malebranche, Spinoza, Leibniz and others; this being the case such a tradition has had a peripheral role at best within the natural rights tradition. Even if some later followers of the rationalist tradition were natural rights proponents also, such as Christian Wolff, their commitment to rationalism was logically independent of their support for natural rights – just as Ockham's commitment to nominalism and voluntarism was logically independent of his support for natural rights.

The import of this misunderstanding is made clear when Morsink goes on to outline what he considers a proper theoretical underpinning of human rights – 'the capabilities approach' of Martha Nussbaum – as a way 'to show how we can and should look on each right in the Declaration as inherent in the human person or as linked to human nature in a nonessentialist way.'[43] Without wanting to go into too much detail about Nussbaum's approach due to considerations of space, suffice to say that, as Morsink himself admits, it broadly adheres to the Aristotelian-Thomist understanding of human nature, potentiality and actuality, natural inclinations and human flourishing.[44] Tellingly, Nussbaum's list of ten 'central functional capabilities' whose protection forms the basis of human rights (life; bodily health; bodily integrity; sense, imagination and thought; emotions; practical reason; social affiliation; other species; play; control over one's environment) is basically an expanded list of John Finnis's[45] list of seven basic forms of human good (life; knowledge; play; aesthetic experience; sociability-friendship; practical

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39 Ibid.

40 Morsink, above n 27, 145-6. The most comprehensive rebuttal of this position is Tierney, above n 20.

41 Morsink, above n 27, 175.

42 Ibid 32.

43 Ibid 161.

44 Ibid 162, 66-85.

45 A Thomist and the foremost natural rights theorist of the twentieth century.

reasonableness; 'religion').[46] Towards the end of his section dealing with Nussbaum Morsink approvingly quotes her as pointing out that 'natural rights ... usually proceed by pointing to some capability-like feature of persons (rationality, language) that they actually have on at least a rudimentary level ... [a]nd I actually think that without such a justification the appeal to rights is quite mysterious.'[47] So, seemingly unbeknownst to Morsnik due to his equation of natural rights with rationalism, his own views on the founding of human rights are implicitly conducive towards acceptance of a natural rights theory also, specifically a natural rights theory closely linked to Medieval natural law.[48]

Yet this is still not the full picture. Ultimately Morsink eschews what he understands by natural rights in favour of a marriage between Nussbaum's 'capabilities approach' and the epistemology of moral intuitionism. Two characteristics of moral intuitionism which Morsink sees as so philosophically advantageous (morality as objectively true; the role of conscience in understanding moral truth) apply equally to reason as understood in the natural rights tradition. But the other two characteristics of moral intuitionism are more problematic philosophically and are only partially compatible with the natural rights tradition, namely that we can be remarkably certain about issues of morality, and that this certitude is often pre-reflective and prior to intellectual contributions. It is true that natural rights theory accepts the existence of self-evident (*per se nota*) moral axioms and goods but not in the sense that such principles are easily and immediately discovered by a sound conscience (as moral intuitionism would have it) but in the sense that these principles stand in need of no further justification other than their intrinsic reasonableness. Likewise, while natural rights theory can accept that moral truth need not be a pot of gold at the end of a rainbow of speculative reflection, it is nonetheless clear on the important role reason plays in conjunction with conscience in discovering and clarifying moral truths, and how reason can be obstructed by emotion and prejudice even allowing for a generally sound conscience. Hence why it is that natural rights theory and not moral intuitionism provides *reasons* for believing in the principles operative within human rights. As such, moral intuitionism can be understood as an emaciated form of natural rights theory, one which accepts many of its conclusions but without acknowledging their rationale in deliberative practical reasoning.

The emphasis moral intuitionism places on epistemology seems to be a primary reason why Morsink disavows the metaphysical meaning of 'reason and conscience' in Article 1 of the UDHR. So in effect, and aside from his caricatured understanding of natural rights, the major stumbling block for Morsink's acceptance of natural rights is his commitment to moral intuitionism. Yet moral

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46 See John Finnis, *Natural Law and Natural Rights* (1980) 85-100.

47 Morsink, above n 27, 184.

48 None of this is to claim that practical reasoning is contingent upon metaphysical analysis. Morsink's disavowal of 'essentialism' is not overtly motivated by a concern to carefully distinguish between practical and speculative reasoning so as to avoid objections of committing the naturalistic fallacy. Rather it is motivated by a concern to avoid discriminating against certain classes of human being.

intuitionism played little or no part in the natural rights tradition behind the UDHR and hence its acceptance as a hermeneutic key to the UDHR is *post facto* projection. The 'classical' moral intuitionists whom Morsink cites, such as David Ross (1877-1971) and Henry Sidgwick (1838-1900), had no apparent influence on the philosophical underpinnings of the UDHR. Even their precursors in the Scottish 'common sense' tradition, eighteenth century philosophers such as Thomas Reid, Francis Hutcheson and Adam Ferguson, exerted far less influence on the 'self-evident' truths contained in the Declaration of Independence than did natural rights theorists such as Grotius, Burlamaqui, Locke and Vattel.[49] Morsink passes over these facts and instead argues that the drafters implicitly accepted moral intuitionism as a theory.[50] But since moral intuitionism is solely an epistemological theory which of itself does not offer a substantive account of human rights, and that Morsink himself sees such substance as attributable to a 'capabilities approach' consonant with the natural rights tradition, then it makes more sense and is much more in keeping with the historical background to the UDHR to see natural rights, not moral intuitionism, as implicit within it.[51] This is especially so given that many of the advantages Morsink sees in moral intuitionism are provided for by natural rights theory also, ie the role of conscience in attaining moral objectivity, without the acceptance of certain facets of moral intuitionism which (as Morsink acknowledges) make the theory so unpopular among philosophers, ie the claim of easy unreflective certainty over moral truth.

6. Essential characteristics of human dignity

Turning to the next conceptual foundation of the UDHR, 'dignity' is mentioned five times in the document: the Preamble (twice), Articles 1, 22 and 23(3). The first preambular paragraph states that the 'inherent dignity … of all members of the human family is the foundation of freedom, justice and peace in the world'. Straightaway there is no doubt that dignity is understood as *inherent* in and as *universal* to all members of the human family, ie all human beings. As with human rights, universality in the context of human dignity has a triple sense: the universal truth of human dignity universal to all human beings is universally binding. The universality of human dignity to all human beings is explicitly stated in the UDHR ('all members of the human family'). The other two senses, the universal truth of human dignity as a foundation for the universally binding

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49 See Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967) 27, 43 and Ronald Hamowy, 'Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America: Jefferson's Declaration of Independence' (1979) 36 *The William and Mary Quarterly* 503.

50 Morsink, above n 27, 99.

51 Morsink calls the explicit omission of the precise phrase 'natural rights' from the 1776 Virginia Declaration of Rights, and hence the Declaration of Independence of the same year, as 'only a matter of word choice', ibid 20. In this sense the analogy holds for the UDHR.

character of this objective moral truth, can be inferred from the moral realist understanding of dignity contained in both the first preambular paragraph where 'freedom, justice and peace' are founded on the 'recognition' of dignity, rather than its constitution, and the fifth preambular paragraph which repeats the UN Charter's preambular affirmation of 'faith' in dignity (and fundamental human rights).

Article 1 repeats the inherence view of dignity ('born') while confirming the *equal* dignity of all human beings: 'All human beings are born free and equal in dignity and rights.' Like human rights, dignity inheres in human beings 'endowed with reason and conscience.' The reference to 'all' human beings indicates that dignity is not contingent upon features common to only some human beings. Hence, dignity is *irreducible to accidental characteristics of the human being*, a point Cassin seemed to endorse when he remarked that the authors of Article 1 'had wished to indicate the unity of the human race'.[52]

So far dignity shares four of the essential characteristics of human rights. But is it true to say that dignity according to the UDHR is *inalienable*? It certainly is the case that once dignity is said to be inherent in the human being *qua* human being it can be logically assumed that it is inalienable *vis-à-vis* the human being insofar as s/he continues to exist. Further, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) affirm in their second preambular paragraphs that human dignity founds human rights; both documents presuppose the truth that human rights are inalienable and, as such, it can be deduced that only inalienable dignity can found inalienable human rights. However, the UDHR does not explicitly state that human dignity founds human rights – although it does seem to equate the two very closely. A more secure path to the claim of inalienable dignity in the UDHR is through Yehoshua Arieli's observation that human dignity, as a core theoretical component of the UDHR, is a counter-thesis to the ideology of National Socialism.[53] Rights in Nazi-era Germany were completely contingent upon the state and were not understood as being in anyway inalienable.

The UDHR drafting debates themselves give further insight into the nature of dignity. The first preamble circulated was authored by John Humphrey and contained an alienable understanding of human dignity: 'That there can be no human freedom or dignity unless war and the threat of

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52 Morsink, above n 5, 38.

53 Yehoshua Arieli, 'The Emergence of the Doctrine of the Dignity of Man' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002) 3.

war are abolished.' The second preamble to be circulated was authored by Cassin and contained a more entrenched understanding of human dignity: '…human freedom and dignity cannot be respected as long as war and the threat of war are not abolished.' The preamble which was eventually accepted was authored by Malik and contained the phrases 'inherent dignity' and 'inalienable rights'.[54] The most significant challenge posed to the inclusion of dignity during the UDHR drafting process came from the South African delegate, CT Te Water, when he proposed the replacement of 'dignity and rights' by 'fundamental rights and freedoms' in Article 1. According to Te Water there was no universal standard of dignity – a view which seemed to unite the other delegates in opposition.[55] Water was clearly uneasy about the implications the term dignity would have for the apartheid regime in his home country. Malik pointed out to Te Water that dignity was included in the UN Charter at the behest of a fellow South African, Field Marshal Jan Smuts, an inclusion which was meant to indicate the value of the human person.[56] This same understanding of dignity was prominent among the UDHR drafting delegates: in response to a further South African claim that as dignity was not a right it ought not to be included in Article 1, Eleanor Roosevelt pointed out that dignity was included to emphasise that every human being is worthy of respect (and thus to indicate why human beings have human rights in the first place).[57] Hence, the UDHR understanding of dignity is that it is indeed inalienable, as well as universal, equal to all human beings, inherent in rational human nature, and irreducible to accidental characteristics of the human being.

54 It is probable that the word 'inalienable' in the UDHR has the same meaning as the word 'inviolable' in Article 1 of the German Basic Law of 1949. For the draft texts of the UDHR see Glendon above n 26, 271-314.

55 Ibid 144.

56 Smut's original preamble referred to 'the sanctity and ultimate value of human personality'; while the final version of the Charter preamble, amended after a committee debate, refers to 'the dignity and value of the human person'. Ruth B Russell, *A History of the United Nations Charter: the Role of the United States, 1940-1945* (1958) does not indicate whether Smuts himself proposed these changes to his original preamble, though Malik seems to think he did. Either way, dignity, value and sanctity are interchangeable terms in the UN Charter preamble.

57 Glendon, above n 26, 146.

7. Is the extrinsic view of human dignity compatible with the UDHR?

To what philosophical tradition of dignity does the UDHR version of the concept cohere? As with rights, it is possible to locate two broad understandings of dignity into which most, if not all, conceivable interpretations of the concept fit. Juxtaposing the terminology of Teresa Iglesias[58] and Daniel P Sulmasy,[59] these two understandings could be labelled the 'restricted-attributed' and 'universal-intrinsic' views,[60] but as these are rather clumsy terms 'extrinsic' and 'intrinsic' dignity is referred to instead.

The extrinsic account of dignity holds that dignity is attributable to a human being upon their achievement of a particular action, characteristic or state, ie attributable to something extrinsic to who they are in the most fundamental sense. As such not all human beings will possess dignity except in the most idealised of worlds. This idea of dignity was frequent in classical Roman culture where *dignitas* was understood to refer to the honour due to political offices and officials. It was also present in canon law as a term referring to the offices of the hierarchical church such as bishoprics. In both cases dignity was attached to a status considered superior to that of the human. One of the first explicit examples of the extrinsic sense of dignity outside of these two contexts also happens to be one of the most famous accounts of dignity generally: that of Pico della Mirandola (1463-94) in his *Oratio de Dignitate Hominis* (Oration on the Dignity of Man). Contrary to accepted wisdom, Pico's oration is not a sustained examination of human dignity; indeed, the only mention of the dignity of man occurs in the title – and even it was a later addition made by Pico's nephew – and there is only one mention of the bare term dignity, occurring in the context of a typically Renaissance optimism in the ability of the human being to achieve equality with the angels: 'let us, incapable of

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58 Teresa Iglesias, *The Dignity of the Individual: Issues of Bioethics and Law* (2001) 6 where Iglesias distinguishes between the 'restricted' and 'universal' senses of dignity.

59 Daniel P Sulmasy, 'Human Dignity and Human Worth ' in Jeff E Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: a Conversation* (2008) 12 where Sulmasy distinguishes between dignity as 'intrinsic' and dignity as 'attributed'.

60 The most in-depth account of the conceptual history of human dignity is Mette Lebech, *On the Problem of Human Dignity: a Hermeneutical and Phenomenological Investigation* (2009) 29-149. A much shorter overview can be found in Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655, 656-75.

yielding to them, and intolerant of a lower place, emulate their dignity and their glory. If we have willed it, we shall be second to them in nothing.'[61] In this case dignity is only attained through a particular utilisation of radical voluntarism by a creature for whom everything is possible: both the basest and the most exalted of ends.

For the materialist Thomas Hobbes (1588-1679) the dignity of man is accorded to him by the sovereign on the condition of his support for the Commonwealth and absolute monarchy. If the man withholds his support he is not granted dignity, and even if he does offer his support his level of dignity presupposes the further contingency of the office he holds.[62] The empiricist and sceptic David Hume's (1711-76) approach to dignity in *Of the Dignity or Meanness of Human Dignity* is similarly utilitarian in that Hume argues on behalf of human dignity based on its benefit to virtue and to society. Comparing human beings to other animals generates an *idea* of dignity that facilitates the cultivation of virtue.[63] Implicit in this approach is the understanding that those who persist in vice make the idea of dignity redundant for themselves.

These fragmentary approaches to human dignity do not belong to even a broadly linear historical tradition of thought but rather to a conceptual tradition of viewing the subject at hand in a particular way. References to dignity are much more commonplace today than they were prior to the UDHR and it would not be difficult to point to contemporary versions of the extrinsic account.[64] Of course, contemporary versions could not have been known by the drafters of the UDHR and so if they were to rely either implicitly or explicitly on the extrinsic approach to human dignity it would have been partly due to persons such as Pico, Hobbes and Hume articulating that approach in the first place. But is there anything to suggest that the drafters and the consequent text of the UDHR rely on a extrinsic sense of human dignity? When it is considered that the UDHR understanding of human dignity affirms its inalienability, universality, equality, inherence in rational human nature, and irreducibility to accidental characteristics of the human being, the answer must be in the negative.

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61 As quoted in Lebech, above n 60, 89.

62 Thomas Hobbes, *Leviathan: with Selected Variants from the Latin Edition of 1668* (first published 1651, 1994 ed) 50-57.

63 David Hume, 'Of the Dignity or Meanness of Human Nature' in Eugene F Miller, Thomas Hill Green and T H Grose (eds), *Essays: Moral, Political, and Literary* (first published 1742, 1987 ed) 80-6.

64 Such versions are ubiquitous in debates surrounding the expression 'dying with dignity' where the loss of certain attributes is seen as involving a loss of dignity.

8. Is the intrinsic view of human dignity compatible with the UDHR?

For the philosophical precursors of the UDHR's understanding of human dignity attention must instead be focused on the tradition giving rise to the intrinsic view of the concept. The first known expression of anything approximating to human dignity in the intrinsic sense is found in Cicero's (106-43 BC) *De Officiis* ('On Duties'). Although Cicero makes extensive reference to dignity throughout his works, he only once links dignity to human nature: in *De Officiis* Cicero writes, '[f]rom this we see that sensual pleasure is quite unworthy of the dignity of man ... [a]nd if we will only bear in mind the superiority and dignity of our nature, we shall realize how wrong it is to abandon ourselves to excess and to live in luxury and voloptuousness, and how right it is to live in thrift, self-denial, simplicity, and sobriety.'[65] For Cicero, human dignity resides in man's superiority over other animals, a superiority founded on man's rational nature.

The Middle Ages saw the emergence of a Christian inspired tradition of intrinsic human dignity as a critique of the Roman focus of dignity in terms of social and political rank. The 6th century liturgical prayer *Sacramentarium Leonianum*, Boethius' (480-524) *De Consolatione Philosophiae* (On the Consolation of Philosophy), the Pseudo-Ambrose treatise *De Dignitate Conditionis Humanae* (On the Dignity of the Creation of the Human Being), and the works of Robert Grossesteste (1168-1253) each indicate in their own way an alternative to the predominant Roman conception of dignity as each proffers a view that dignity is universally intrinsic to the human substance. Whereas Cicero ascribed human dignity to rational human nature, the Christian sources buttressed this ascription by the proposition that human nature is made in the *Imago Dei*.[66]

The most famous account of human dignity from within the intrinsic viewpoint is that of Immanuel Kant (1724-1804). Stoicism's influence on

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65 As quoted in Lebech, above n 60, 51-2.

66 Thomas Aquinas clearly fits within this context, and indeed provides a remarkably sophisticated account of how dignity is intrinsic to human nature, how the human subject is essentially characterised by dignity, and even how dignity is linked to justice. However, the overall coherence of his account of dignity is significantly undermined by his claim that it is theoretically possible for human dignity to be abolished by sin, Summa Theologiae, IIaIIae q. 64 a. 2. Interestingly, Aquinas' contention that it is faith which affirms that the human being is made in the image of God, and hence that faith affirms human dignity, mirrors the UDHR's reaffirmation of faith in fundamental human rights and the dignity and worth of the human person.

Kant played a role in his understanding of dignity, a term he uses more frequently than Cicero ever did.[67] The different constructions of dignity employed by Kant include 'the dignity of human nature' and 'the dignity of humankind', and anytime he ascribes dignity to mankind he does so based on mankind's capacity for morality, the ability to formulate and abide by the categorical imperative – a crucial deduction of which is never to treat someone as a means but always as an end. Some reticence is required, however, when situating Kant within the intrinsic tradition of human dignity: though on one level he would certainly have thought of dignity as inhering in real human beings, his commitment to transcendental idealism, where the 'I' does not know anything outside of its own intuitions and concepts, means that his account of dignity is open to the charge of being nothing more than an epistemological construction. That Kant's view of dignity is not necessarily tied to some of the major problems associated with his transcendental philosophy is indicated by the fact that the Catholic theologian Antonio Rosmini could 'baptise' the Kantian idea of dignity for its eventual inclusion in Pope Leo XIII's social encyclical *Rerum Novarum* (1891), concerned with, *inter alia*, the innate dignity of workers being affronted by their exploitation.[68]

Indeed, the broad coalescence of natural law, theistic and Kantian notions of dignity was the dominant idea of dignity at the time of the drafting of the UDHR. The US Catholic Bishops' draft 'A Declaration of Rights' (1946), the American Jewish Committee's draft 'Declaration of Human Rights' (1944), and the American Declaration of the Rights and Duties of Man (1948) all propounded a intrinsic view of human dignity and all were known to at least some of the drafters of the UDHR.[69] It is not surprising, then, that the intrinsic account of dignity is fully compatible with the essential characteristics of human dignity as outlined in the UDHR. Further, only the intrinsic view of human dignity can properly account for a genuinely *human* dignity, ie dignity proper to the human being *qua* human

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67 See Hubert Cancik, ''Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105-107 ' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002) 33-6. Kant's three most prominent works for his view of dignity are his *Groundwork for the Metaphysics of Morals* (1785), *Metaphysics of Morals* (1797), and *On Pedagogy* (1803).

68 See Daniel P Sulmasy, 'Death with Dignity: What Does it Mean?' (1997) 4 *Josephinum Journal of Theology* 13.

69 This is not to say intrinsic dignity could not be located, in inchoate form at least, in other traditions stemming from the eighteenth century. Both the feminist Mary Wollstonecraft's *A Vindication of the Rights of Men* (1790) and the socialist Pierre-Joseph Proudhon's *Of Justice in the Revolution and the Church* (1858) contain embryonic examples of the intrinsic view of human dignity.

being. This understanding of human dignity is a 'bedrock truth'[70] of morality, it is not demonstrable to the extent that it could convince amoralists or moral sceptics as to its truth. It is instructive to note that the medieval *dignitas* refers both to personal worth/value and to a non-demonstrable fundamental principle.[71] Behind this there was no one Greek word for dignity. Instead, those who were dignified were the *hoi axioi* (the worthy) to whom *time* (awe) was the appropriate attitude. *Axoima* and *axia*, both translatable to *dignitas*, not only indicated worth but also a fundamental principle (ie axiom). Doubtless many of the drafters of the UDHR would not have been fully cognisant of this rather convoluted story, but the etymology of dignity does fit extremely well with defining it as the fundamental worth of the human being which lies at the foundation of human rights. [72]

9. Inflorescent dignity: another aspect of conceptualising dignity

The discussion so far has not exhausted the meaning of dignity within either the UDHR or past and present philosophical debate. Not only does dignity as a fundamental principle help ground rights but it is also concerned with standards of behaviour and states of affairs which to greater and lesser degrees may correspond to the fundamental worth of the human being. This

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70 Iglesias, above n 58, 1-2.

71 The following account of dignity's etymology is a synopsis of the one contained in Lebech above n 60, 30-2.

72 Some authors have argued that the UDHR does not contain a concept of dignity with a single theoretical foundation, eg Christopher McCrudden, above n 60, 678; and Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183, 194-5. While they are correct that no overt foundation is provided for in the UDHR text, they overlook the fact that the essential characteristics of the UDHR view of dignity as indicated by its clear textual provisions and as supported by the sporadic mentions of dignity during the drafting process do point towards a general foundation for the UDHR view of dignity: one consonant with the natural rights tradition. This is not an inconsequential point, since there is a tendency in the literature to move from the premise that no theoretical foundation for the UDHR endorsed view of dignity exists to the conclusion that there is no single meaning of the UDHR view of dignity. Instructive is McCrudden's contention that Jacques Maritain and Jean-Paul Sartre shared an equal faith in human dignity, 678. While there are overlaps between Maritain and Sartre's views on dignity the latter's absolutist emphasis on human autonomy as its ground is partially inconsistent with dignity as enumerated in the UDHR. Hence suggesting that both views equally cohere with the UDHR means either that the UDHR has an inconsistent sense of human dignity or one so utterly vague as to render it somewhat meaningless.

notion of dignity has been labelled by Sulmasy as 'inflorescent dignity' and it is used 'to describe how a process or state of affairs is congruent with the intrinsic dignity of a human being.'[73] It is again possible to distinguish between two basic approaches to inflorescent dignity, what Isaiah Berlin in the context of political theory has described as the distinction between 'positive liberty' and 'negative liberty.'[74] Positive liberty is the freedom *for* pursuit of some particular goal(s) or some particular standard(s), both of which adhere to what is considered good and reasonable. Hence, a positive liberty view of inflorescent dignity sees human dignity as requiring certain minimal standards of behaviour in order for its protection and fulfilment. Negative liberty on the other hand is nothing more than freedom *from* constraints. It is an anarchic conception of human freedom which is characterised by the understanding that autonomy is an end-in-itself. Hence, a negative liberty view of inflorescent dignity sees the operation of free agency – fettered only by minimalist respect for the freedom of others – as the proper fulfilment of dignity.

When applied to the demands made by human dignity upon human beings themselves it becomes clear that the negative liberty approach to inflorescent dignity fits uncomfortably with the intrinsic sense of human dignity. Anarchically autonomous behaviour is substantially more likely to undermine the equal dignity of all human beings through illicitly infringing on others' rights and freedom. Further, it may even undermine the dignity of the one who acts in such a completely autonomous fashion as they may engage in activities so repugnant and degrading that it is hard to imagine how they would be in any way compatible with the fundamental moral worth of the human being (eg bestiality, self-enslavement, heroin abuse etc.) As Christopher McCrudden explains, '[w]here a choice-based autonomy approach to human dignity is adopted, then it would seem strange to think that it cannot be waived by the person whose dignity is supposedly in issue. To do otherwise smacks of paternalism.'[75] It would also be strange if intrinsic dignity, founded as it is on *rational* human nature, could be considered compatible with the negative freedom approach to inflorescent dignity, an approach which values the absence of constraints on human agency, including the constraints of reason on the appetitive passions.

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73 Sulmasy, above n 59, 12.

74 Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy and Ian Harris (eds), *Liberty: Incorporating Four Essays on Liberty* (first published 1969, 2002 ed) 166-218. Berlin's distinction between positive and negative liberty corresponds to Deryck Beyleveld and Roger Brownsword's distinction between human dignity as constraint (positive liberty) and human dignity as empowerment (negative liberty) in Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (2001).

75 McCrudden, above n 60, 705.

With this in mind it is scarcely surprising that many of the major proponents of intrinsic human dignity have considered inflorescent dignity to entail positive rather than negative freedom. Two telling examples are those of Cicero and Kant. For Cicero, as mentioned earlier, human dignity requires control over one's passions. Commenting on Cicero Lebech states, '[d]ignity is not something simply had, but something one must live up to.'[76] In part two of the *Metaphysics of Morals* Kant discusses the duty to respect one's inalienable dignity, a respect which is lost whenever one fails in abiding by the categorical imperative through treating oneself as a means to an end rather than an end itself.[77] For both Cicero and Kant, then, human dignity requires of the subject of that dignity the channelling of liberty for the purpose of dignified moral behaviour: a positive liberty view of inflorescent dignity. Instructive in this regard is that Article 29 of the UDHR expressly states that rights and freedoms are not absolute and that they must be balanced with duties towards the community, and the rights and freedoms of others, whereas Article 30 states that no person has the right to destroy any of the rights contained within the UDHR, presumably including those rights accruing to the person themselves.

Of course the UDHR is addressed to states more directly than to individual citizens, and hence just as inflorescent dignity places a normative framework on individual behaviour so it does on state behaviour also. In this context the negative liberty view of inflorescent dignity again fails to cohere with the UDHR's intrinsic notion of human dignity. Mary Ann Glendon has argued convincingly about how dignitarian documents of the intrinsic type by their very nature stress solidarity and the interplay of rights and duties to an extent far surpassing the more individualist legal frameworks prevalent in the Anglo-American common law tradition.[78] The disavowal of individualism and the trumpeting of solidarity by the dignitarian tradition of Europe and South America entail a far greater openness to social and economic rights then is present in the American legal and political traditions especially. A negative liberty view of inflorescent dignity applied to the state entails a relatively non-interventionist policy stance on individual welfare. The only duty the state would have if bound by such an approach to inflorescent dignity would be to ensure minimal constraints on human autonomy, enterprise and association. It is much easier, then, to reconcile a positive liberty approach to inflorescent dignity with the social and economic rights of the UDHR, where the state has a duty to ensure a livelihood minimally worthy of intrinsic human dignity.

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76 Lebech, above n 60, 50.

77 Immanuel Kant, *The Metaphysics of Morals* (Mary J Gregor and Roger J Sullivan eds, first published 1797, 1996 ed) 171-221.

78 Mary Ann Glendon, 'The Dignitarian Vision of Human Rights Under Assault' (Treviso, January 17 2006).

This is especially the case with Articles 22 and 23(3), the two other occasions outside of the Preamble and Article 1 where dignity is mentioned. Article 22 states, 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.' Article 23(3) states, 'Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.'

10. Essential characteristics of personhood

Comparatively little scholarly attention has focused on the meaning of the concept 'person' in the UDHR as against the many works which discuss its understanding of rights and dignity. Yet, like dignity, person is mentioned five times in the UDHR: in the fifth preambular paragraph, and in Articles 2, 3, 6, and 30. The fifth preambular paragraph reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women....' The phrase is borrowed from the preamble to the UN Charter and it immediately raises the question as to the identity and characteristics of the 'human person.' The mention of the term person in the preamble is the only time in the UDHR where it is qualified by the adjective 'human'. Since the UDHR is to be interpreted as a whole it is safe to assume that human person and person are equivalent terms. Beyond this the phrase indicates that the person is in possession of dignity, understood by the UDHR to be intrinsic, and is closely connected to the equality of fundamental human rights. Even at this stage it is difficult not to think that personhood and human being are intimately related.

This intuition is confirmed by Article 6 which reads, 'Everyone has the right to recognition everywhere as a person before the law.' As 'everyone' refers to all human beings without exception the UDHR accepts what Morsink has described as 'stripped down' personhood,[79] a personhood stripped down to what Anna Grear has termed in another context the 'embodied vulnerability of the human sub-stratum.'[80] There was considerable debate as to whether the reference to juridical personhood in Article 6 should be retained, with the UK and US delegations in particular reluctant to keep it (for jurisprudential and, possibly in the case of the latter,

79 Morsink, above n 4, 230.

80 Anna Grear, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7 *Human Rights Law Review* 511, 517.

domestic political reasons). However, the majority of delegates present were impressed by the arguments of Cassin and others who pointed out that personhood had been used as a legal tool for denying the fundamental rights of human beings such as Jews and black people; the article was necessary according to Cassin because 'persons existed who had no legal personality.'[81] The attribution of personhood to all human beings by the UDHR is further evidenced by the other instances where the term person is mentioned as in these cases unless personhood and being human are coterminous the UDHR would explicitly remove certain undefined classes of human being from its protection. To illustrate, Article 2 reads, 'Everyone is entitled to all the rights and freedoms set forth in this Declaration ... no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs...'; Article 3 reads, 'Everyone has the right to life, liberty and security of person'; while Article 30 reads, 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.' Indeed 'human beings' is mentioned only twice in the UDHR, in the second preambular paragraph and in Article 1, and in the latter case an earlier draft of the Article had people inserted instead – though both 'all people' and 'all human beings' accomplish the same conceptual task in Article 2 in that both avoid latent discrimination based on sex.[82]

Since in the context of the UDHR personhood is coterminous with being human, and since persons possess inherent dignity as well as being subject to human rights (ie natural rights) protections, it can be concluded that personhood according to the UDHR shares the same essential characteristics as both dignity and natural rights, ie equally possessed by all human beings, inalienable to all human beings, universal, irreducible to accidental characteristics of the human being and inherent in rational human nature. Before moving on it is worth briefly mentioning another characteristic of personhood according to the UDHR, one it shares to some extent with the UDHR's view of inflorescent dignity, that of the

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81 Morsink, above n 5, 44. Humphrey was responsible for originally making reference to juridical personality in the UDHR, see John P Humphrey, *Human Rights and the United Nations: A Great Adventure* (1984) 40. For an analysis of personhood in American law, and how it has been employed judicially to both protect and deny protection to certain classes of human beings, see David Fagundes, 'What We Talk about When We Talk about Persons: The Language of a Legal Fiction' (2001) 114 *Harvard Law Review* 1745.

82 Morsink, above n 4, 233-6. As well as 'human beings', 'all members of the human family' is mentioned in the first preambular paragraph. Here too an earlier draft had inserted instead 'all persons', see Morsink, above n 27, 27.

communitarian dimension to the concept. During the drafting debates Malik emphasised the primacy of the person, both an individual *and* a social being, in contrast to Roosevelt's exaltation of the 'individual.'[83] This relational dimension to personhood helps makes intelligible and credible the limiting functions of Articles 29 and 30 on individual freedom.[84]

11. Is the Lockean view of personhood compatible with the UDHR?

As with rights, dignity and even inflorescent dignity, a conceptual analysis of personhood indicates that there are two primary and competing ways of interpreting it: what are termed here, following the thinkers who supplied the standard definition for the respective traditions of enquiry into personhood, as the Lockean and Boethian accounts of personhood. Though the Lockean philosophy of personhood appeared later by over a millennium, it is currently the more influential account of personhood within the academic community at large.

According to one reading of Locke[85] only persons – as distinct from human beings – have natural rights.[86] A person on Locke's empiricist view is classically defined in the second edition of his *An Essay Concerning Human Understanding* (1694) as a 'thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places, which it does only by that consciousness which is inseparable from thinking....'[87] Locke goes on to explicitly state that personhood ultimately consists solely of consciousness,

> consciousness always accompanies thinking ... in this alone consists personal identity, ie the sameness of a rational being: and as far as this consciousness can be extended backwards to any past action or thought, so far reaches the identity of that person; it is the same self not it was then; and it is by the same self with this present one that

83 Glendon, above n 26, 41-2.

84 As Glendon notes, '[t]hough its main body is devoted to basic individual freedoms, the Declaration begins with an exhortation to act in a spirit of brotherhood' and ends with community, order, and society', ibid 227.

85 A notoriously inconsistent thinker, Locke did not always make it easy for commentators to formulate a general, settled account of his philosophy.

86 For discussions on Locke's use of personhood in the context of his moral philosophy see Gary B Herbert, *A Philosophical History of Rights* (2002) 114-20 and Ruth Mattern, 'Moral Science and the Concept of Persons in Locke' (1980) 89 *The Philosophical Review* 24.

87 John Locke, *An Essay Concerning Human Understanding* (P H Nidditch ed, first published 1690, 1975 ed) 335.

> now reflects on it, that that action was done.[88]

In this view personhood is not ascribed to human beings as such, but is rather an entity's consciousness of their conscious experience. Personhood persists insofar as some memorial continuity to consciousness persists: hence theoretically the one human being may be home to a number of persons (or even none) over the course of his/her lifetime.

This account of personhood is substantially the same as the one found in Kant where 'a person is a subject whose actions can be imputed to him ... a thing is that to which nothing can be imputed.'[89] Kant bases his moral view of personhood on the more basic psychological view of personhood, where personhood entails the 'ability to be conscious of one's identity in different conditions of one's existence.'[90] Today, what has come to be known as the 'neo-Lockean' account of personhood is widely accepted in a variety of different forms.[91] For instance, the noted philosopher of evolutionary naturalism Daniel Dennett has famously argued that self-consciousness, intentionality, rationality, relationality, the ability to reciprocate and verbal communication are all necessary conditions for personhood to exist,[92] while Michael Tooley has proposed a list of seventeen properties often cited by philosophers as sufficient conditions for personhood including consciousness, the ability to experience pleasure and pain, temporal awareness, social interaction, the ability to plan a future for oneself, and moral deliberation.[93] These are but two examples of Lockean personhood 'checklists' and the issue of randomness can already be glimpsed from them: as Dennett himself acknowledges, 'there can be no way to set a "passing grade" that is not arbitrary.'[94]

The problem the Lockean view of personhood poses for human rights in the UDHR is that it denies personhood to certain classes of human beings such as the young, handicapped, comatose, senile (and arguably even sleeping!) – a point which is enough to render it incompatible with the UDHR personhood theses of equality, universality, inalienability,

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88 Ibid.

89 Kant, above n 77, 16.

90 Ibid.

91 Carol Rovane defines neo-Lockianism as the view that 'to be a person is to be a series of appropriately related – i.e., psychologically related – intentional episodes', Carol Rovane, 'Self-Reference: The Radicalization of Locke' (1993) 90 *The Journal of Philosophy* 73, 76.

92 Daniel Dennett, 'Conditions of Personhood ' in Amelie Rorty (ed), *The Identities of Persons* (1976) 175-96.

93 Michael Tooley, 'Personhood' in Helga Kuhse and Peter Singer (eds), *A Companion to Bioethics* (2009) 117-27.

94 Dennett, above n 92, 193.

irreducibility and inherence. As Rovane notes, 'the common-sense attitudes that include infancy, senility, and interruptions of psychological life as parts of a single person's life reflect a fundamentally unLockean point of view, one which conflates "person" and "human being."'[95] There is potentially another problem with Lockean personhood from the point of view of the UDHR, at least in relation to how Locke himself understood it. Locke defines personhood without any reference to sociability and relationality. His is a thoroughly individualistic view of personhood, a view which fits comfortably with the common depiction of Locke as an important figure in the traditions of economic and ethical individualism. Thus Lockean personhood, by itself, would seem to have some difficulty in justifying the limiting functions of Articles 29 and 30 of the UDHR on individual freedom. Of course, the question of whether proponents of Lockean personhood are logically committed to such pronounced individualism is a matter separate from the historical connection between the two, and moves by contemporary proponents of Lockean personhood to include characteristics such as relationality and reciprocity among the necessary conditions for personhood go towards dispelling notions of such a logical commitment (though such notions will presumably find sustenance in a personhood founded on *self*-consciousness).

12. Is the Boethian view of personhood compatible with the UDHR?

Boethius was not the first thinker to make use of the term 'person.'[96] The Latin word *persona* was a translation of the Greek theatrical term *prosopon*, the latter meaning mask (worn *pros opon*, 'before the face'), whereas the former came to mean, again in the context of drama and theatre, a role or character (*per sonare*, 'to sound through').[97] To this foundation the Romans

95 Rovane, above n 91, 77. Commenting on neo-Lockian accounts of personhood Jenny Teichman states, '[m]uch recent philosophy, on the other hand, if put into legislation, would have the effect of reducing the area of rights by reducing the number of human beings who count as persons: thus exemplifying the way in which liberal premises can sometimes lead to anti-egalitarian conclusions.' Jenny Teichman, 'The Definition of Person' (1985) 60 *Philosophy* 175, 179.

96 For an anthropological history of the term see Marcel Mauss' famous essay, 'A Category of the Human Mind: the Notion of Person; the Notion of Self' in Michael Carrithers, Steven Collins and Steven Lukes (eds), *The Category of the Person: Anthropology, Philosophy, History* (first published 1938, 1985 ed) 1-25.

97 The masks worn by ancient actors were not intended to hide the identity of the actors but instead to portray the identity of the theatrical characters, see Aldo Tassi, 'Person as the Mask of Being' (1993) 37 *Philosophy Today* 201, 201.

added a juridical and moral layer, much like our understanding of personhood, whereby a person is an individual with legal standing or an individual who ought to be recognised before the law. Though personhood to the Romans was intimately linked to being human, slaves were excluded.

It was not until the Christological debates of the fourth and fifth centuries that the concept assumed an explicitly defined ontological character. These debates on the unity of the triune God and the manner in which human nature came to be united to divine nature in Jesus Christ relied ultimately on a definition of personhood. The theatrical and legal connotations of personhood proved a fruitful point of departure for theological reflection because they already suggested distinct, individual and rational identity.[98] The Council of Chalcedon (451) resolved the dispute over the tri-unity of God and the unity of the human and divine in Christ by turning to *prosopon* as a vehicle for making intelligible how Christ's dual nature could be instantiated in a distinct and irrepeatable individual (one person, two natures), and how a triune God of three persons could inter-relate closely enough so as to avoid the charge of polytheism.[99] From the outset, then, the ontological view of personhood encapsulated individuality, life, rationality (possessed analogously by both God and human beings), and relationality (of relevance to the communitarian dimension to the UDHR – 'spirit of brotherhood').

It was in the aftermath of the Chalcedon council, while ecclesial debate concerning its deliberations was still ongoing, that Boethius entered the fray to provide a concise definition of the concept of person in response to what he saw as prevalent misunderstandings. In *Contra Eutychen et Nestorium* (*Against Eutyches and Nestorius*: c. 512) Boethius responds to the eponymous thinkers who have completely conflated personhood with nature by offering definition of a person as a '*naturae rationabilis individua substantia*' – 'an individual substance of a rational nature.'[100] This formula,

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98 Joseph W Koterski, 'Boethius and the Theological Origins of the Concept of Person' (2004) 78 *The American Catholic Philosophical Quarterly* 203, 206.

99 It is plausible to think that this early emphasis on relationality in the Boethian version of personhood helps make the concept more amenable to interrelationality and sociability than the self-consciousness of Lockean personhood. Perhaps a phenomenological re-working of Lockean personhood could overcome this potential shortcoming, one stressing that consciousness of self is constituted by consciousness of others.

100 Anicius Manlius Severinus d Boethius, 'Against Eutyches and Nestorius' in Hugh Fraser Stewart, Edward Kennard Rand and Stanley Jim Tester (eds), *The Theological Tractates: The Consolation of Philosophy* (1973 ed) 85. I am grateful to Eamonn Gaines for sharing with me his expertise on Boethius.

which Aquinas accepted with some minor tweaking,[101] was the primary philosophical understanding of personhood up until the time of Locke. Though Boethius' definition was clearly born of a theological context it has been historically, and can be logically, applied to the specific issue of human personhood. In this regard it shares an interesting similarity with Locke's definition: Locke's concept of personhood was partly developed through a philosophical attempt to legitimise the Christian dogma of personal identity and moral responsibility before divine judgement[102] – though of course this did not prevent Lockean personhood from exerting such a formative influence on legal and ethical theory thereafter.

The Boethian understanding of personhood differs from the Lockean understanding in two important respects. First, it provides personhood with a concrete ontological basis in the very existence of an individual being rather than in consciousness or other epistemic activities. Related to this feature is the impossibility of attributing Boethian personhood to corporate entities such as companies, and of an individual being ever being more than one person throughout their existence (whereas a schizophrenic could possibly be two persons in the Lockean sense). The second relevant difference relates to how rationality is understood. On the Lockean view, rationality is a condition for personhood once it is presently actual or, at the very least, the state of rationality is potentially actual at any given instant, ie irrational thoughts can potentially change to rational thoughts at any given moment. But on the Boethian view (and the Thomist view – both are Aristotelian in this regard), what defines an individual substance as having a rational nature is its essential potentiality to be rational; Christopher Megone puts it succinctly,

> any member of a natural kind has a nature that is its essence, and the essential properties of that natural substance are a set of potentialities – the particular set

101 Koterski, above n 98, 222-4.

102 See Bert Gordijn, 'The Troublesome Concept of the Person' (1999) 20 *Theoretical Medicine and Bioethics* 347, 349-54. Gordijn argues that 'person' is a redundant concept in bioethical debates in that it is merely a 'cover-up' for more substantial moral categories. In this regard Gordijn's argument is parallel to Ruth Macklin's treatment of dignity in Ruth Macklin, 'Dignity Is A Useless Concept: It Means No More Than Respect For Persons Or Their Autonomy' (2003) 327 *British Medical Journal* 1419-20. Both Gordijn and Macklin pay insufficient attention to the historical dimensions to the respective terms and the consequent competing conceptual understandings of same. In failing to do so they both lose sight of the distinctive and original meanings of the terms in question, and of the possibility for analysing how these meanings fit within competing legal and moral philosophies.

> that plays a role in the teleological explanation of that substance's behaviour. In the case of any member of a species, what makes it the thing it is – a member of that kind – is its instantiation of this set of potentialities.[103]

As Megone goes on to argue, such a view explains why a three-legged horse is still a horse: such a horse instantiates the essential potentialities of a horse but has failed to actualise all that would be actualised by the paradigm member of the horse-kind.[104] Hence the Boethian view explains why the comatose, very young, senile, mentally handicapped etc are all persons: they all instantiate the essential potentialities characteristic of personhood, they are all individual substances whose nature is to be rational – even if, for whatever reason, none of them are fully rational presently.

Since on the Boethian view all human beings are persons, in marked contradistinction to the Lockean view, it follows that the UDHR understanding of personhood is implicitly Boethian rather than Lockean: personhood is inherent in rational human nature, inalienable, equal to all human beings, irreducible to accidental characteristics of the human being, and universal to all human beings as a universally binding universal moral truth. It comes as no surprise, then, to learn that the dominant concept of personhood at the time of the drafting of the UDHR seems to have been the Boethian version, as exhibited by the US Catholic Bishops' draft 'A Declaration of Rights' (1946), the American Jewish Committee's draft 'Declaration of Human Rights' (1944), and the American Declaration of the Rights and Duties of Man (1948).[105]

13. How do human dignity and personhood interrelate with each other and with human rights?

This article has sought to show that human rights, human dignity and personhood possess the same essential characteristics. Yet so far little has

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103 Christopher Megone, 'Potentiality and Persons' in Mark G Kuczewski and Ronald M Polansky (eds), *Bioethics: Ancient Themes in Contemporary Issues* (2002) 162. Teichman puts it in less technical language, 'in order to count as a person an individual creature need not itself be actually rational, as long as it belongs to a rational kind.' Teichman, above n 95, 182.

104 Ibid.

105 See Klaus Dicke, 'The Founding Function of Human Dignity ' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002) 113. A contemporary proponent of Boethian-type personhood is the Thomist Joseph Torchia. See Joseph Torchia, *Exploring Personhood: An Introduction to the Philosophy of Human Nature* (2008).

been said by way of the interrelationship between these three concepts in the UDHR. Before concluding it is worthwhile to offer a preliminary examination of such an interrelationship, especially since the relationship between dignity and personhood in the context of the UDHR is very much a neglected topic.

On the one occasion where dignity and personhood are mentioned together in the UDHR, the preamble's recital of the 'dignity and worth of the human person', it is a clear emphasis (dignity *and* worth) of the fundamental value of human personhood. As both the preamble and Article 1 make reference to the dignity of all members of the human family/all human beings, personhood parallels humanity in relation to dignity: human dignity is one and the same thing as personal dignity according to the UDHR. If such a parallel is not to be empty tautology then it would have to add somehow to the meaning of the UDHR. Arguably the most satisfactory explanation available is that personhood offers a moral and metaphysical emphasis or gloss to the basic biological expression 'human being'. What does it emphasise? That which separates this being from others: its rational nature. It is this rational nature that explains and is at the basis of the dignity inherent in human nature: rational nature is an inherently dignified (valuable) nature.[106] Human dignity, then, is the value attributable to the human being on account of the type of being he/she is, a being with a rational nature or, in another word, a person. The rational nature indicative of personhood is essential to what makes a human being the type of being it is and consequently what distinguishes it from others beings that lack such a profound dimension to their existence. No doubt there is a metaphysical dimension to this understanding of personhood but this is completely in accord with Cassin's reminder during drafting that persons existed who had no legal personality – ie that the personhood relevant to the field of human rights was not a legal fiction, like, say, corporate personality, but a fundamental reality about the human being to the effect that all human beings are equally valuable on account of their essential nature. Malik reminded his colleagues during drafting that the term used in the UN Charter for the value of the human person was 'dignity', while Roosevelt pointed out that human dignity was the reason why there were human rights in the first place.

It is no coincidence that the traditions of intrinsic dignity and Boethian personhood contain a very similar picture of the relationship

106 Mette Lebech speculates that '"[h]uman dignity" probably became part of current usage at the same time and for the same reasons as the expression "human person", ie to designate the fundamental value or importance of the human individual as such. The 1948 *Universal Declaration of Human Rights* testifies to the currency of both terms….' Lebech, above n 60, 27.

between the two concepts in question. According to Cicero the dignity of human nature resides in the *persona* (role) of reason as a characteristic of the human being that separates him/her from other animals.[107] The aforementioned *De Dignitate Conditionis Humanae* (On the Dignity of the Creation of the Human Being) postulates a triple dignity inherent in the human being corresponding to the three powers of the soul, intellect, memory and will, and analogous to the three persons in the one God.[108] Alongside endorsing the Boethian definition of personhood as an individual substance of a rational nature, Aquinas also cites approvingly the definition of person as a subject (*hypostasis*) 'distinct by reason of dignity',[109] a distinction which Aquinas links with the subject's rational nature. Contemporary theorists sympathetic to these traditions of enquiry hold a similarly interrelated view of dignity and personhood: according to Patrick Lee and Robert George,

> [a]lthough there are different types of dignity, in each case the word refers to a property or properties – different ones in different circumstances – that cause one to excel, and thus elicit or merit respect from others. Our focus will be on the dignity of a person or personal dignity. The dignity of a person is that whereby a person excels other beings, especially other animals, and merits respect or consideration from other persons. We will argue that what distinguishes human beings from other animals, what makes human beings persons rather than things, is their rational nature.[110]

This account of the relationship between personhood and dignity fits perfectly with the (albeit implicit) account contained within the UDHR.

Even though the UDHR, unlike both the ICCPR and the ICESCR, does not explicitly recognise that human rights 'derive from the inherent dignity of the human person', ie recognise that human rights are founded on dignity and personhood, it is clear the source document of the contemporary human rights corpus does envisage an exceptionally close, symbiotic and mutually reinforcing relationship between the concepts of human rights, human dignity and personhood. Hence what is almost explicit in the UDHR is made fully explicit in the ICCPR and ICESCR's recognition that human rights 'derive from the inherent dignity of the human person'. With this in

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107 See Cancik, above n 67, 19-25.

108 See Lebech, above n 60, 66-8.

109 Summa Theologiae, Ia q. 29 a. 3.

110 Patrick Lee and Robert P George, 'The Nature and Basis of Human Dignity' (2008) 21 *Ratio Juris* 173, 174.

mind it is not surprising that all three concepts should share the same essential characteristics.

Conclusion

It comes as no surprise to learn that human rights, human dignity and personhood, which are so intimately linked in the text of the UDHR share the same essential characteristics. Indeed if these concepts did not share so much in common it would pose a significant threat to a holistic interpretation of the UDHR, and to human rights instruments generally in as much as they are founded on the UDHR. That the conceptual background to these three core ideas is so complex, long and possibly even out of synch with the contemporary philosophical *Zeitgeist* may cause some to disregard attempts at its analysis as esoteric, self-indulgent and ultimately inconsequential. Yet the practicalities of human rights are not dissociable from their philosophical meaning and as such meaning is easily forgotten or obscured, reminders and analysis should be welcomed by all – from those concerned with conceptual truth to those primarily concerned with the just application of human rights. The importance of this point is heightened when one considers the emergence of new fields of human rights application such as bioethics, where all three concepts under discussion in this article are critical, and environmental law, where the same is potentially the case also. Further, in the field of comparative constitutional law the concept of human dignity is being cited more and more by judges just as scholars collectively lament its supposed indeterminacy: much could be gained by turning again to the moral truths presupposed and enshrined in the UDHR, especially since judicial reference to dignity is so often framed in accordance to dignity's relation to the human person.

The collective meaning of the three concepts treated in this article, a meaning inseparable from the idea of objective moral truth, should caution theorists attempting to co-opt human rights within a preconceived relativistic framework. Such attempts are more and more prevalent in a world where the objective moral basis for human rights has never been less accepted and where the political utility of human rights has never been more lauded. Yet in a rush to reaffirm the objective morality at the heart of the UDHR it is vital to take objections to such objectivity seriously. This is the one failing of Morsink's human rights scholarship; his endorsement of moral intuitionism tends to undermine somewhat his otherwise brilliantly clear elucidation of the philosophical meaning of inherent human rights. While this article has critiqued Morsink on this point it has only offered broad indications of what a convincing rationale for inherent human rights looks like. The focus has been more on conceptual coherency than on

substantive moral theory. Attempts at the latter will hopefully benefit from the emphasis on conceptual consistency here.

Interpreting Plans: A Critical View of Scott Shapiro's Planning Theory of Law

THOMAS BUSTAMANTE[†]

Introduction

In his new book, *Legality*, Scott J Shapiro states in a comprehensive and fully articulated way his jurisprudential theory, which characterises legal activity as a form of shared 'planning activity' the fundamental aim of which is to solve moral disagreements that cannot be properly resolved by purely moral deliberation. Nevertheless, he not only addresses the issue of the identification of the necessary features of the legal system, but also the theories of legal interpretation – or the theories about how to extract a theory of legal interpretation – embedded in the structure of the legal system. In the following sections, I will reconstruct some of the central elements of his argument about legal reasoning and legal interpretation, and then propose a critical analysis of his work. My objective is to illustrate some of the problems of the methodology chosen by Shapiro and to discuss the most important problems of legal interpretation that his theory intends to solve.

The first section attempts to reconstruct the main arguments of Shapiro's book. At section 1.1, I explain Shapiro's views on the nature of jurisprudence, with particular emphasis in his distinction between 'normative' and 'analytical' jurisprudence, and attempt to reconstruct his understanding of positivism and how it bears on legal reasoning. In sequence, at section 1.2, I present his answer to the so-called 'Identity Question', that is, the question about the nature of law and how legal validity is to be ascertained. Moreover, I focus on one particular point of

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this answer, the Moral Aim Thesis, which holds that the 'fundamental aim' of law is to rectify the deliberative deficiencies of moral reasoning, and on the Simple Logic of Planning Argument, which holds that the existence and the content of legal norms can never depend on moral reasons. The second section, in turn, attempts to criticise the central arguments found in the first section. In short, I claim at this section that Shapiro's Planning Theory of Law is a form of 'normative' positivism that is not entirely coherent with its own views on the nature of jurisprudence, since it adopts an interpretive attitude towards the law that does not square well with the claim that the Planning Theory is circumscribed to an ontological or 'analytical' inquiry into the nature of law. Furthermore, I hold that there are two serious problems in Shapiro's legal theory. Firstly, it does not have a sound explanation for the presence of moral reasons in legal documents and in adjudication. And secondly, its meta-interpretive theory is as abstract and philosophical as the theories that Shapiro criticises for giving too much interpretive power to legal officials.

1. An Overview of Scott Shapiro's Planning Theory of Law

1.1 ON POSITIVISM AND THE NATURE OF JURISPRUDENTIAL INQUIRY

Shapiro's Planning Theory of law intends to be a jurisprudential inquiry which shares the same spirit of Hart's descriptive approach to legal theory. He sees his own theory as an 'analytical', rather than 'normative', type of jurisprudence. While 'normative' jurisprudential theories deal 'with the moral foundations of law,' the Planning Theory is part of an 'analytical' strand of juristic theories that examines its 'metaphysical foundations.'[1] It is thus as an inquiry into the 'fundamental nature of law,'[2] which claims to be very different from the natural law theories whose purpose is to providing a moral justification for the legal system. While natural law theories are supposed to 'undertake a critique of practical viewpoints', with a view to 'identify conditions and principles of practical right-mindness, of good and proper order among persons, and individual conduct,'[3] his legal theory intends to be an exercise on 'social ontology', which is 'a branch of analytical philosophy that studies the nature of entities belonging to social reality.'[4] The main question to be answered by such inquiry is the 'What is

1 Shapiro, above n 1, 2.

2 Ibid 8.

3 John Finnis, *Natural Law and Natural Rights* (2nd ed, 2011) 18.

4 See Carlos Bernal Pulido, 'Austin, Hart and Shapiro: Three Variations on Law as an Entity Grounded in a Social Practice' (2012) *Rechtstheorie*, forthcoming, where the author provides an elegant explanation for Shapiro's

law?' question, which should be sharply distinguished from the 'What is *the* law?' question, since it is concerned with the 'nature of law in general,' rather than with any specific legal system.[5]

The problem about the nature of law, in turn, can be split into two different, but correlated, more specific questions. The first is the so-called 'Identity Question.' To ask about the identity of X, Shapiro says, 'is to ask what is it about X that makes it X and not Y or Z or any other such thing.'[6] The second question, in turn, is the so-called 'Implication Question,' which concerns 'not what makes the object the thing that it is,' but rather what '*necessarily follows from* the fact that it is what it is and not something else.'[7] When one considers the Implication Question, one no longer asks about how to identify a thing, but inquires into the properties that it necessarily has.

Once these distinctions are fixed, Shapiro turns to the problem of the practical relevance of jurisprudence. According to his argument, whoever intends to address 'the most pressing practical matters that concern lawyers' – including not only the question of who has authority to make law, but also the problem of how the law is to be interpreted – must necessarily answer the analytical questions raised by conceptual jurisprudence. 'In order to prove conclusively that the law is thus-and-so in a particular jurisdiction, it is not enough to know who has authority within the jurisdiction, which texts they have approved, and how to interpret them. One must also know a general *philosophical truth*, namely, how *legal authority* and *proper interpretive methodology* are established in general.'[8] Hence, a jurisprudential disagreement such as the debate between positivists and natural lawyers is a debate over both the *necessary properties* of the law and the correct way to *interpret* the law.[9] As we can see, Shapiro is well aware that 'the resolution of certain legal disputes depends on the ability to resolve certain philosophical questions as well.'[10]

Hence, the practical question of how the law is to be interpreted depends on one's answer to the ontological question of what the law is or how legal validity is to be ascertained.

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ontological claim that laws are social plans that coordinate social action and pre-empt moral and political reasons in practical deliberations.

5 Shapiro, above n 1, 7.

6 Ibid 8.

7 Ibid 9.

8 Ibid 25.

9 Ibid 26-7.

10 Ibid 29.

Shapiro's answer to the ontological question of the nature of law is, as one might suspect, strongly committed to legal positivism. Yet it is not simply a 'casual' form of legal positivism which is indifferent to one's interpretive attitude towards a legal norm. On his view, positivim's solution to the 'Identity Question' bears heavily on one's answer to an 'Implication Question' concerning the choice of the right interpretive approach to the legal system. Hence, if Raz and other positivists are right when they contend that 'all laws are source-based,'[11] then 'the only way to demonstrate conclusively that a person has legal authority or that one is interpreting legal texts properly is by engaging in sociological inquiry.'[12] Therefore, Shapiro holds that jurists should not (and need not to) engage in any form of moral inquiry or further philosophical reflection in order to determine the content of a particular legal system.

This strikingly positivist view on methodology leaves its mark in Shapiro's attitude towards legal philosophy throughout the book. For he divides very sharply the competences of legal philosophers and practical lawyers: 'The philosopher's job is to identify *the proper method for determining the content of the law*,' while 'the lawyer's job is to put that method into practice.'[13] Thus, Shapiro's view on the character of legal theory is very different from, say, Dworkin's. While the former thinks that the job of legal philosophy is to reveal the 'philosophical truths' which determine the nature or the essential features of law and legal reasoning, the latter does not see philosophical reflection as qualitatively different from the kind of reflection that practical lawyers make about legality.[14] A philosophy of law, for Dworkin, is also a constructive interpretation of the political concept 'law', rather than the search for the 'essence' of a thing or a brute social fact which pre-exists the inquiry and is left untouched or unaffected by the arguments used to describe it.[15]

1.2 THE ANSWER TO THE IDENTITY QUESTION: LAWS AS PLANS

Shapiro's strongest jurisprudential claim is that 'the fundamental rules of the legal system *are* plans', and thus 'the existence conditions for the law are the same as those for plans.'[16] This implies, on his view, that 'legal activity is best understood as social planning and that legal rules themselves

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11 Raz, Joseph. *Ethics in the Public Domain* (revised ed, 1996) 194.
12 Shapiro, above n 1, 29.
13 Ibid 31-2.
14 Ronald Dworkin, *Law's Empire* (1986) 87 f.
15 Ronald Dworkin, *Justice in Robes* (2006) 140-186.
16 Shapiro, above n 1, 149.

constitute *plans*, or *planlike* norms.'[17] A plan, here, is not a 'mental state' or a personal intention. Shapiro emphasises the normative aspects of plans and defines them as 'abstract propositional entities that require, permit, or authorize agents to act, or not to act, in certain ways under certain conditions.'

Since laws are plans, the argument goes, legal authority is possible *because* of the ability of social planners to create plans that are binding upon the members of the social group. The creation and persistence of the fundamental rules of law 'is grounded in the capacity that all individuals possess to adopt plans.'[18] Human beings, as Michael Bratmann has famously argued, are 'planning creatures'[19] and thus have a 'special kind of psychology: we not only have desires to achieve complex goals, but we also have the capacity to settle on such goals and to organize our behaviour over time and between persons to attain them.'[20] This assertion is regarded by Shapiro as an ontological claim about the nature of human activities, which in his interpretation will provide the basis for an ontological claim about the nature of law and legal reasoning.

Therefore, when maintaining that legal activity is a form of social planning, Shapiro claims not only to be offering an 'analogy,' between laws and plans, but rather to be 'drawing an implication' from the nature or essence of the fundamental rules of legal systems.[21]

Let us consider in a bit more detail what Shapiro means by a planning activity.

On the basis of Bratmann's insights on the relations between planning and practical reasoning, Shapiro thinks that plans have a 'partial' character and a 'nested' structure, since the activity of planning 'typically

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17 Ibid 120.

18 Ibid 119.

19 Mitchel Bratmann, *Intention, Plans and Practical Reason* (1999).

20 Shapiro, above n 1, 119.

21 See: M E J Nielsen, 'Scot Shapiro' (interview with) in M E J Nielsen (ed), *Legal Philosophy: 5 Questions* (2007), 214, where Shapiro literally states this point in the following terms: 'I want to be clear here that I am not simply offering an analogy – I am drawing an implication. The existence conditions for law are the same as those for plans because the fundamental rules of legal systems *are* plans. Their function is to structure legal activity so that participants can work together and thereby achieve the political objectives of the practice. As a result, whether someone has legal authority in a particular system depends on whether the officials in that system plan to defer to this person in the relevant circumstances and not whether they morally ought to do so.'

involves the creation of… larger plans' which are needed to accommodate and execute the original plan.[22] When we plan to do something, even small things such as cooking tonight, we usually end up having to engage in further planning like going to supermarket to get food or leaving work early to check on whether we have the ingredients for the meal.

Furthermore, a plan is seen as a *norm*, that is, as 'an abstract object that functions as a guide for conduct and a standard for evaluation.'[23] Plans can be characterised as 'purposive entities' that are created according to the principles of 'instrumental rationality' with a view to 'settle… questions about what is to be done.'[24] Similarly to Raz's views on authority, Shapiro holds that 'when one has adopted a plan, for oneself or for another person, the plan is supposed to *pre-empt deliberations about its merits*, as well as purporting to provide a reason to pre-empt deliberations about its merits.'[25]

This pre-emptive character of plans makes them an indispensable tool in the realm of *shared activities*. When we think of social groups, it seems virtually impossible to coordinate action without engaging in planning activity. 'Shared plans … bind groups together,' since they 'explain how groups are able to engage in the activity.'[26] Plans 'lower deliberation costs and compensate for cognitive incapacities' of the members of the group, as well as 'coordinate' the behaviour of the participants of the community. The plan provides a higher degree of *predictability* for social action and 'serves a crucial control function,' since 'it enables some participants to channel the behaviour of others in directions that they judge to be desirable.'[27]

This control function is maximised as soon as planners introduce hierarchy as a means to allocate planning capacities and requirements for the members of the group. Planning within a hierarchical structure enables the creators of the plan to compensate for their lack of trust in some individuals (for instance, in the bulk of the staff of a company, who are not entirely committed to their work and do not care about the success of the business) and to capitalise on the trust that they have in others (for instance, the managers and supervisors, to whom the planners may allocate a greater degree of discretion and planning competence).[28] As Shapiro explains, plans 'are powerful tools for managing the distrust generated by alienation. For the task of institutional design in such circumstances is to create a practice

22 Shapiro, above n 1, 121.
23 Ibid 127.
24 Ibid 128-9.
25 Ibid 129.
26 Ibid 137.
27 Ibid 132-3.
28 Ibid 148.

that is so thick with plans and adopters, affecters, appliers, and enforcers of plans that alienated participants end up acting in the same way as non-alienated ones.'[29]

In larger communities, this need for planning increases exponentially, for shared agency becomes impossible unless the power to plan is concentrated in the hands of a few.[30] Shapiro refers to these situations as the 'circumstances of legality,' ie, the 'social conditions that render sophisticated forms of social planning desirable.'[31] In this view,

> The circumstances of legality obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary. In such stances, the benefits of planning will be great, but so will the costs and risks associated with non-legal forms of ordering behaviour.[32]

We can see, here, what makes the law indispensable is precisely the inefficiency of moral principles, ie, the incapacity of moral standards to act as an independent guiding standard for the community. 'The law is first and foremost a social planning mechanism whose aim is to rectify the moral deficiencies of the circumstances of legality.'[33] It is here that the value of *legality* or, in other words, the Rule of Law, resides: 'its value derives entirely from the benefits that social planning generates and is best served when legal structures maximise these benefits.'[34] Legal systems and institutions are justified *only* as a *means* to social planning, and their fundamental aim '*is to compensate for the deficiencies of alternative forms of planning in the circumstances of legality.*'[35]

We can see, therefore, that Shapiro's positivism is based on the 'instrumental' character that he ascribes to the legal system. 'To build or operate a legal system', he says, 'one need not possess moral legitimacy to impose legal obligations and confer rights: one need only have the ability to plan.'[36] The law is therefore an 'universal means' to coordinate social action in the direction desired by the authors of the Master Plan. Since the fundamental rules of the system are 'a shared plan' accepted by legal officials, then according to Shapiro they must be ascertained through an

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29 Ibid 150.
30 Ibid 143.
31 Ibid 170.
32 Ibid 170.
33 Ibid 172.
34 Ibid 396.
35 Ibid 171, emphasis as in the original.
36 Ibid 156.

examination of the 'relevant social facts.'[37] Shapiro pays tribute to the Social Sources Thesis, which states that the existence and the content of law 'can be identified by reference to social facts alone, without resort to any evaluative argument.'[38]

Nevertheless, though Shapiro is promising us an 'ontological' argument about the 'nature' of law, I do not think he is able to offer us more than a moral argument to prove his point. His basic answer to the Identity Question is that 'a group of individuals are engaged in legal activity whenever their activity of social planning is shared, official, institutional, compulsory, self-certifying, and has a moral aim.' Or, in a more straightforward formulation,

> What makes the law, understood here as a legal institution, *the law* is that it is a self-certifying, compulsory planning organization *whose aim is to solve those moral problems* that cannot be solved, or solved as well, through alternative forms of social ordering.[39]

Of the features that Shapiro uses to state this answer to the Identity Question, there is at least one which is not fully compatible with his strict methodology which forbids moral and political evaluations from the legal theorist. Even if this purely analytical jurisprudence could vindicate the claims that the legal system is a 'self-certifying' organization, in the sense that it is 'free to enforce its rules without first demonstrating to a superior (if one exists) that its rules are valid,'[40] and that laws are planning organizations, it is very improbable that a purely sociological inquiry would be able to grant the Moral Aim Thesis, which holds that 'the fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality.[41]

According to the Moral Aim Thesis, the law plays a pivotal role for resolving coordination problems because its authoritative character has a special value, which stems 'not only from its ability to lower deliberation costs and compensate for cognitive capacities, but also from its power to coordinate the participant's behaviour.'[42] The costs and risks associated with any form of non-legal deliberation under the circumstances of legality are so high that no stable and legitimate society is able to afford them. These costs and risks can only be reduced through 'sophisticated

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37 Ibid 177.
38 Raz, above n 12, 210-211.
39 Shapiro, above n 1, 225.
40 Ibid 220-221.
41 Ibid 213.
42 Ibid 134.

technologies that only legal institutions provide', such as universal laws, publicly ascertainable rules and previously established procedures.[43] The fundamental aim of the law, which is its 'moral aim,' is indeed to 'enable communities to overcome the complexity, contentiousness, and arbitrariness of communal life by resolving those social problems that cannot be solved, or solved as well, by nonlegal means alone.'[44]

Shapiro extracts far-reaching consequences from the Moral Aim Thesis. This thesis is important to provide the answers both to the Identity Question, as we have seen above, and the Implication Question.

Since the law claims to settle moral disputes, it also claims that the norms that it establishes are morally obligating, although in specific cases this claim may not be satisfied. 'What makes the law *the law* is that it has a moral aim, not that it satisfies it.'[45] We may say, however, that '*from the legal point of view*' or the 'perspective' of the law, legal authorities settle moral disputes in a morally legitimate way.[46] One may reason about the law even without morally endorsing its norms or approving the solution offered by the legal system. Legal reasoning is seen as a 'descriptive', rather than normative or prescriptive, type of discourse. The word 'legal', sometimes, 'registers our agnosticism' about a particular moral issue: 'We do not know or care whether the law's normative judgments are correct – we are simply reporting these judgments and, in effect, bracketing them off in a special kind of invisible commas.'[47] We are, to be sure, 'thinking inside the box,' since as legal interpreters we 'suspend our moral judgments and show fidelity to the legal point of view.'[48]

This 'perspectival' attitude should always be adopted in legal reasoning, since otherwise the law would not be able to settle the moral disputes it purports to. To sum up, legal reasoning is entirely *amoral*.

As the author states,

> Shared plans must be determined exclusively by social facts *if they are to fulfil their function*… The logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that

43 Ibid 170.
44 Ibid 171.
45 Ibid 214.
46 Ibid 184-5.
47 Ibid 186.
48 Ibid 398.

> plans are designed to settle. Only social facts, not moral ones, can serve this function.[49]

At this point, the Planning Theory of Law states a very ambitious ontological claim. The contention stated at the quote above, for Shapiro, is a 'metaphysical truth,' not a moral argument.[50] It not only demonstrates that exclusive positivism is *the* correct type of legal theory and that natural law is wrong to believe that the validity of laws depends partially on moral facts; to be sure, it goes way beyond that, since it provides both an answer to the Implication Question and a genuinely positivistic theory of legal reasoning, which excludes moral and evaluative considerations from the realm of legal argumentation.

In a more straightforward formulation, this reasoning can be presented in the form of what Shapiro calls the 'Simple Logic of Planning Argument', which is enunciated in the following terms:

> *SLOP*: The existence and content of a plan cannot be determined by facts whose existence the plains aims to settle.[51]

There are at least two important points worth mentioning here.

First, with the SLOP Argument Shapiro intends to dismiss not only natural lawyers and non-positivists, but also the so-called 'inclusive positivists', who believe that a legal system may contingently incorporate moral criteria into the rule of recognition. 'The problem with inclusive positivism', he argues, 'is that it too violates SLOP. If the point of having law is to settle matters about what morality requires so that members of the community can realize certain goals and values, then legal norms would be useless if the way to discover their existence is to engage in moral reasoning.'[52]

Second, SLOP leads to a theory of legal reasoning that entirely excludes moral considerations from the realm of legal reasoning. Sociological inquiry, rather than moral or philosophical arguments, suffices to offer an answer to every legal question. The law dictates its own interpretive methodology, which has to be extracted by an empirical analysis of social facts.

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49 Ibid 177.
50 Ibid 275.
51 Ibid 275.
52 Ibid 275.

The Planning Theory entails that the *master plan* of the legal system, ie its fundamental rules, express attitudes of 'trust' and 'distrust' towards all agents and legal officials. At this stage, Shapiro introduces the notion of 'economy of trust', which rests at the core of his views on legal reasoning and legal interpretation. According to Shapiro, the economy of trust can be understood as 'the distribution of trust upon which a plan is predicated'.[53] For every legal system, one of the tasks of its Master Plan is to allocate burdens, competences and discretionary powers among participants in the legal activities. By entrusting some officials to decide important matters while binding others with very strict rules and directives, the framers of the Master Plan may channel the behaviour of the whole society in the direction that they find appropriate.

As one would expect, it would be odd to claim that the authors of the Master Plan would ascribe relevant decision-making powers to agents in whom they do not trust, or that they would assign a great amount of interpretive freedom to officials who lack either interest in public policies or the institutional competences for making legal judgments and moral or political evaluations. Decisions about the quality and the range of discretion that will be attributed to someone will thus be based on a particular 'economy of trust', since it is part of the nature of plans that they are 'sophisticated devices for managing trust and distrust' because they 'allow people to capitalize on the faith they have in others or compensate for its absence.'[54]

It is on the basis of the economy of trust, rather than any abstract philosophical theory about the character of legal interpretation, that one is to solve all 'meta-interpretive' disagreements that may affect legal reasoning. A meta-interpretive disagreement, for Shapiro, is a special type of 'theoretical disagreement' which concerns the best interpretive theory for a particular legal system.

Hence, when lawyers defend different interpretive theories of law they must take into consideration both the Moral Aim Thesis and the SLOP argument, which refer to the 'fundamental aim' of the legal system.

On the basis of SLOP, Shapiro raises a strong criticism on Dworkin's theory of adjudication. Since, as we have seen, the Planning Theory 'maintains that the fundamental aim of all legal systems is to rectify the moral deficiencies of the circumstances of legality,'[55] a methodology such

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53 Ibid 335.
54 Ibid 334.
55 Ibid 209.

as Dworkin's fails because it 'defeats the purpose of law.'[56] It is at this stage that Shapiro states what he calls the 'General Logic of Planning argument', which is an adaptation of SLOP to the context of meta-interpretive disagreements.

> GLOP: The interpretation of any member of a system of plans cannot be determined by facts whose existence any member of that system aims to settle.[57]

GLOP is used, in the last four chapters of the book, to support Shapiro's own meta-interpretive theory, which claims to be determined by social, rather than moral, considerations.

2. A Critical Assessment of Shapiro's Planning Theory of Law

2.1 PLANNING THEORY AS NORMATIVE POSITIVISM

My main objection to the Planning Theory is that it is much closer to the tradition of 'normative positivism' than it intends to be. As we have seen above, the Moral Aim Thesis is the central aspect of Shapiro's account of the nature of legal systems. The 'fundamental aim' of every legal system is to 'rectify the moral deficiencies of the circumstances of legality.'[58]

Law becomes indispensable precisely because no other form of social ordering is as efficient, controllable and certain as it is. The existence of the legal system promotes a set of basic moral values in such a way that the law becomes in itself *morally* valuable because no other normative system is better equipped to solve *moral* quandaries in a *morally correct* way. The universal character and the predictability of legal rules have a very specific moral worth, which helps participants in legal discourse to maintain the 'social pressure' for the compliance with the law. The moral attributes of law, in this scheme, play a crucial role to keep and strengthen the normativity of the legal system.

As Shapiro asserts in defence of the Moral Aim Thesis,

> Of course, the aim of the law is not planning for planning's sake. If legal systems were merely supposed to adopt and apply plans regardless of method or content, the task would be better solved by flipping a

56 Ibid 310.
57 Ibid 311.
58 Ibid 172.

> coin. Rather, the law aims to compensate for the deficiencies of nonlegal forms of planning by planning in the 'right' way, namely, by adopting and applying morally sensible plans in a morally legitimate manner.[59]

Therefore, Shapiro's exclusive positivism, which is at the core of the SLOP argument, has a moral root. Since the law is understood by the Planning Theory as a 'universal means' to solve moral disputes in the best possible way, it is obvious that the Moral Aim Thesis is at the end of the day a *moral* argument for a non-moral criterion to identify the law.

Only if the Moral Aim Thesis is true can we say that the SLOP argument is correct, and that Shapiro's exclusive positivist view is a proper way to remain faithful to the 'fundamental' point of the law. As I had a chance to argue in a previous writing,

> It is very implausible to hold, unless one is advocating a natural law position, that the Moral Aim Thesis is simply a 'truism' or a 'metaphysical truth' that is part of the essence of every legal system, rather than a normative thesis in defence of a particular conception of law. If the Moral Aim Thesis is to endure, this is not because it is a philosophical dogma which is simply a part of the immutable 'nature' of law and that has to be merely 'acknowledged' by jurisprudents. It is not something that is simply 'out there' to be 'found' by our sensorial perception. On the contrary, the Moral Aim Thesis is itself the result of a political choice of the legal theorist when she constructs her own interpretive theory of law.[60]

If this is true, then the Moral Aim Thesis is not only a thesis about the point of law, but also a moral and political argument for Shapiro's interpretation of the value of legality. Rather than a 'truism' or an 'ontological' or 'philosophical truth' about the nature of law, the Planning Theory would thus be an instance of normative positivism, ie the kind of legal positivism which starts with a *moral* argument in support of its own constructive interpretation of the concept of legality.[61]

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59 Ibid 171.

60 Thomas Bustamante, 'Legality, by Scott Shapiro' (2012) 32 *Legal Studies – The Journal of the Society of Legal Scholars* 3, 499-507, at 504.

61 Therefore, as I argued elsewhere, normative or prescriptive positivism 'resists accepting the "natural law versus positivism" paradigm. It starts with a moral thesis and then, as a result of the truth of the moral ideal which is claimed to be the "point" of law, draws positivistic inferences on how the

As Waldron has famously stated, 'the claim of normative positivists is that the values associated with law, legality, and the rule of law – in a fairly rich sense – can be best achieved if the ordinary operation of such a system does not require people to exercise moral judgment in order to find out what the law is.'[62] Thus, prescriptive positivists such as Waldron or Campbell attempt to 'rehabilitate' positivism by stressing the 'strong normative aspects' of its main tenets. Positivism is viewed as 'strongly motivated by certain moral values and political concerns which is in no way at odds with the positivist mantra that we must always distinguish between the law as it is and as it ought to be.'[63]

The key difference between 'normative' or 'prescriptive' legal positivism, on the one hand, and 'descriptive' or 'neutral' legal positivism, on the other hand, seems to be that the former is not committed to any form of 'logical' or 'philosophical' positivism. It neither claims to be neutral nor holds that it is merely acknowledging a purported 'essence' or a 'truism' about the nature of law, as Kelsen purports to do when he holds that his legal theory is 'purified of all political ideology' and 'focus solely on the cognition of law rather than on the shaping of it,'[64] or as Hart says when he holds that his account 'does not seek to justify or commend on moral or other grounds' the rules, forms and structures of legal systems.[65] When Shapiro holds that he is engaging in 'analytical jurisprudence'[66] or inquiring 'into the fundamental nature of law'[67] to discover the 'properties that it *necessarily* has'[68] by 'gathering truisms,'[69] he is promising us a descriptive form of legal positivism, but in the end he does not give us more than an interpretive theory (in Dworkin's sense) which justifies its adherence to exclusive positivism on his own interpretation of the moral aim of the legal system.

Therefore, Shapiro's exclusive positivist view is justified by political values which entail a particular attitude towards legal reasoning and

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law is to be ascertained and legal reasoning is to be conducted' (Bustamante, above n 61, 505) .

62 Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (2001) 411-433, 421.

63 Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (2004) 5.

64 Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Pauson trans, 1992) 1.

65 H L A Hart, *The Concept of Law* (2nd ed, 1994) 240.

66 Shapiro, above n 1, 3.

67 Ibid 8.

68 Ibid 9.

69 Ibid 13

interpretation. As it happens with the most successful arguments for legal positivism, this is a 'moralistic' argument for an 'a-moral' reading of the law, ie a set of 'purely practical and moral grounds' that make a case for legal positivism.[70] And it is precisely because of this normative or prescriptive aspect of its positivism that the Planning Theory is successful in explaining the connection between the criteria that we use to define the concept of legality and the interpretive attitudes of the norm-users.

2.2 METAPHYSICAL TRUTHS OR INTERPRETIVE CONCEPTIONS? A NOTE ON THE CHARACTER OF JURISPRUDENCE

The argument at the previous sections shows that Shapiro's substantial views on the nature of law are inconsistent with the essentialism that he purports to defend while he distinguishes sharply between 'normative' and 'conceptual' jurisprudence. To be sure, this methodological divide is at odds with the Moral Aim Thesis, which stands at the core of Planning Theory and provides the basis for the 'Simple Logic of Planning' argument.

Furthermore, as Mark Murphy has shown in his review of *Legality*, Shapiro's approach to jurisprudence is very close to that of natural lawyers such Aquinas or John Finnis. Though his exclusive positivism separates him from these thinkers, his view of the 'inquiry into the nature of law' as having 'not only theoretical interest' but also 'a practical upshot' brings him very close to the tradition of *normative* jurisprudence[71].

I am convinced, for reasons that I have stated in length elsewhere,[72] that the whole project of descriptive positivists is deemed to fail, since any theory of law is based on constructive interpretations that cannot avoid deep-level moral and political evaluations. In my opinion, Shapiro is not the only one to commit the methodological fallacy of denying the normative character of his jurisprudence In the case of Shapiro, however, the coincidence between his views on the fundamental aim of law and those of self-professed normative positivists like Waldron or Campbell is so strong that it does not even make sense to argue – as he does at the first chapter of *Legality* – that his project is merely to develop a purely analytic type of jurisprudence.

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70 Neil MacCormick, 'A Moralistic Case for A-Moralistic Law?' (1985) 20 *Valparaiso University Law Review* 1, 11.

71 Mark C Murphy, 'Scott J. Shapiro. Legality (Book Review)' (2011) 30 *Law and Philosophy* 369, 371.

72 Thomas Bustamante, 'Comment on Petroski: On MacCormick's Post-Positivism' (2011) 12 *German Law Journal* 693, esp p 700-707

It makes more sense to hold, as Dworkin does, that 'any theory of law, including positivism, is based in the end on some particular normative political theory.'[73] Hence, Shapiro is repeating the same mistake that Hart committed when he held that his jurisprudence 'is *descriptive* in that it is morally neutral and has no justificatory aims.'[74]

With regards to this point, I think that though Hart believed that his theory was purely 'conceptual' in Shapiro's sense, he did not manage to free his theoretical inquiry from arguments of political morality. I can think of two of his most central arguments as genuine examples of the moral-political commitments of his theory, which will be analysed in the following paragraphs.

The first argument which exemplifies Hart's moral-political commitments appears in his reply to Radbruch's post-war papers against positivism. In one of his most celebrated essays, Hart heavily criticises Radbruch and the German Constitutional Court for the decisions that applied the so-called 'Radbruch Formula' and thus denied legal character to a set of Nazi Laws which imposed racist measures on people of the Jewish religion. In particular, Hart was not satisfied with the reasoning provided by the Constitutional Court to justify, in a set of criminal cases, the conclusion that some statutes are too unjust to deserve any form of obedience. Instead of saying that the laws which legalised murder against the Jews lacked legal validity because of their extreme injustice, Hart argues, the court should have admitted that these statutes had indeed legal character, although the law in that case was too wicked to be obeyed. In order to correctly justify its decisions, the court should have recognised the legal character of the old statutes while creating a new legal rule with retrospective effects. In Hart's own words:

> Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems. Surely if we have learned anything from the history of

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73 Ronald Dworkin, 'A Reply' in Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (1984) 247-300, 254.

74 Hart, above n 66, 240. For a very successful attempt to rewrite Hart's *Postscript*, translating it into the language of normative positivism, see Tom Campbell, 'Rewriting Hart's Postscript: Thoughts on the Development of Legal Positivism' (2011) 5 *Problema - Anuario de Filosofía y Teoría del Derecho*, 23 ff.

> morals it is that the thing to do with a moral quandary is not to hide it.[75]

It is clear, therefore, that one of Hart's most famous arguments in reply to non-positivism is a genuinely moral and political argument, which has very little neutrality in it. A positivist definition of law should be preferred to a non-positivist one because it would make plain the sacrifices and the choices that one has to make in order to impose legal obligations with retrospective effect.

The second argument, on the other hand, is even more expressive of the moral or political preferences of the author, for it clearly demonstrates that the allegedly descriptive theoretical account proposed in *The Concept of Law* has important normative elements built into it. Hart's central argument in support of the idea that a legal system must have not only 'primary rules' according to which humans are required to do or abstain from certain actions, but also 'secondary rules' which are concerned with the primary rules themselves, is grounded on a *reductio ad absurdum* that exposes the inadequacies of a political organisation which uses only the former type of rules. An imaginary society where there are only primary rules of obligation would suffer from the problems of *uncertainty*, for there would be no procedure for settling any doubt about the validity of a rule; of having a *static character*, for there would be no means, in such society, for deliberately adapting these rules to novel circumstances; and of *inefficiency*, since there would be no procedure to keep the diffused social pressure by which rules are enforced and maintained.[76] It is because of this that we need secondary rules to provide a remedy for these three serious problems for any legal society. Nevertheless, as Dworkin correctly argues, such construction is far from being neutral or purely conceptual, as Hart claims it to be. Dworkin's words about this point are particularly illuminating:

> He [Hart] develops his own account of the main elements of law by showing how the device of a secondary rule of recognition responds to these particular defects by making possible a new set of rules that are flexible, efficient, and certain. This, I believe, does support my suggestion about the political basis of positivism.[77]

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75 H L A Hart, 'Positivism and the Separation of Law and Morals' in Ronald Dworkin (ed), *The Philosophy of Law* (1977) 17-37.

76 Hart, above n 66, 92–93.

77 Dworkin, above n 74, 255.

If Dworkin is right about this, then Hart's advocacy of neutrality in jurisprudence is inconsistent with his own theory, for the choice of his theoretical position is entirely determined by political considerations.

If I am right, then, the Planning Theory suffers from the same defects of Hart's methodology.

> The only explanation for the fact that Shapiro is unaware of the fact that his own theory is a form of normative positivism is his insistence on the view that his theory is a metaphysical demonstration of the 'necessary' features of law, rather than a normative 'conception' of legality. When Shapiro holds that the fundamental aim of law is to settle moral disputes which arise in the 'circumstances of legality', he needs to adopt an *interpretive attitude* in order to justify the choice of this purpose for legal activity.[78]

According to Dworkin, when one adopts an interpretive attitude towards a social practice such as law or courtesy, this interpretive attitude has 'two components.' The first is that such practice 'does not simply exist but has a value', i e that 'it serves some interest or purpose or enforces some principle – in short, that it has some *point* – that can be stated independently of just describing the rules that make up the practice.'[79] And the second, in turn, 'is the further assumption' that the practice is 'sensitive to its point,' since this point guides the ways in which we should understand and interpret the practice.[80] Just like Hart's theory, Shapiro's Planning Theory 'is not a neutral description of legal practice, but an interpretation of it that aims not just to describe but to justify it – to show why the practice is valuable and how it should be conducted so as to protect and enhance that value.'[81]

At this point, at least, one cannot help but to agree with Dworkin that 'Archimedian Philosophies' that 'look down, from outside and above, on morality, politics, law, science and art'[82] are inadequate to understand political concepts such as justice, democracy and law, since they 'ignore the way in which political concepts actually function in political argument.'[83] When a philosopher defines a political concept, she is 'taking sides,' ie she is making 'normative claims' about the content of that concept and the role that it should play in political argument. This is so, for Dworkin, because

78 Bustamante, above n 61, 506.
79 Dworkin, above n 15, 47.
80 Ibid 47.
81 Dworkin, above n 16, 141.
82 Ibid 141.
83 Ibid 148.

political concepts are not 'natural kinds' that are 'real' entities in the sense that 'neither their existence nor their features depend on anyone's invention or belief or decision.'[84] While the 'deep structure of natural kinds is physical', that of 'political values is not physical,' but 'normative.'[85] Jurisprudential theories, hence, are different 'conceptions of legality' which claim to be correct when the value of 'legality' or 'the rule of law' is applied as a political argument.

As Dworkin has persuasively shown in his comment on the Postscript to Hart's Concept of Law, all different jurisprudential views 'represent a common adherence to the value of legality,' albeit with different conceptions of what legality is. 'Conceptions of legality differ,' the argument proceeds, 'about what kinds of standards are sufficient conditions to satisfy legality and in what way these standards must be established in advance; claims of law are claims about which standards of the right sort have in fact been established in the right way.'[86]

Shapiro's Planning Theory, then, is a defence of a conception of legality which claims that the fundamental point of the legal system is to cut down moral deliberation by means of ascertainable plans which pre-empt value judgments of the people and the legal officials who are in charge of the application of law. It is because the social practice of 'law' is sensitive to this point that Shapiro believes, like normative positivists do, that the law is to be determined by social facts alone.

2.3 ON THE DISTINCTION BETWEEN LEGAL REASONING AND JUDICIAL DECISION-MAKING

Another problem with the Planning Theory of law is that its method for choosing interpretive methodologies is somewhat at odds with the sharp distinction that Shapiro establishes between legal reasoning and judicial decision-making.

Shapiro makes this distinction while he is comparing his exclusive positivism with legal formalism, which implies that judges lack competence to decide cases on the basis of moral considerations. In fact, Shapiro understands legal formalism as committed to the following four theses: (1) *Judicial Restraint*, for the judicial role is always limited to asserting and applying the law, since 'only the legislature may amend the law'; (2) *Determinacy*, for the law is inherently accurate and 'always exists and is available to judges for deciding cases'; (3) *Conceptualism*, for the law is

84 Ibid 154.
85 Ibid 155.
86 Ibid 170.

understood as a logical system which resembles a 'squat pyramid', since 'by knowing a limited number of top-level principles, a judge can derive the lower-level rules'; and (4) *Amorality of Adjudication*, since judges must resolve all cases 'without resort to moral principles.'[87]

Nevertheless, Shapiro is happy to acknowledge that the formalist picture of adjudication is far from being accurate to describe the way judges reason in modern legal systems. When legal systems apply standards such as that of 'reasonableness' or use concepts such as 'public interest,' 'best interest of the child,' 'fair use,' 'justice,' 'unconscionable,' 'human dignity,' 'cruel punishments' etc, they are thereby granting officials discretion to decide cases on the basis of their own moral evaluations.

However, the presence of these concepts in Constitutions, Treaties and statutes creates a puzzle for the thesis that legal reasoning is necessarily an *amoral* process.

Shapiro finds a way out of this puzzle by defining legal reasoning as merely the process of 'discovering the law,' rather than the resolution of a dispute. He admits, however, the possibility of *moral reasoning* within the practice of 'judicial decision-making,' whose aim is the 'resolution of a dispute.'

Hence, Shapiro is not necessarily committed to a theory of adjudication that prevents judges from making moral judgments while they hand down their decisions in pivotal cases. It may perfectly be the case, for instance, that the legal system entrusts the judges of the higher courts with a law-making authority similar to that of the legislator, when the basic norms of the Constitution deploy moral concepts whose meaning and interpretation cannot be determined solely on the basis of empirical judgments over social facts.

In hard cases, when 'pedigreed primary norms run out,' it is often the case that 'judges are simply *under a legal obligation to apply extra-legal standards.*'[88] At this point, Shapiro is following Raz's view that it is perfectly feasible that the law itself requires us to look beyond the law to reach a decision in a difficult case. When judges are under a legal obligation to apply norms that lack a social pedigree, then, the Planning Theory interprets this requirement as an authorisation to create, rather than apply, novel legal rules.

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87 Shapiro, above n 1, 241-242.

88 Ibid 272.

Following Hart,[89] Shapiro distinguishes very sharply between 'legal reasoning' and 'judicial decision making.' Strictly speaking, 'the object of legal reasoning is the discovery of the law,' while the aim of judicial decision making 'is the resolution of a dispute.' Hence, though the 'positivistic privileging of social facts' indicates that legal reasoning is amoral, it does not necessarily claim that the same goes for 'judicial decision making.'[90] As long as linguistic indeterminacy leaves 'cracks' or 'gaps' in the system, 'a judge who is obligated to rule cannot employ legal reasoning, and therefore has no choice but to rely on policy arguments in order to discharge his duty.'[91]

When legislators deploy moral concepts, they thereby establish a 'legal obligation to apply extra-legal standards.'[92] Moral concepts in legislation are thus read as 'mandates' authorising legal officials to engage in further social planning or to decide legal disputes according to their own moral considerations.[93] Let us call this contention the 'Moral Mandate Thesis'.

According to the Moral Mandate Thesis, the application of moral standards by judges would be like the application of foreign laws when the rules of a domestic legal system obligate the judge to decide a case in accordance with the law of a foreign jurisdiction. As Raz has famously argued, neither the foreign law nor the moral concepts used by legislators become 'part' of the law from the sole fact that the legal system makes it obligatory to apply them to concrete cases. 'The distinction between normative systems is preserved even when one system borrows from another.'[94]

Nonetheless, the Moral Mandate Thesis is not free from some very uncomfortable inconveniencies. Though this thesis is elegant from the analytical point of view, it pays a high price when we consider its practical implications. In effect, most of the normative requirements contained in the texts of contemporary Constitutions and Charters of Rights would be classified as 'non-legal' or merely 'law-like' provisions. When the 14th Amendment of the American Constitution forbids states to 'deny to any person within its jurisdiction the equal protection of the laws,' it would be merely granting the judges a 'mandate' to engage in further social planning. In European Human Rights Law, for instance, the entirety of the European

89 H L A Hart, *Essays in Jurisprudence and Philosophy* (1983), 62-66.
90 Shapiro, above n 1, 248.
91 Ibid 248.
92 Ibid 272.
93 Ibid 276.
94 Ibid 272.

Convention of Human Rights would not be labelled 'law,' and we would be left with a European Court of Human Rights whose competence would be to legislate nearly from scratch. It would be a court of non-law, who would be very tempted to regard itself as free to engage in sheer judicial activism.

One of the problems generated by the Moral Mandate Thesis is that it empowers judges to rely on their *own* moral judgment, rather than to 'reconstruct' in a hermeneutical process the 'political morality' of the community. Hence, although the Moral Mandate Thesis might settle with unprecedented clarity what the law is, it unsettles in even greater extent than most natural law theories do the question of how legal cases are to be decided. Let us compare, for instance, Dworkin's interpretive methodology with Shapiro's proposal to explain the presence of moral concepts in constitutions and legislation. While Dworkin holds that judges have a 'political responsibility' to undertake their political judgments in the light of the institutional history of legal systems and the political morality that supports it, since 'political rights are creatures of both history and morality,'[95] a judge who follows the Moral Mandate Thesis would be in the dark when it comes to balancing moral arguments that may be employed to define the meaning of clauses like the 'equal protection.' She would find no directive on how these moral principles ought to be balanced, but that won't stop her from receiving an authorisation to resolve these cases with no institutional constraint.

Hence, while Dworkin's methodology 'condemn a style of political administration' that can be classified as 'intuitionistic,'[96] the Moral Mandate Thesis seems to recommend it.

As we can see, the Moral Mandate Thesis is nothing more than an *ad hoc* response to some criticisms that the Sources Thesis has received in other contexts.[97] This response should not have been imported by the Planning Theory because it does not fit very well with the rest of the theory, and particularly with the meta-interpretive approach that Shapiro suggests to solve theoretical disagreements over interpretive theories. It should be stressed, here, that Shapiro's solution to meta-interpretive debates is to attempt to extract from the system's 'economy of trust' the criterion to choose amongst the interpretive theories available to the theorist. While the Planning Theory respects the economy of trust of legal systems, the Moral Mandate Thesis unequivocally does not.

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95 Ronald Dworkin, *Taking Rights Seriously*, (5th printing, 1978) 87.

96 Ibid 87.

97 See Gerald J .Postema, 'Law's Autonomy and Public Practical Reason' in Robert George (ed), *The Autonomy of Law*, (1996) 79-118, where the reader finds a more developed critic of Raz's version of the Moral Mandate Thesis.

The Moral Mandate Thesis gives rise to a paradox for the Planning Theory of Law, which can be stated thus: If the Planning Theory does not trust judges and legal officials to 'interpret' the law on the basis of the political morality embedded in the basic norms of the legal system, it cannot at the same time authorise them to use unrestricted discretion and to give full weight to their moral judgments when it comes to 'creating' new legal norms when the Constitution or a Bill of Rights makes reference to evaluative or morally-laden concepts. The Planning Theory becomes very strict when it comes to 'identifying' the law, but extremely permissible when it comes to developing the law through adjudication or carving exceptions to the legal rules on the basis of vague moral principles.

2.4 THE CHOICE OF INTERPRETIVE METHODOLOGIES

Furthermore, apart from the objections raised in the previous sections, it is not clear whether Shapiro can offer us a meta-interpretive theory which avoids all the problems that he sees in hermeneutic theories such as that of Dworkin.

When we compare Shapiro and Dworkin's views on interpretation, it does not take too long to notice that there is an initial agreement between Shapiro's Planning Theory and Dworkin's model Law as Integrity, since they both intend to explain the existence of theoretical disagreements over the proper interpretive methodology for legal reasoning. This initial agreement covers the following three points, which are stated in their literal wording:

> 1. The Planning Theory concedes that the plain fact view, or any other account that privileges interpretive conventions as the sole source of proper methodology, ought to be rejected. Because theoretical disagreements abound in the law, interpretive methodology may be fixed in ways other than specific social agreement about which methodologies are proper.
>
> 2. The Planning Theory also agrees with Dworkin that when theoretical disagreements abound, ascertaining proper interpretive methodology involves attributing aims and objectives to the law. [Disagreements on interpretive methodologies] are disputes about the point of engaging in a particular practice of law.
>
> 3. The Planning Theory maintains, with Dworkin, that in such cases proper interpretive methodology for a particular legal system is primarily a function of which

> methodology would best further the objectives that the system aims to achieve.[98]

This initial agreement, however, stops when it comes to decide how one is to attribute purpose to the legal practice. As Waldron argued in a comment on this particular issue, Shapiro may well be in trouble when it comes to explain what a judge is supposed to do when an 'allegedly settled plan uses terms like "reasonable" or "cruel" and "excessive", or entirely abstract ideas like "equal protection" and "due process."' For Waldron, what Shapiro does tell us is merely that his Planning Theory 'explains why these are difficult questions' and that 'whatever the right strategy of interpretation is (originalist, textualist, purposivist), it certainly can't be Dworkinian.'[99]

The reason it cannot be Dworkinian, for Shapiro, is that Dworkin's interpretive methodology violates the GLOP argument. The right interpretive methodology must be, for Shapiro, 'established by determining which methodology best harmonizes with the objectives set by the planners of the system in the light of their judgments on competence and character.'[100] One should undertake, thus, a sociological inquiry into the intention of the creators of the 'master plan', looking for something like the institutional history of a particular community, as Shapiro did in order to criticise Dworkin,[101] and into the 'economy of trust' of the legal system.

The most pressing factor for this choice, however, is not institutional history, but the 'economy of trust' of the legal system. To be sure, it is evident from Dworkin's 'chain novel' metaphor that his model of 'law as integrity' is highly sensitive to institutional history, since every judge must construct her interpretation in the light of the constitutional history of her

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98 Shapiro, above n 1, 381.

99 Jeremy Waldron, 'Planning for Legality' (Review Essay) (2011) 109 *Michigan Law Review* 883, 900.

100 Shapiro, above n 1, 382.

101 Ibid 307-330.

community.[102] Rights, for Dworkin, are 'creatures both of history and morality.'[103]

The feature that distinguishes Shapiro's methodology from 'Law as Integrity' lies elsewhere. In contrast to Dworkin's model, Shapiro insists that the Planning Theory 'does not demand that interpretive methodologies be justified from the moral point of view… Interpretive methodology is pegged not to the truth of any abstract philosophical or social-scientific theory, but rather to the law's presuppositions concerning the trustworthiness of legal actors.'[104] That is to say: 'the planner's method will never license interpretive methodologies that are inconsistent with the system's distribution of trust and distrust.'[105]

This brings us to another question that is vital for Shapiro'a Planning Theory of Law: can Shapiro offer us a meta-interpretive theory that does not violate GLOP?

If the answer is 'yes', then his arguments against Law as Integrity might be sound, although they will still depend on the plausibility of GLOP, which is far from evident, since according to the views defended in this essay GLOP is not a 'truism', but just one of the possible interpretations of the point of having an interpretive theory of law.

If, however, the answer is 'not', then Shapiro's central argument against Dworkin's theory of legal interpretation is fundamentally flawed, since the Planning Theory of Law would be in no better position than the model of Law as Integrity to avoid 'intensely abstract and relentlessly philosophical' arguments in judicial decision-making.[106]

At this point, it is worth noticing that Shapiro's meta-interpretive theory can only offer a real alternative to Dworkin or any other abstract theory of legal interpretation if it can provide a criterion to interpret the law

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102 See Dworkin, above n 15, 227, where the author explicitly states that history plays an important part in law as integrity, though the institutional history shall be interpreted in a hermeneutic way that looks both to the past, to the present and to the future. Law as integrity 'insists that the law – the rights and duties that flow from past collective decisions and for that reason license or require coercion – contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them. History matters because that scheme of principles must justify the standing as well as the content of these past decisions.' (Ibid 227).

103 Dworkin, above n 96, 87.

104 Shapiro, above n 1, 357.

105 Ibid 357.

106 Ibid 296.

which is not dependant on abstract philosophical considerations. Shapiro would have to construct a scientific, rather than hermeneutic, meta-interpretive theory of law.

Shapiro attempts to move into this direction when he holds that the legal system's distribution of trust and distrust depends upon contingent features of the legal system, such as the constraints that the authors of the law's 'master plan' place upon each of the actors or officials in the social group. 'Legal interpretation is always *actor-relative*,' since texts are to be interpreted correctly 'only in relation to an actor and her particular place within the system's economy of trust.'[107] The degree of discretion and the character of the interpretive competences of actors such as judges, policemen, administrators etc is thus determined both by the 'level of trust' accorded to them and to the 'roles' assigned to them by the economy of trust of the legal system.[108]

The Planning Theory, thus, does not give us a general interpretive theory to be applicable to every legal system. Yet it can offer a meta-interpretive theory that intends to be useful for determining the interpretive theories of concrete legal systems. Nonetheless, when we take a closer look at this meta-interpretive theory, it becomes obvious that it violates GLOP in the same measure as Dworkin allegedly does, since Dworkin's *interpretive* theory of law is very similar to Shapiro's *meta-interpretive* theory.

Shapiro's meta-interpretive theory comprises three steps which need to be progressively taken by the meta-interpreter: (1) specification, (2) extraction, and (3) evaluation.

The first step, *specification*, is meant to ascertain 'the basic properties of various interpretive methodologies.' It inquires into the 'competence' and the 'character' needed to 'implement different interpretive procedures' to check which of these alternative procedures is compatible with the distribution of trust and competence found at the master plan of a concrete legal system.[109]

At the second step, *extraction*, the meta-interpreter must 'assess whether, from the system's point of view, interpreters and other actors have the competence and character to implement these methodologies effectively.'[110] At the extraction stage, the meta-interpreter reconstructs the economy of trust of the system, and solves the problem of which

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107 Ibid 358.
108 Ibid 359.
109 Ibid 359.
110 Ibid 361.

interpretive theory is suitable for each interpreter within the system. This is done by acknowledging the 'planner's attitudes regarding the competence and character of certain actors, as well as the objectives that they are entrusted to promote.'[111] Furthermore, once the meta-interpreter has *recovered* these disparate attitudes towards different actors within the legal community, she has to *synthesize* them into 'one rational vision.' As Shapiro states, this assessment of the economy of trust is not a mere empirical verification, but a creative process in which the meta-interpreter participates: 'A system's economy of trust is *constructed* during meta-interpretation, *not simply found*.'[112] Finally, the meta-interpreter has to extract the 'objectives that various actors are entrusted with serving.' When the meta-interpreter is a legal official, for instance, she has to determine what her role in the system's operative activity is and what part she is meant to play in legal activity.[113]

At the third and final step, 'evaluation', the meta-interpreter should 'apply the information culled from the first two tasks in order to determine the proper interpretive methodology', ie 'she must ascertain which interpretive methodologies *best further* the extracted objectives in light of the extracted attitudes of trust.'[114] The meta-interpreter is now in a position to choose the interpretive methodology that is *most appropriate* to the legal system, and this is to be done on the basis of the *evaluation* of the interpretive methodologies 'extracted from the institutional arrangements.'[115] At this point Shapiro's solution for meta-interpretive problems is still very abstract and, indeed, more philosophical than he intended, as we may see in the following excerpt:

> To evaluate interpretive methodologies, the meta-interpreter engages in a thought experiment: for any given methodology, she imagines what the world would be like if the interpreter claimed to be following the methodology when interpreting legal texts *and* possessed the competence and character that the designers attribute to him as well as to others. … While engaging in this thought experiment, the meta-interpreter grades interpretive methodologies according to their performance in the imagined circumstances. Methodology M ranks above methodology N just in case the goals that the legal actors are entrusted with advancing are better served in the imagined

111 Ibid 359.
112 Ibid 366 (emphasis added).
113 Ibid 369.
114 Ibid 359.
115 Ibid 370.

> circumstances when M is claimed to be followed that when N is claimed to be followed. The interpretive methodology that is ranked highest when all methodologies are considered is the correct one for the particular legal system. [116]

As we can see, almost any interpretive methodology may be compatible with the meta-interpretive view entailed by the Planning Theory, depending on the economy of trust of the legal system at stake. Yet the economy of trust, itself, is not an evident social fact which may be discovered without an interpretive reasoning in Dworkin's sense. Its details and normative significance are not simply given, since the law is not a natural kind that can be merely captured by external observation. In fact, it is not very difficult to notice that judgments about the economy of trust are not purely empirical or analytical discoveries, but rather constructive interpretations defended by the participants in legal discourse. Hence, Shapiro fails to achieve his main purpose while he rejects Dworkin's interpretive methodology, which is precisely to prevent legal officials from embarking on highly philosophical and abstract value judgments. Since the economy of trust stems from the interpretation of the master plan of the legal system, the planning theory is entering a vicious circle, for the choice of the interpretive theory already depends on a constructive interpretation of the law.

By the same token, according to Shapiro's meta-interpretive theory each and every interpretive theory must be understood *in its best light* if it is to make any sense, and this meta-interpretation must pay attention to the political principles that these interpretive theories pursue. An interpretive theory, just like any interpretive practice, has its sense derived from the 'point' or 'purpose' that one attributes to it. Hence, at the 'evaluation' stage of the three-step procedure that Shapiro establishes for choosing an interpretive theory, the question of which interpretive methodology *best furthers* the objectives of the framers of the 'master plan' is as abstract or philosophical as Dworkin's inquiry over the 'right answer' to a legal question. When Shapiro searches for the interpretive theory that best furthers the economy of trust of a legal system, he is impliedly claiming that there is a *right answer* about the *correct* interpretive theory for each and every legal system, and this 'correct' interpretive theory is unachievable unless there is also a right answer about the economy of trust of the legal system.

In effect, the best understanding of Dworkin's 'moral reading of the constitution'[117] is not to say that Dworkin is defending that judges are

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116 Ibid 370.

117 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American*

authorised to engage in unconstrained moral reasoning when the legal sources run out. To be sure, this is probably how a positivist who accepts Shapiro's Moral Thesis would depict the job of the supreme courts when they face legal gaps in hard cases, but not how Dworkin sees it. For this author, the reasoning of judges and legal officials is neither strictly 'legal' nor purely 'moral'. One of the distinctive features of the law is that moral and political concepts are embedded in its sources, in such a way that many legal concepts can only make sense if they are illuminated by moral considerations.[118] Yet these moral concepts do not necessarily retain their original senses once they have been incorporated by legal documents. As Waldron explains in a very persuasive way, 'what we have here is a mélange of reasoning – across the board – which, in its richness and texture, differs considerably from pure moral reasoning as well as from the pure version of black-letter legal reasoning that certain naïve positivists might imagine.'[119] This hybrid or intertwined type of reasoning stems from the interpretive attitude that one is supposed to adopt while constructing the meaning of the legal sources, since these sources normally refer to political concepts whose senses derive from their uses.

It is now clear why Shapiro fails to produce a meta-interpretive theory that does not violate GLOP. The same interpretive freedom that Dworkin attributes to constitutional lawyers is found on Shapiro's meta-interpreter, when she is called to decide which interpretive theory best suits the economy of trust of a particular legal system. Shapiro's meta-interpretive theory is exactly as abstract and philosophically demanding as Dworkin's interpretive theory. Shapiro simply moves the constructive interpretation from what he calls the 'second stage of interpretation', in which one applies an interpretive theory to decide a particular case, to the 'first stage of interpretation', in which one decides which interpretive theory will be employed. [120] Nevertheless, he does not explain how one makes the transition from the one of these stages to the other, or why it is important to allocate the 'constructive' aspects of juristic interpretation at the first level, since the choice of the interpretive theories, at the 'evaluation' stage, depends on one's interpretation of the fundamental rules of the legal system, at the 'specification' and the 'extraction' levels.

Constitution (1996).

118 Dworkin, above n 16, 51.

119 Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2, 2-24, at 12. It must be stressed, however, that Waldron does not believe that this approach to legal interpretation should be adopted.

120 Shapiro, above n 1, 305.

Shapiro needs to answer, therefore, the following two questions: How can we know who is authorised to make the move from the 'second' to the 'first' stage of interpretation? Does it make any practical difference if we distinguish between the two stages and if we make the move from the 'second' to the 'first' stage of legal interpretation?

As to the first question, Shapiro does not give a direct answer, but I think that he is probably thinking that it is the legal official herself who is going to decide which interpretive theory best fits the economy of trust of her legal system, for otherwise the Planning Theory would be impliedly advocating a sort of Platonic government of 'philosophers' and legal theorists, which is at odds with the ambition of the planning theory to free the interpretation of legal statutes from moral, political and philosophical considerations. Shapiro cannot be thinking that it is up to a legal theorist to determine which interpretive theory best fits a given legal system because this answer would dismiss his very strong claim that the law should be interpreted from the 'point of view' of the legal system, rather than from abstract philosophical considerations about the nature of legal argument. Yet if every judge or legal official is authorised to embark on a constructive interpretation to decide which interpretive theory is more appropriate to the legal system, then Shapiro is giving us no more than an illusion of methodological certainty, since this argument already presupposes that the choice of the interpretive theory is just a part of the reasoning process that judges have to take up in order to lay down valid and properly justified decisions.

The second question, in turn, could only be answered in the affirmative if in the previous answer we had said that the judge was not authorised to balance interpretive methodologies before she reached a decision about which interpretive methodology she would employ. But since this answer is not allowed by the planning theory, this theory is no less evaluative, abstract and philosophical than Dworkin's model of law as integrity. Since every judge is authorised at any time to move from the 'second' to the 'first' stage of legal interpretation, this distinction does not make any practical difference because every judge remains enjoying the same interpretive freedom as before.

3. Concluding remarks

Shapiro's Planning Theory of Law has gained a lot of attention from the academic community, and I will not be surprised if *Legality* becomes one of the most influential books on jurisprudence of the coming decades. It has attracted, as one would expect, all sorts of criticisms. Some have argued that Shapiro is not fair to Hart on the criticisms that he addresses to his

theory of the rule of recognition as a social norm.[121] Others have argued that Shapiro is wrong when he claims that the attitude of fidelity to the 'legal point of view' is enough to explain how the moral legitimacy of legally authoritative directives is obtained.[122] Others, finally, have criticised Shapiro for neglecting the importance of coercion as an ingredient of legality.[123] Neither of these criticisms, however, have been discussed here. Instead, I prefer to take a more general look on Shapiro's fundamental thesis on the nature of plans and on the interpretive issues that he touches upon in his book. I relied, in part, on some of Waldron's insights on the connection between the Planning Theory and normative positivism,[124] and then attempted to demonstrate how this bears on the meta-interpretation proposed by this theory.

My conclusion is that the Planning Theory touches on very important points and is a valuable contribution to the development of legal theory. Nevertheless, it must be revised on several issues which refer, in their majority, to the methodological essentialism that underlies the book. Firstly, the Planning Theory should be able to recognise that, in the end, it is a form of normative positivism, and hence that its foundations lie on a moral proposition about how the law is to be understood. Secondly, it should give up the very ambitious claim that it is actually revealing a 'philosophical truth' about the 'essential properties' or the 'fundamental nature of law,' which seems to presuppose that the law is a physical entity that is 'out there' to be discovered independently of our attitude towards it. Thirdly, it should give up the Moral Mandate Thesis and find a better explanation for the presence of moral concepts in written legislation and in the fundamental rules of the legal system. Even if it insists on that thesis, it must at least give us a clue on how legal officials ought to decide moral disputes in such a way that does not violate the SLOP argument. And finally, it must recognise that its meta-interpretive theory requires the same sort of constructive interpretation as other hermeneutic theories such as Dworkin's law as integrity. All of this poses, to be sure, a relevant challenge to the theory.

However, if we rewrite Shapiro's Planning Theory as a genuine normative or prescriptive theory of law and legal reasoning, we may find in

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121 Stefan Sciaraffa, 'The Ineliminability of Hartian Social Rules' (2011) 31 *Oxford Journal of Legal Studies* 603.

122 Veronica Rodriguez-Blanco, 'The Moral Puzzle of Legal Authority: A Commentary on Shapiro's Planning Theory of Law' in Stefano Bertea and George Pavlaklos (ed), *New Essays on the Normativity of Law*, (2011), 86 f.

123 Frederick Schauer, 'Best Laid Plans' (Review Essay) (2010) 120 *Yale Law Journal* 586.

124 Waldron, above n 100.

it a good starting point for the choice of a positivist theory of legal interpretation that can take the institutional capacities of the legal officials seriously, and that explains the relations of mutual dependence between one's jurisprudential theories about the nature of law and one's interpretive approaches to legal reasoning. Shapiro's insight that legal interpretation depends on the economy of trust of the legal system is beyond any doubt an important ingredient to construct a sound interpretive theory of legal interpretation. Perhaps Shapiro's most important contribution to legal interpretation is not to show that Dworkin is wrong because his method entails that judges undertake abstract philosophical reasoning, but rather to bring our attention to the distribution of trust and distrust contained in the fundamental norms of the legal system, which is indeed an important factor that should play a part in legal interpretation.

Kelsen, the Enlightenment and Modern Premodernists

IAIN STEWART[†]

Hans Kelsen did not want his latest book to be published. However, the Hans Kelsen-Institut in Vienna, after lengthy deliberation, has respectfully disagreed with him. *Secular Religion: a Polemic Against the Misinterpretation of Modern Social Philosophy, Science, and Politics as 'New Religions'*[1] has little to say about positive law and does not mention the Pure Theory of Law. It is an attack on those who contend that modern thought, despite its secularism, displays so many parallels to western religion that it should be characterised as a set of 'new' or 'secular' religions, which may then be dismissed as impoverished analogues of true religion (QED).

The book may be assessed on three planes, which will not be wholly separate. First: as to what it may contribute to current debate on 'science and religion'. Second: as to the relation, both for Kelsen and in general, between science of law and the Enlightenment. Third: as to how this book may illuminate the Pure Theory. There is no 'new Kelsen' here, rather aspects of Kelsen that so far have been little seen in English yet which are fundamental to his thought.[2] They involve the reasons why the Pure Theory

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1 Hereafter, *SR*: published in 2012 by Springer Verlag for the Hans Kelsen-Institut (which holds most of Kelsen's papers and maintains a free online database of works by and on Kelsen); edited by Robert Walter (a founding Director of the Institut, who died in 2010), Clemens Jabloner (one of the current Directors) and Klaus Zeleny (Secretary of the Institut). Other works by Kelsen will be referenced here as follows: *ELMP – Essays in Legal and Moral Philosophy* (sel and ed Ota Weinberger, trans Peter Heath, 1973); *GTLS – General Theory of Law and State* (trans Anders Wedberg) (1945, 1961); *IPLT – Introduction to the Problems of Legal Theory* (trans Bonnie Litschewski Paulson and Stanley L Paulson, 1992); *PTL – Pure Theory of Law* (*RR*, trans Max Knight) (1967); *RR – Reine Rechtslehre* (2nd ed, 1960); *WIJ – What is Justice?* (1957). References to 'Métall' are to Rudolf Aladár Métall: *Hans Kelsen: Leben und Werk* (1969).

2 I will refer little to periodisation of Kelsen's work: rather, what strikes me more here is the continuity of *SR* with his enduring concerns. On

of Law is proposed, as well as the intellectual and political conditions for a rationalist, materialist science of law.

Defending Enlightenment

This book is not directed at professional theologians. Kelsen considers it 'futile' to argue with them 'from the point of view of someone who in his scientific view of the world does not presuppose their creed'.[3] His target, instead, is religious thinkers who set themselves up as 'scientific' – who contend that 'science' would be better if it were imbued with theology. Since that argument is applied primarily to 'scientific' discussion of politics and society, in attacking it Kelsen seeks to defend the *acquis* of the Enlightenment:

> The author wants to show the fundamental misinterpretation in seeing theology in the thought of men who, like the philosophers of the Enlightenment, Lessing, Comte, Marx, Nietzsche, tried to emancipate human thinking from the bondage of theology. This misinterpretation is, in the author's opinion, disastrous; for it implies the view, consciously or unconsciously, that a social science or philosophy (and especially a science or philosophy of history) independent of theology can have no satisfactory results because it does not lead to the absolute values that can be based only on true religion and without which society and history are meaningless; that politics is by its very nature religion or cannot be separated from it; and that, consequently, the open return of science and philosophy to theology, the return of politics to religion, is indispensable.[4]

Kelsen is not, however, a thoroughgoing *philosophe*.[5] He does not spell the difference out and he does not stick to it entirely, but in general his defence is not of all the *lumières* but only of the light of science. Yet the defence is not only of the sciences as such but, even more, of the scientific spirit. It is

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periodisation of Kelsen's work, see Stanley L Paulson, 'Introduction' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998); also papers by Paulson and others in Letizia Gianformaggio (ed), *Hans Kelsen's Legal Theory: a Diachronic Point of View* (1990).

3 *SR*, 3-4.

4 *SR*, 3.

5 Though he defends the *Encyclopédistes* against Voegelin's allegation that the *Encyclopédie* is a 'Gnostic koran': *SR*, 124.

a defence, as he puts it, of 'modern times' – which in German would be '*die Neuzeit*', and in English one would now say 'modernity'.

> The development of modern science is the result of its emancipation from religion and theology. This emancipation is particularly important to social science and especially to historical science, for in these areas of thought theology serves definite political interests, and submission to it is incompatible with an objective science of society and history.
>
> If any criterion distinguishes modern times from the Middle Ages it is – in Western civilization – the existence of objective and independent science. A retrogression of science to metaphysics and theology means the return to the spirit of the Middle Ages. The literature against which this book is written seriously endangers the existence of an objective and independent science and therefore the spirit of modern times.[6]

The book's title and subtitle fit Kelsen's strategy of hoisting these writers upon their own petars of what he contends are false claims and self-contradictions. The title 'secular religion', as will be shown, is a quotation from some of those writers. The subtitle's characterisation of the book as a 'polemic' is ironical: the theologically committed will be attacked within one of their favourite categories. The tone of the book, which was written in the 1950s and early 1960s, closely resembles that of Karl Popper's *The Open Society and its Enemies*.[7] Kelsen and Popper oppose all metaphysics. They also, as well as those whom Kelsen attacks, abhor totalitarianism both left and right. Popper attacks metaphysics within totalitarianism; Kelsen attacks metaphysics when it is used against totalitarianism. Kelsen's concern is that these anti-totalitarians themselves argue with such a totalitarian tendency that they are dangerous comrades.

Many writers are attacked: principal among them are émigré philosophers Eric Voegelin, Karl Löwith and Ernst Cassirer, as well as historians of ideas Crane Brinton and Carl L Becker. These writers' brushes are broad. Kelsen quotes Brinton's claim that 'modern natural science' has 'made possible a whole set of heresies of Christianity'. The set includes 'materialism, rationalism, "humanism", scientism, naturalism, secularism, evolutionism, positivism, ethical culture'. For Brinton these are 'great

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6 SR, 4.

7 Karl R Popper, *The Open Society and its Enemies* (1945; 5th ed, 1966); summarised in *The Poverty of Historicism* (1964).

secular religions' and their culprits include Galileo, Newton, Darwin, Locke, Spencer and Marx. This is to claim, Kelsen objects, that 'science itself' has the character of a secular religion.[8] Kelsen at first limits his defence to science. But his reasons for mounting that defence find broader ground, in that Brinton's range of malefactors to be hammered reaches so far as to include not only western totalitarianism but even western democracy. Kelsen protests that democracy 'is a specific form of government by men exercised over men on this Earth' and 'has nothing to do with religion'.[9]

'Gnosticism': if you only knew

Kelsen's main attention is to Voegelin, whose strategy is more elaborate and at points even more bizarre. Voegelin contends that the 'secular religions' are not just parallels to Christianity, but heresies of a particular and far from novel kind. They are, he claims, new forms of 'Gnosticism'. Now, the present writer, being no theologian, used not to know a Gnostic from a gnu and had been prepared to gather his news of Gnosticism merely from the protagonists here. But he has found it necessary to look at current assessments of Voegelin on Gnosticism in order to work out why Kelsen is so perplexed and what may be the current value of his perplexity.[10]

Voegelin draws his conception of Gnosticism principally from the twelfth-century heretic Joachim of Fiore.[11] Already puzzled, Kelsen engages in his own research on the identity of Gnosticism. He claims that Voegelin has misunderstood Joachim, who in his view actually is not a Gnostic: Gnostics believe that the world was created by an evil demiurge and that God stands apart from the world, whereas Joachim believes, like Augustine, that God is immanent in the world.[12] But Voegelin extends his crusade against 'Gnostic insanity' to all of modernity, including liberalism

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8 *SR*, 252. Though I would let Brinton have Spencer, whom Kelsen mentions only as one of Brinton's targets: my 'Commandeering Time: the Ideological Status of Time in the Social Darwinism of Herbert Spencer' (2011) 57 *Australian Journal of Politics and History* 389.

9 *SR*, 268.

10 See the 50th anniversary symposium on Voegelin's *The New Science of Politics* in (2005) 34 *Political Science Reviewer.*

11 Voegelin and Kelsen, as well as others, latinise him as Joachim of 'Flora'. Voegelin's type of argument lives on in the Vatican. In 2009 a theologian informed Pope Benedict XVI that allusions to Joachim could be found in speeches by US President Obama: Richard Owen, 'Medieval monk hailed by Barack Obama was a heretic, says Vatican', *The Times Online*, 27 March 2009.

12 *SR*, 71-83.

and democracy. To do that, he loosens the meaning of 'Gnosticism' until, Kelsen objects, he is using the label 'arbitrarily'.[13] Indeed, absurdly: 'Has he forgotten', Kelsen protests, 'that the "Gnostic insanity" of the Western societies destroyed the nazi(sic) movement after a very short existence?'[14] And not only absurdly but bizarrely: 'Gnostic politicians have put the Soviet army on the Elbe, surrendered China to the Communists, at the same time demilitarized Germany and Japan and in addition demobilized our own army'.[15] And that was only what Voegelin published. Privately, he could write in 1953: 'In every visage of a positivistic professor or liberal pastor I see the visage of the SS-murderer that he causes.'[16] In Voegelin, liberal Professor Kelsen had not just a scary comrade but a dedicated enemy. Kelsen may not have known that, but he had reason to suspect it.

The so-called 'secular religions', Kelsen maintains, are certainly secular but they cannot be religions: 'religion' by definition involves belief in a supernatural being or beings and these outlooks reject, and indeed often condemn, any such belief. Voegelin acknowledges that rejection and responds that in the heart of the rejection and condemnation lies an unadmitted reproduction of that which is rejected and condemned. This reproduction of the divine within the material, Voegelin calls 'immanentisation'. He claims that it is typical of Gnosticism and accordingly he feels able to classify his targets as modern Gnostics. Kelsen responds, with painstaking analysis, that the allegations of Voegelin and his like are simply untrue and, moreover, riddled with self-contradiction.

What is 'immanentised', for Voegelin, is above all the *eschaton*. As Kelsen explains this, Christian 'eschatology' is the study of 'last things' – of the final stage, *eschaton*, of the world when material reality will be resumed into the transcendent and last judgement passed upon both the quick and the dead, with salvation for the righteous and retribution for the rest.[17] For Voegelin, then, 'Enlightened' outlooks are 'secular religions' because they attempt to 'secularise' the *eschaton*. They too envisage progress toward a final stage of humanity – only immanently, ie in merely material terms. What is transcendent, and most of all the *eschaton*, is surreptitiously reproduced within the immanent.

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13 *SR*, 261. Cp Eugene Webb, 'Voegelin's "Gnosticism" Reconsidered' (2005) 34 *Political Science Reviewer* 48.

14 *SR*, 266.

15 Quoted: ibid.

16 Quoted: Stefan Rossbach, '"Gnosis" in Eric Voegelin's Philosophy' (2005) 34 *Political Science Reviewer* 77, 113.

17 *SR*, 9-14, 20-21, 114-117, 150-156, 168-174.

Voegelin endeavours to identify such reproduction in both likely and highly unlikely quarters – most prominently Hobbes, Hume, Kant, Saint-Simon, Proudhon, Comte, Marx and Nietzsche. Kelsen has fun with Voegelin's claim that Nietzsche's proclamation that God is dead is a 'Gnostic murder' because Nietzsche is denying God in the name of 'salvation'. Kelsen maintains that, for Nietzsche, salvation is an entirely human self-salvation to which any idea of transcendent divinity is otiose; we are saving ourselves from ourselves by killing off the idea of a divinity.[18] Comte and Marx, Kelsen observes, are certainly materialists and do envisage progress toward a better state of society. But their anticipations, he insists, do not involve religious salvation or retribution, nor the 'soul' or moral judgement. Nor do they involve finality, but rather – and especially for Marx – an indefinite continuation of society in a different, albeit preferable, form. The *eschaton* is an 'irruption of the supernatural into empirical reality' whereas, in science, any prediction of a future state is an observation in terms of causal law.[19]

> According to enlightened doctrine, the future state of mankind, the result of progress, is not to be brought about by divine interference or by any kind of suprahuman power, but by man himself, by his own will directed by his own reason. Progress is not a supernatural, but a natural process. It takes place exclusively in this world, without any end of it being predicted.[20]

Unlike the *eschaton*, this does not involve ideas of salvation or retribution.[21] In sum, Kelsen says: 'A "secularized" eschatology is the negation of eschatology.'[22] In all of these cases, he maintains, what is alleged to be a reproduction can hardly be so, since the author has actually rejected what the critic identifies as the necessary foundational assumptions.

The arbitrariness of Voegelin's conception of Gnosticism has been recognised by others and, without greatly modifying it, he came to include it among a broader set of ideas.[23] In its 1952 expression, all the same, it

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18 *SR*, 215-223. The seriousness with which Kelsen takes his task is evident in the chapter that follows (*SR*, ch 12), which is a critical review of Heidegger's then recently collected claims to find 'metaphysics' in Nietzsche: Martin Heidegger, *Nietzsche* (1961).

19 *SR*, 115.

20 *SR*, 116.

21 Ibid.

22 *SR*, 21.

23 Symposium, above n 10. Kelsen refers to only one of Voegelin's later works: *Wissenschaft, Politik und Gnosis* (1959).

predates the transformation of studies in Gnosticism that followed the publication and assessment, from 1977, of the Nag Hammadi 'library' of codices, sometimes known as the Gnostic Gospels.[24] Kelsen's own researches in Gnosticism are likewise outdated.

Relevance to current debates

How relevant can this book be today? Voegelin still has a following.[25] More generally, Kelsen's book might now be of interest to modernists resisting postmodernist attacks on scientific 'objectivity'.[26] More broadly still, it might be relevant to current debate on 'science and religion'. That relevance, however, might be only tangential. Unlike Richard Dawkins or Christopher Hitchens,[27] Kelsen is neither attacking theologians nor arguing partly from moral grounds. Nor is Kelsen's argument generally on behalf of science and the scientific attitude, but specifically against attempts to infect them with religion. Nonetheless, Kelsen would be with Dawkins and Hitchens against Stephen Jay Gould's compromise. For Gould argues strategically that, in the USA today, outright rejection of religion is ineffective. He prefers a strategy of characterising science and religion as 'non-overlapping magisteria' (NOMA); one should render to science the things that are science's and leave the godly to their own business.[28] To Dawkins and Hitchens, that is to give up: one does not serve truth by creating a reservation for dedicated falsehood.[29]

This book will, however, find a readership among jurists who already have an interest in Kelsen. Both jurists and others can also find in it an attack on the 'political theology' of Kelsen's arch-enemy, Carl Schmitt. I will turn to these matters in a while.

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24 Webb, above n 13, 50.

25 Voegelin's *Collected Works* have been published in 34 volumes (the last in 2006) by University of Missouri Press and the Eric-Voegelin-Archiv in Munich continues to publish on him.

26 Richard Potz, 'Introductionary(sic) Remarks' in *SR*, vii-x at x.

27 Richard Dawkins, *The God Delusion* (2006); Christopher Hitchens, *God Is Not Great* (2007).

28 Stephen Jay Gould, 'Non-Overlapping Magisteria' (1997) 106 (March) *Natural History* 16, repr in *Leonardo's Mountain of Clams and the Diet of Worms* (1999); *Rocks of Ages* (1999).

29 Dawkins, above n 27, 54-61; Hitchens, above n 27, 282.

How *Secular Religion* came to be published

Kelsen did not want this book to be published. He withdrew it when it was already set up in print. The story behind that is, as the book's back cover advertises, 'mysterious'. The mystery may be of more than historical interest since, when such a major thinker goes wrong, the errors are likely to be instructive.[30]

The text was written in English and originated in a review, in English, of Voegelin's 1952 book *The New Science of Politics.*[31] However, the review was not published.[32] The editors of the present work speculate on three reasons for this.[33] First: since the draft had reached 125 pages, it had become too long to publish as a review; but I would doubt that, in the USA, that would have prevented publication as an article, and it certainly would not have prevented publication altogether. Second: that Kelsen had 'made plans to carry out a more extensive examination of metaphysical doctrines, containing also his criticism of Voegelin'. The present work is that 'more extensive examination'.

A third possible reason, which the editors leave in the realm of reasonable speculation, lies in the work's 'positive valuation of Marx's criticism of religion'. The US authorities already suspected Kelsen of sympathising with Marxism, which in the McCarthy era could have had 'far-reaching personal consequences'.[34] In the present book, Kelsen provides what the malevolent might so understand. 'Hegelian dialectic', he

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30 Cp Eckhard Arnold, 'Hans Kelsens Auseinandersetzung mit den Säkularizierungstheorien' (address at the book launch of *SR*, Hans Kelsen-Institut, 30 November 2011), 1; I am grateful to the author for a copy of this paper.

31 Eric Voegelin, *The New Science of Politics: an Introduction* (1952, repr 1987). By the early 1940s, Kelsen was attacking in English the importation of politics into legal science: 'Science and Politics' (1941) in *WIJ*.

32 The review would eventually appear as Eckhart Arnold (ed), *A New Science of Politics: Hans Kelsen's reply to Erik*(sic) *Voegelin's 'New Science of Politics': a Contribution to the Critique of Ideology* (2004); with Introduction and Afterword (both in German) by Arnold.

33 The story is related in the 'Editorial Remarks' by Clemens Jabloner, Klaus Zeleny and Gerhard Donhauser: *SR*, xi-xv.

34 The suspicions could have reached back to Vienna, where Kelsen, although he had never supported the communists, had taken their scholarship seriously enough to debate it in their own journals – though most of his journalism had appeared in the liberal *Neue Freie Presse*. However, Kelsen was a member of no political party and in 1920 his appointment 'for life' to the new Constitutional Court, of which he had been an architect, had all-party support: Métall, 48.

says, is 'rescued by Marx and Engels from Hegel's silly idealism about "spirit" and put squarely on the solid ground of "matter"'. Thus: 'So far as dialectic materialism is a causal explanation of social reality – and this is its main concern – it is certainly a scientific theory.'[35] Yet, by 1964 McCarthyism was spent.

Voegelin himself thought that he might have had a hand in Kelsen's reluctance. They knew, or had known, each other well. Kelsen had been one of the supervisors of Voegelin's doctorate in political science and Voegelin had been a junior academic (*Assistent*) under Kelsen.[36] Voegelin had also reviewed Kelsen's books with high praise, in English from as early as 1927.[37] He would continue to praise the Pure Theory as a theory of law, while considering it thoroughly mistaken as an account of the state and generally inadequate in its understanding of politics. This had made relations between the two men difficult as early as 1936.[38] Nevertheless, Kelsen sent a draft of his review of *A New Science of Law* to Voegelin for comment.[39] In his *Autobiographical Reflections*, Voegelin characterises it as 'an elaborate book-length critique crushing me thoroughly'. However, he records that he warned Kelsen, cautiously by letter and 'more outspokenly' through mutual friends, that publication 'would damage his prestige rather than mine'.[40]

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35 *SR*, 167. 'Dialectic' is an error for 'dialectical' – in German they are the same, '*dialektisch*'. Importantly, however, 'dialectical materialism' was the Stalinist name for a form of historical determinism, distinct (or distinguished today) from Marx's expression 'historical materialism', which I understand to refer to a form of radical relativism.

36 Métall, 29; Voegelin, *Autobiographical Reflections* (*Collected Works*, vol 34; 1989, rev ed 2006), 49.

37 He had praised Kelsen's *Allgemeine Staatslehre* of 1925 for its scientific rigour and its commitment to democracy: 'Kelsen's Pure Theory of Law' (1927) 42 *Political Science Quarterly* 268. In 1945 he had termed the theory 'the outstanding achievement of our time in legal theory', including its separation of politics and legal science; in spite of its 'positivistic metaphysics' in opposition to theory of natural law, as well as a limited grasp of the nature of politics, it was 'a magnificent contribution to the science of law': review of *GTLS* and of William Ebenstein, *The Pure Theory of Law*, (1945) 6 *Louisiana Law Review* 489.

38 Voegelin, *Autobiographical Reflections*, above n 36, 81.

39 A typescript by Kelsen, 'A New Science of Politics', remains among Voegelin's papers: Hoover Institution Archives, 'Register of the Eric Voegelin Papers, 1907-1997', box 63, folder 13 (<http://www.oac.cdlib.org/findaid/ark:/13030/tf4m3nb041> accessed 26 August 2012).

40 Voegelin, *Autobiographical Reflections*, above n 36, 81.

However, in 1955 Kelsen would condemn Voegelin's book within his long essay 'Foundations of Democracy'.[41] Voegelin had distinguished between merely 'elemental' representation and 'existential' representation. He had argued, Kelsen quotes, that:

> A representative system is truly representative when there are no parties, when there is one party, when there are two or more parties, when the two parties can be considered factions of one party … a representative system will not work if there are two or more parties who disagree on points of principle.[42]

Voegelin nevertheless rejects the concept of a 'one-party state' as 'theoretically of dubious value'. Kelsen objects, deadpan, that a one-party state may 'offer an ideal case of "existential" representation' and the 'most characteristic type of one-party state is the Soviet Union'.[43] Voegelin digs himself deeper: a form of government that is 'nothing but representative in the constitutional sense' will be overthrown by 'a representative ruler in the existential sense' and 'quite possibly the new existential ruler will not be too representative in the constitutional sense'. Kelsen fills in the hole: this would be 'a ruler who represents the people in a fascistic sense – "Fuehrer" or a "Duce" who effectively organizes the mass of the people for action and may claim to realize democracy'.[44] Kelsen may therefore have thought that he had dealt with Voegelin's views on politics as such. He could now deal with Voegelin and others regarding polticisation of science.[45]

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41 Kelsen, 'Foundations of Democracy' (1955) 66(1/2) *Ethics* 1. The uncharacteristic vehemence of this attack upon communism, as well as in *The Communist Theory of Law* (1955), was perhaps motivated by the above-mentioned suspicions of fellow-travelling.

42 'Foundations of Democracy', above n 41, 6-10. This is hardly consistent with Voegelin's praise of the British and US democracies as, among 'the major European political societies', the 'most resistant against Gnostic totalitarianism' (quoted: SR, 268). Voegelin seems never to have found himself between a British socialist and a Tory.

43 'Foundations of Democracy', above n 41, 10.

44 Id, 14.

45 On Kelsen in relation to Voegelin's *œuvre*, see Dietmar Herz, 'Das Ideal einer objektiven Wissenschaft von Recht und Staat: Zur Kritik Eric Voegelins and Hans Kelsen', Eric-Voegelin-Archiv, Occasional Papers III (1996; 2nd ed, 2002); see also Herz, 'The Concept of "Political Religions" in the Thought of Eric Voegelin' in Hans Maier (ed), *Totalitarianism and Political Religions*, vol 1 'Concepts for the Comparison of Dictatorships' (Jodi Bruhn trans, 2004); Peter J Opitz, 'Eric Voegelins *The New Science of Politics* – Kontexte und Konturen eines Klassikers', Eric-Voegelin-Archiv, Occasional Papers XLI (2003).

The 'more extensive examination' had its own vicissitudes, going through several versions whose titles included 'Defense of Modern Times', 'Theology without God?' and 'Religion without God?' Various possibilities of publishing the whole work, or an extract from it as an article, seem to have emerged but been forgone. In 1963 the University of California Press set up the whole work in galley proof, followed by revised galleys in 1964. Then Kelsen decided to withdraw it, at considerable personal expense in reimbursing the publisher.[46] On Kelsen's death in 1973, his papers passed to his former student, now friend and biographer, Rudolf Aladár Métall. After Métall's death in 1975, they passed to the Institut. In 1979 the Institut took the view, which Métall had shared, that Kelsen's wishes should be respected and the work should not be published. That decision was maintained, despite recommendations for publication from one of Kelsen's daughters and from others. However, the earlier version was published in 2004,[47] which could have weakened the argument regarding content against publishing the later text as well as increasing the text's historical value. In 2008 – on the advice of Richard Potz, who would contribute an introduction – the Institut decided to seek a publisher. Springer Verlag agreed, with a subsidy from the Austrian government. The text that is this book is based on the 1964 galley proofs, with (it is stated) very conservative corrections.[48]

One might reasonably suspect that Kelsen, born in 1881, was just tired. That speculation, however, does not fit with his continuing to work on logic and legal science or with the quick and sprightly demolition in 1966 of a complaint that the Pure Theory of Law fails to measure up to the *philosophia perennis*. This, Kelsen hits back, is simply 'not legal science but legal theology'.[49]

'Religion' for all

One further reason for withdrawing the book had been offered in the biography by Métall, who one can suppose had heard it from Kelsen. It had to do with the book's highly stipulative insistence that the central defining element of 'religion' is a belief in a metaphysical God or gods. Kelsen rejects the suggestions of Bertrand Russell and Julian Huxley that 'religion'

46 *SR*, xiii.

47 Above n 32.

48 The present text has, unfortunately, significant editorial weaknesses which must be remedied before it is included in the *Werke*. These have been indicated separately to the editors.

49 Kelsen, 'Rechtswissenschaft oder Rechtstheologie? Antwort auf: Dr. Albert Vonlanthen, *Zu Hans Kelsens Anschauung über die Rechtsnorm*' (1966) 16 *Österreichische Zeitschrift für öffentliches Recht* 233, 233. Vonlanthen's small work – Kelsen calls it a 'pamphlet' (ibid) – had appeared in 1965.

might be defined without this assumption.[50] Russell, says Kelsen, defines 'religion' in two ways: first, it consists of a church, a creed and a code of personal morals; second and more broadly, it is a 'way of feeling' concerning human suffering and the hope of its alleviation. For Huxley, religion consists simply of feeling – a feeling of 'awe and reverence'. Russell is then able to characterise communism and fascism, including national socialism, as 'new religions'. Kelsen objects that Russell contradicts himself and in a way that is shared by Huxley. Russell, says Kelsen, 'uses the word "religion" to designate two phenomena which – in spite of a certain similarity – are so essentially different that such a terminology is inadmissible'. Russell commits this contradiction because his first characterisation of 'religion' has 'missed the essential point: the belief in God or gods'. That omission from the first characterisation allows Russell to maintain the second. Then the second, Kelsen complains, weakens Russell's preference for science over religion. For Russell is forced to admit: 'In so far as religion consists in a way of feeling, rather than in a set of beliefs, science cannot touch it.' But Russell is then quite wrong, Kelsen claims, in his identification of the 'new religions': for fascism and communism are not 'feelings' but 'political systems, that is, doctrines, ideas'. They do involve feelings, like the 'persecuting zeal' that Russell finds in both of them. Yet hostility to opposition, Kelsen notes, is a mark of any political system. Therefore Russell, through both of his characterisations of 'religion', 'obliterates the difference between religion and politics'.

The editors are puzzled, supposing that Kelsen 'would have attached great value to the views of Huxley and Russell'.[51] They are motivated by Métall's suggestion that this book was withdrawn because Kelsen had eventually come around to those views – accepting that, as Métall puts it, 'intensive religious feelings are also possible without a belief in a metaphysical God (or gods)'.[52] Kelsen would then have been faced with a thorough and very difficult rewrite of a book whose structure is already shaky. The book is arranged in chapters, but the discussion proceeds more author-by-author than idea-by-idea – very differently from Kelsen's usual practice. It is also imbalanced among the authors criticised – still too much the review of Voegelin, rather than a survey of a range of like-thinking writers.[53] Part of the problem is that, the more Kelsen organises his

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50 *SR*, 32-38. Kelsen's references are to Bertrand Russell, *Religion and Science* (1935) and Julian Huxley, *Religion without Revelation* (1957).

51 *SR*, xiii.

52 Métall, 91; Métall refers, apparently mistakenly, to Julian Huxley's brother Aldous.

53 Also, some arguments remain in footnotes that stretch through several pages, instead of being integrated into the main text: *SR*, notes 92, 199, 571,

discussion around the concept of Gnosticism as he researches it, the deeper he is led into expecting exactitude of a term that was only ever a modern label and, often, a sweeping accusation.[54] A larger part of the problem is the extent to which the book's structure hangs upon the narrow definition of religion – though less as a premiss for Kelsen himself than as the central feature of his subject matter, since Voegelin takes a stand upon it in order to denounce heretical departures from it. Worse for Kelsen, Voegelin characterises 'religion' without God or gods not only as 'secular religion' but specifically as 'Gnosticism'. This does not leave Kelsen without a place to stand, which would still have been 'science'. But, from that place, he would have been combating less a set of arguments against deviation, in which it was fairly clear what the deviation was from, than whatever Voegelin had chosen to label 'Gnosticism'. He might also have found it difficult to distinguish, except merely in principle, between a scientific sense of wonder and transcendently oriented reverence.

Kelsen, Marx and Freud

If it is often unclear why Voegelin attaches the label 'Gnosticism', it is usually clear to whom he attaches it. Of all the targets selected by Voegelin and his like, the most politically important was Marx. Kelsen, throughout the present book, defends Marxism against the allegation that it is a 'secular religion'. He places it, overall, on the side of 'science'.[55] That defence is clearly accurate. It could also have endangered Kelsen, in three dimensions. First: the more successfully he can show that these attacks on Marx are misguided, the more he can seem to be defending not just science with Marx as a representative of it but Marx and Marxism specifically. Second, and capable of reinforcing such an impression: when Kelsen defends Marx and Engels by praising their materialism for its scientific character, he is praising the standpoint from which they attack Christianity – not a very safe path in the USA in the 1950s. Third: there are even moments when Kelsen's own attacks on the Christian idea of 'transcendence' are so similar to those made by Marx and Engels that Kelsen might have been borrowing from them. In criticising Voegelin's allegation that Marxism is one of the secular religions, Kelsen quotes Engels:

> It is the Christians who, by presenting a peculiar 'History of the Kingdom of God[',] deprive real history of its very essence and claim this essence solely for their transcendent[], abstract and merely invented history, who have history arrive at an imaginary end in

711 and 812.

54 Rossbach, above n 16, 102 (tracing it to eighteenth-century France).

55 Eg *SR*, 167, 271-272.

> their Christ as the perfection of the human race; who interrupt history in the midst of its course; and consequently are compelled to declare the eighteen hundred years following Christ as absurd nonsense and void of content. *We* reclaim the content of history; but we see in history not the revelation of 'God' but of man and only of man.[56]

Engels is attacking all Christians. Yet the terms in which Kelsen attacks those who talk about 'secular religions' are much the same.

It is perhaps in awareness of this similarity that, within the book's single-page Conclusion,[57] Kelsen's language switches from that of the dispassionate scientist to that of a cold warrior who is finding some of his comrades troubling. To give a theological interpretation to history and society and to introduce religion into science and politics, he says,

> might be considered to be merely a more or less exaggerated presentation of certain similarities, a *façon de parler* chosen because of its effect on the reader, a quasi poetical licence, without serious consequences.
>
> However, this is a dangerous error in the author's opinion. The purpose – and if not the purpose, the inevitable effect – of the interpretation stigmatized in this book is to undermine the powerful dam which has been erected to protect science and politics from being flooded by metaphysico-theological speculation. This speculation is not the product of man's rational cognition, but of his imagination rooted in his wishes and fears.

The terminology becomes Freudian, yet Kelsen's concern is not individual but social. He goes on:

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56 *SR*, 170 (my corrections in brackets); Kelsen's translation from Friedrich Engels, 'Die Lage Englands' (1844), a review of Thomas Carlyle, *Past and Present* (1843), in Karl Marx and Friedrich Engels, *Historisch-Kritische Gesamtausgabe* (1930), Erste Abteilung, II, 427; the passage can be found in Marx and Engels, *Werke*, vol 1 (1976), 545. I have presumed to correct to 'transcendent' what is – apparently – Kelsen's translation of *jenseitige* as 'transcendental'. The standard English translation has, better, 'other-worldly': Marx and Engels, *Collected Works*, vol 3 (1975), 463. Also: query 'transcendental' at the bottom of *SR*, 62.

57 *SR*, 271.

> The interpretation against which the author is fighting is part of an intellectual movement within Western civilization which can be understood only by recognition of its social function. Provoked by the social instability following the two World Wars, the Russian Revolution, and the establishment of communism in great parts of the world, this movement is aiming at returning religion to politics, and theology to science. For it is assumed that only by this return, and that means by the belief that the capitalist-democratic social order maintained in the Western Hemisphere corresponds to the will of a transcendent and hence absolute authority, can this social order be absolutely justified in its conflict with communism.

On that plane, nonetheless, even in 1964 he was courting trouble from some quarters with this plain allusion, a few pages earlier, to McCarthyism: stating that those whom he is attacking are employing 'the same tactic as smearing as Communists those who do not conform with one's own opinion'.[58] Risk of this order is perhaps why Kelsen continues his Conclusion in more subtle terms:

> Whether any such justification is possible, however, is no concern of science, scientific philosophy or political theory. For science is not, as the Marxists pretend, a mere intellectual superstructure over political reality – a view which the anti-marxists, without being aware of it, confirm by attributing to science the function of justifying a definite political system.

Yet, if Kelsen's road sometimes runs parallel to that of Marx and Engels, it is not more than parallel. It is parallel in critique of ideology, and critique of ideology is an exercise primarily in theoretical reason. On that plane, however, Kelsen's framework is sourced not to Marxism but to Freud. Moreover, while the more political arguments of Marx and Engels demonstrate a commitment to practical reason, Kelsen continues to deny the existence of practical reason:

> The philosophers' assumption that moral and political principles can be found in human reason is certainly an illusion, for these values have their ultimate source in the emotional, not in the rational, component of the human mind.[59]

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58 *SR*, 267.

59 *SR*, 98. His sustained position was that there is a fundamental difference

Science, therefore, must be independent of morality and politics, in the same breath as admitting nothing transcendent or supernatural. The book ends:

> Science can only describe and explain; it cannot justify reality. It has the immanent tendency to be independent of politics and, as a rational and comprehensive cognition of reality, cannot presuppose in the description and explanation of its object the existence of a transcendent authority beyond any possible human experience.

All the same, Kelsen has put a lot of reason into his politically aligned defence of science.

The whole Kelsen

This is, nonetheless, the dry sort of language to be found at the beginning of the first chapter of *Pure Theory of Law*.[60] That should not be a surprise. Yet neither should the philosophical depth and political engagement of the rest of the present book.

Anglophones are hampered in their overall understanding of Kelsen by the absence in English of an up-to-date survey of his work,[61] or of a biography in English,[62] the paucity of English translations of his earlier works[63] and inaccuracies[64] and omissions[65] in the best known of the

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between thinking, which can be rational, and willing, which cannot. Accordingly, logic is applicable to legal propositions (*Rechtssätze*), which describe legal norms (*Rechtsnormen*), but not to the norms themselves. Logical 'validity' and legal 'validity' are quite different. See Kelsen, 'Law and Logic' (1965), 'Law and Logic Again' (1967) and 'On the Practical Syllogism' (1968) in *ELMP*. See further Stanley L Paulson, 'A "Justified Normativity" Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz' in Matthias Klatt (ed), *Institutionalized Reason: the Jurisprudence of Robert Alexy* (2012).

60 *PTL*, 1.

61 One awaits Stanley L Paulson, *Kelsen's Legal Philosophy* (forthcoming, Oxford U P).

62 The only biography so far, which has not been translated, is that by Métall, above n 1. *SR* is dedicated to Métall, 'my faithful friend'. Kelsen's autobiography, now published for the first time in volume 1 of his *Werke* (which I have not seen), goes up to 1947. *Hans Kelsen Werke* (2007-), edited by Matthias Jestaedt, is published by Mohr Siebeck in cooperation with the Hans Kelsen-Institut.

63 Among them, his higher-doctoral thesis *Hauptprobleme der*

translations that we do have.[66] Later translations have been more accurate and complete, but mostly they have been of Kelsen's works on norms and logic.[67] Kelsen's vast *œuvre*, however, ranges from the start through not only general theory of law but also constitutional law, administrative law, philosophy and politics; a specialisation on international law is added in the

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Staatsrechtslehre entwickelt aus der Lehre vom Rechssatze (1911, 2nd ed, 1923), followed by 'Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft' (1916) 40(3) *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche* 95; *Der soziologische und der juristische Staatsbegriff* (1922, 2nd ed, 1928); *Rechtsgeschichte gegen Rechtsphilosophie?* (1928). An exception is the very long article of 1928 that appears as an appendix to *General Theory of Law and State*; but, having in the volume little more than the translations of the book and the article, it is difficult to relate the two works. There is now a fine translation, with an extensive introduction, of the first version of *Reine Rechtslehre* (1934): *Introduction to the Problems of Legal Theory* (*IPLT*), using what had been the subtitle, *Einleitung in die rechtswissenschaftliche Problematik*, in order to distinguish this book from *PTL*. The two 'editions' of *Reine Rechtslehre* are substantially different books, the second much bigger than the first; I refer to them as 'versions'.

64 As when the key expression *Rechtssatz* is rendered 'rule of law in a descriptive sense': *GTLS*, 45ff. The German original of this text appears to have been lost (as I have been told by the Hans Kelsen-Institut), but from other of Kelsen's works the expression used is evidently *Rechtssatz*. In *PTL*, absurdly for a translation of a strongly Kantian work, *transzendent* is rendered at least once as 'transcendental': *RR*, 29; *PTL*, 28. For Kant, 'transcendental' refers to intellectual conditions of the possibility of knowledge: Stanley L Paulson, 'Introduction' in *IPLT*, xvii-xlii at xxx; 'A "Justified Normativity" Thesis in Hans Kelsen's Pure Theory of Law?', above n 59, 71-73.

65 In translation, the second version of *Reine Rechtslehre* lost its more philosophical footnotes, even those that refer to well known philosophers writing in English. For example, the opening discussion of the difference between 'is' and 'ought' (*PTL*, 5-6) is referenced in the original (*RR*, 5) to George Edward Moore, *Principia Ethica* ('1922', actually 1903) and Arthur N Prior, *Logic and the Basis of Ethics* ('1944', actually 1949). Also missing in the translation are Moore, in the same book, famously on the 'naturalistic fallacy' (*RR*, 11) and a reply to criticisms of Kelsen's views on 'is' and 'ought' in Alf Ross, *Towards a Realistic Jurisprudence* (1946) (*RR*, 19). Deplorably, too, *PTL* has no index whereas *RR* has a very good one.

66 A good early translation, however, is the work through which Kelsen first became well known to anglophones: 'The Pure Theory of Law: its Method and Fundamental Concepts', (Charles H Wilson trans, 1934) 50 *Law Quarterly Review* 474 and (1935) 51 *Law Quarterly Review* 517. The text translated was developed into the first version of *Reine Rechtslehre* (1934).

67 Kelsen, *ELMP*; *General Theory of Norms* (1979; Michael Hartney trans, 1991), which does not mention Voegelin.

1930s. In Vienna, from 1919 to 1930, he was a public figure: a professor of law at the University of Vienna, an architect and a judge of the Constitutional Court, an architect of the Austrian constitution of 1920 and a contributor to both liberal and left-wing newspapers.[68] A summary in English of his political views appeared in 1955, but it is more a statement of positions than a comprehensive argument.[69] During his long retirement, he returned increasingly to philosophy – that is, to considerations of normativity, logic, politics and justice.[70] There is therefore no 'new Kelsen' in this book, only aspects of Kelsen that have been unfamiliar to anglophones and that it is good to see more of now.

For science of law

Does this book, then, cast new light upon the Pure Theory of Law? At first sight, that may not seem likely. Or, if it does, the light might be of interest solely to Kelsenologists – who are many in Continental Europe and in Latin America, yet in the English-speaking world are few.[71] For surely the Pure Theory of Law has little or even nothing to do with society, politics or history? On the contrary, I would argue, it has first nothing but then everything to do with society, politics and history. In that perspective, I will suggest, this book can also be important to the broad project of a rationalist, materialist science of law.

The first version of *Reine Rechtslehre* contains an author's preface which begins with a solid commitment to modernism in science of law:

> More than twenty years ago I undertook to develop a pure theory of law, that is, a legal theory purified of all political ideology and every element of the natural sciences, a theory conscious, so to speak, of the

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68 Métall, 28-57; see also Horst Dreier, 'Hans Kelsen (1881-1973): "Jurist des Jahrhunderts"?' in Helmut Heinrichs et al (eds), *Deutscher Juristen jüdischer Herkunft* (1993).

69 'Foundations of Democracy', above n 41. On Kelsen's political writings, see Stanley L Paulson, 'Kelsen as Political Theorist' (1990) 17 *Cahiers de philosophie politique et juridique* 81.

70 He regretted all his life that he had not become a philosopher, but the realistic prospect for a philosophy graduate of modest origins had been school teaching: Métall, 4-5.

71 Maybe two or three each in the USA, the UK and Australasia. See Robert Walter, Clemens Jabloner and Klaus Zeleny (eds), *Hans Kelsen anderswo – Hans Kelsen abroad: Der Einfluß der Reinen Rechtslehre auf die Rechtstheorie in verschiedenen Ländern, Teil III* (2010), including my chapter 'Kelsen's Reception in Australasia'. My thanks to ASLP members who responded to my request for information on that topic.

> autonomy of the object of its enquiry and thereby conscious of its own unique character. Jurisprudence (*Jurisprudenz*) had been almost completely reduced – openly or covertly – to deliberations of legal policy, and my aim from the very beginning was to raise it to the level of a genuine science, a human science (*Geistes-Wissenschaft*). The idea was to develop those tendencies of jurisprudence that focus solely on cognition of the law rather than on the shaping of it, and to bring the results of this cognition as close as possible to the highest values of all science: objectivity and exactitude.[72]

The Pure Theory, he records, had received recognition and had inspired imitation. It had also encountered 'an impassioned resistance rarely seen in the history of legal science'. That resistance had been based partly on misunderstandings, often 'less than completely unintentional', and partly on 'political motives – that is, motives highly coloured by the emotions'.[73]

That preface is reproduced in the second version of *Reine Rechtslehre*, which adds a new preface. There Kelsen says that, as in the first version:

> an objective, solely descriptive science of law is hurled against the stubborn resistance of all those who, misunderstanding the borderlines between science and politics, in the name of the former prescribe a particular content for law – that is, 'right law' – and thereby suppose that they have been able to establish a set of values to which positive law must conform (*ein Wertmaß für das positive Recht*).[74]

All of this material is omitted from the translation of the second version.[75] If one now reads it in, one can see that the present book, far from being alien to the Pure Theory, is a counterpart, on another front, of its struggle against politicisation in science. The present book illuminates what we do find in *Pure Theory of Law*, on the opening page of its first chapter. The Pure Theory, Kelsen repeats, is concerned only to describe. It will state what law is, not what it ought to be; it is a 'science of law (*Rechtswissenschaft*)' and not 'legal politics (*Rechtspolitik*)'.

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72 *IPLT*, 1; my interpolations from *Reine Rechtslehre* (1934), iii.

73 *IPLT*, 1-2.

74 *RR*, viii; 'right law (*das gerechte Recht*)'.

75 Albeit that the 'Translator's Preface' (*PTL*, v-vi) is largely a reworking of the rest of the author's preface to the second version. The omission is understandable; Kelsen's new, anglophonic audience was very different.

> It is called a 'pure theory' of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.[76]

This correspondence of form extends to the content of the Pure Theory. The present book focuses centrally upon the idea of transcendence, which within the various presentations of the Pure Theory of Law receives less emphasis in *Pure Theory of Law* itself, but this is an alteration only of focus and not of standpoint. Earlier, in *General Theory of Law and State,* Kelsen says:

> The dualism of law and State is a superfluous doubling or duplication of the object of our cognition; a result of our tendency to personify and then to hypostatize our personifications. ... Thus, we imagine behind the law, its hypostatized personification, the State, the god of the law. The dualism of law and State is an animistic superstition.[77]

Then in 1961 he would say:

> Whoever believes that norms can be discovered in facts, or that values can be found in material reality, is deceiving himself. For he must – though possibly unconsciously – be *projecting* (*projizieren*) the norms that he has somehow presupposed, or the values that are constituted by those norms, into material reality, so as to be able to deduce them from it. Just as a circus magician pulls out of his top hat doves and rabbits which he had put into it beforehand. … A nature that is endowed with a will is either an *animistic superstition* or else a nature that has been created by God and in which God's good will is manifested. The will of nature is God's will *in* nature.[78]

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76 *IPLT*, 1; *Reine Rechtslehre* (1934), iii. At the same time, the tone of this chapter's title switches from oddness to defiance. It is not, as the theologically inclined might have written, 'Natural Law', but 'Law and Nature'; and in the original, even more clearly, it is not '*Naturrecht*' but '*Recht und Natur*'. Kelsen is booking space to say that they are separate.

77 *GTLS*, 191; cp *PTL,* 293.

78 Kelsen, 'Naturrechtslehre und Rechtspositivismus' (1961) in *Die Wiener rechtstheoretische Schule* (ed Hans Klecatsky et al, 1968), 817-832, 821. Such imagery, of course, is a game at which two can play. In 1965 Vonlanthen would call the Pure Theory 'fairytales in a juristic magic mirror'

Marx would have applauded both the ideas here and the imagery. But the inspiration drawn upon is Freud. In the 1920s, Kelsen had earlier written such a critique in Freudian terms[79] and had linked state personification to the personification named 'God'.[80] His arguments are also close to Marx's early critiques of Christianity and, although Kelsen would not have been aware of it at that time, of Hegel's conception of the state.[81] His path from Freud, however, would also be followed by some of the American legal realists, as with Thurman Arnold on law as both a comforting heaven on earth and a 'brooding omnipresence in the skies'.[82] Marx as well as Freud trace illusion to conflict, but for Marx both are primarily social whereas for Freud both are primarily psychological. The two perspectives can be combined, and each can be applied to the other's primary subject matter, but they are differently focused.

If Kelsen's concern with the idea of transcendence, as renewed and intensified in the present book, were to be taken back into debate on the identity of legal science, the prime target would probably have to be Schmitt. His 'political theology' appears early but briefly in the book and is not mentioned again.[83] For this reader, however, it lurks in the background all the way through.[84]

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and Kelsen's conception of a legal norm a 'magical witch's cauldron' (quoted: Kelsen, above n 49, 236).

79 Eg Kelsen, 'The Conception of the State and Social Psychology: with special reference to Freud's Group Theory' (1924) 5 *International Journal of Psycho-Analysis* 1. Kelsen had mixed closely with Freud's circle while in Vienna: Métall, 40-43; Clemens Jabloner, 'Hans Kelsen and his Circle: the Viennese Years' (1998) 9 *European Journal of International Law* 368.

80 Kelsen, 'God and the State' (1922-1923) in *ELMP*.

81 Karl Marx, 'Contribution to the Critique of Hegel's Philosophy of Law' (1843, first published in 1927) in Karl Marx and Frederick Engels, *Collected Works*, vol 3 (1975), 3-129.

82 Thurman W Arnold, *The Symbols of Government* (1935), 33-38. Another American legal realist, Jerome Frank, draws directly upon Freud to liken law to father-authority and to emphasise the emotional drives of non-realist jurists: *Law and the Modern Mind* (1930, 1970), 216-218, 265, 395. Also, Kelsen's conception of positive law as 'dynamic' legal order – a chain of authorisation, not of deduction – has much in common with the Free Law Movement (*Freirechtslehre*), whose inspiration is found in the 'indeterminacy thesis' of American legal realism and Critical Legal Studies: Stanley L Paulson, 'Formalism, "Free Law", and the "Cognition" Quandary: Hans Kelsen's Approach to Legal Interpretation' (2008) 27 *University of Queensland Law Journal* 7.

83 *SR*, 17-19. See further Stanley L Paulson on Kelsen and Schmitt in *The Oxford Carl Schmitt Handbook* (forthcoming); also Olivier Beaud and Pasquale Pasquino (eds), *La controverse sur 'le gardien de la Constitution'*

The present book's relevance to the Pure Theory may, however, be mainly through the second way in which, as I take it, the theory is 'pure'. Kelsen excludes elements of natural science, in that he excludes behaviourism. At the same time, in several respects the Pure Theory is constructed by analogy with natural science. Thus, to the natural-scientific principle of causality will correspond a legal-scientific principle of 'imputation (*Zurechnung*)' and to a 'law' of natural science will correspond a 'law of law (*Rechtsgesetz*)' that will describe regularities in legal phenomena. In the light of this programme of analogy with natural science, I take the Pure Theory to be analogous to Kant's 'pure part' of natural science.[85] In both, the basic concepts of the science are stated *a priori*, in order to make possible an 'empirical part' in which there will be an account of particular phenomena.[86] In the empirical part of legal science, these phenomena will be understood as legal. That would not, however, be to exclude – but, on the contrary, to engage in – description of their social, historical and political context. Further: description of law and its context could include describing and explaining any illusions that might be found – for example, personification of the state.

Enlightenment, science and democracy

An additional reason for Kelsen to withdraw his book, or at least not to attempt to revive it, may now be speculated. In 1964, the historian Peter Gay published *The Party of Humanity: Essays in the French Enlightenment*.

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et la justice constitutionnelle: Kelsen contre Schmitt / Der Weimarer Streit um den Hüter der Verfassung und die Verfassungsgerichtsbarkeit: Kelsen gegen Schmitt (2007).

84 To contend that legal science should be grounded in theology is very different from observing historical connections and actual similarities between law and religion and between legal doctrine and theology. As to such description, see eg Jacques Lenoble and François Ost, *Droit, mythe et raison* (1980).

85 Immanuel Kant, *Metaphysical Foundations of Natural Science* (1786; James Ellington trans, 1970), 5-6. By 'metaphysics' here, Kant means universal postulates. See further my 'The Critical Legal Science of Hans Kelsen' (1990) 17 *Journal of Law and Society* 273, 282-283.

86 The Pure Theory provides 'the fundamental principles by means of which any legal order can be comprehended': Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) in *WIJ*, 266. It is a '*general* jurisprudence' which furnishes 'the basic conceptions that enable us to master any law' and accordingly it serves as 'the theoretical basis for all other branches of jurisprudence', such as 'dogmatic' (ie doctrinal), historical or comparative jurisprudence: Kelsen, 'The Function of the Pure Theory of Law' in Alison Reppy (ed), *Law: a Century of Progress 1835-1935* (1937), vol 2, 231-241, 231-232. Even sociology of law: *GTLS*, 175-177.

A specialist on Voltaire, Gay characterised that *philosophe* as a 'pagan', indeed a 'belligerent pagan'.[87] The idea of an eighteenth-century 'paganism' does not, however, play a dominant rôle in his book. His characterisation of the Enlightenment is, rather, in terms of paradoxes: 'aristocratic liberalism', 'passionate rationalism', 'tragic humanism' and 'a mixture of activism and acceptance'.[88] But Gay foreshadows, in a footnote that Kelsen, if he had seen it,[89] could have found ominous:

> Voltaire's paganism is representative of the pagan world view of the Enlightenment as a whole. I shall allude to this paganism throughout this book, and I am now completing a general interpretation of the Enlightenment that will attempt to give full weight to the affinity of the *philosophes* for ancient ways of thinking.[90]

Enlightenment irreligiosity as religion, and from a specialist historian. This was already ammunition for Kelsen's targets and it promised much more.

The promise was fulfilled and amply. In 1966 appeared the first volume of Gay's *The Enlightenment: an Interpretation*.[91] This magisterial survey made an instant impact[92] and would be central to Enlightenment studies for the next four decades. The subtitle to the first volume would have been most unwelcome to Kelsen: 'The Rise of Modern Paganism'. It would have been even less welcome that Hume, who in Kelsen's view 'much more than Kant deserves to be called the destroyer of metaphysics',[93] is characterised as 'the complete modern pagan'.[94] Gay's second volume would appear in 1969 with the more welcome subtitle 'The Science of Freedom', but the theme of 'modern paganism' is continued.

The issue to confront here is whether Gay shows Kelsen's targets to have been right all, or some of the way, along. Or at least, on the several

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87 Peter Gay, *The Party of Humanity: Essays on the Enlightenment* (1964), 10-14.

88 Id, 288-290.

89 *SR* does not mention Gay; neither does Métall.

90 Gay, above n 87, 11.

91 Peter Gay, *The Enlightenment: an Interpretation* (vol 1 'The Rise of Modern Paganism', 1966; vol 2 'The Science of Freedom', 1969).

92 The first volume won the 1967 National Book Award for History and Biography.

93 Kelsen, 'Absolutism and Relativism in Philosophy and Politics' (1948) in *WIJ*, 205; repeated in 'Foundations of Democracy', above n 41, 38.

94 Gay, above n 91, vol 1, 401.

occasions when Kelsen associates himself with the Enlightenment,[95] is he grievously mistaken? That depends, to begin with, on what Gay means by 'modern paganism'. Gay identifies the Enlightenment mainly with the writings of the *philosophes*. In his first volume, while acknowledging their diversity and inconsistencies he contends that the *philosophes* thought of themselves as a family – with normal family quarrels – and can even be seen as an 'army' of intellectual liberation.[96] Their experience

> was a dialectical struggle for autonomy, an attempt to assimilate the two pasts they inherited – Christianity and paganism – to pit them against one another and thus to secure their independence. The Enlightenment may be summed up in two words: criticism and power.[97]

They were, in short, 'modern pagans': they drew upon classical pagan culture for inspiration against Christian superstition, both ecclesiastical and as ideological support for state absolutism. Gay prefers the label 'pagan' to others such as 'Augustan, Classical, Humanist' because these 'illuminate segments of the Enlightenment but not the whole'.[98] He means by 'modern pagan' no more and yet no narrower than 'the affinity of the Enlightenment to classical thought'.[99] In his second volume, Gay comes closer to Kelsen's concern with science:

> I have defined the Enlightenment as a mixture of classicism, impiety, and science, and the philosophes as modern pagans; what made the pagans modern and gave them hope for the future was that they could use science to control their classicism by establishing the superiority of their own, second age of criticism over the first, and thus keep their respect for their ancestors within proper bounds.[100]

It turns out that Gay understands 'modern paganism' to be irreligious, at least if Christianity is taken to be the paradigm of a religion. Importantly for

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95 *SR*, index entry 'Enlightenment, enlightened'.

96 Gay, above n 91, vol 1, 3-8. This claim of consistency is criticised as overstated: eg James Schmidt, 'Introduction' in his (ed), *What is Enlightenment?* (1996); Annelien de Dijn, 'The Politics of Enlightenment: from Peter Gay to Jonathan Israel' (2012) 55 *The Historical Journal* 785. Gay's perspective, however – of intellectual history rather than social and cultural history – may be enjoying a revival: Dan Edelstein, 'The Classical Turn in Enlightenment Studies' (2012) 9 *Modern Intellectual History* 61.

97 Gay, above n 91, vol 1, xiii.

98 Id, vol 1, 8-10.

99 Id, vol 1, 9.

100 Id, vol 2, 125; Gay prefers not to italicise 'philosophe'.

Kelsen, Gay understands 'paganism' to involve a resolute opposition to the idea of transcendence. Only in that light could he have termed Hume a 'complete pagan'.[101] Whether Gay should have spoken at all of 'paganism', or in this context even of 'science',[102] need not be pursued here. There remains for Kelsen the problem that Gay does speak of 'paganism', that he applies the term comprehensively to the Enlightenment and that what he means by 'paganism' is close to what Huxley and Russell meant by 'religion'.

Kelsen would not have gone along with 'pagan', but he was keenly interested in 'criticism and power'. On that plane, he is in line with Gay in subscribing to what has been termed (albeit, criticising Gay) the 'modernisation thesis' – the idea that key themes identifiable as those of an 'Enlightenment' have been motors for modernity.[103] Kelsen, like Gay (and, more so, Gay's critics), is aware of the Enlightenment's diversity and inconsistencies. He defends Enlightenment rationalism only so far as it is relativistic, rejecting absolutisation of reason.[104] Then he defends Enlightenment relativisation of reason so far as it counts toward modernity and, centrally to modernity, toward modern science. He says, as has been seen: 'If any criterion distinguishes modern times from the Middle Ages it is – in Western civilization – the existence of objective and independent science.' That is wholly consistent with the positivism, in the philosophical sense, of the Pure Theory of Law. By 'positivism' in that sense Kelsen understands two principles, to both of which he strives to adhere. First: that *reality is exclusively physical*; obversely, that there is no metaphysical reality. Second, which possibly follows from the first: that *statements of what is and of what ought to be are qualitatively different, so that neither can be inferred from the other*. By 'legal positivism' he understands the application of these principles to the study of law.[105]

These two principles can be attributed to some of the enlighteners, such as Hume, but by no means to all. There is, however, a further principle which can be attributed to all: *freedom of thought*. An application of that principle is rejection of transcendence, where a claim of transcendence is

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101 Id, vol 1, 401-419; referring especially to Hume, *Enquiry Concerning Human Understanding* (1748), ch 10 'Of miracles' and ch 11 'Of a particular Providence and of a future State'.

102 Eg James A Leith, 'Peter Gay's Enlightenment' (1971) 5 *Eighteenth-Century Studies* 157.

103 de Dijn, above n 96. This thesis is, however, broadly favoured in the trilogy by Jonathan Israel: *Radical Enlightenment* (2001), *Enlightenment Contested* (2006) and *Democratic Enlightenment* (2011).

104 *SR*, 103-104, 114-117.

105 Eg 'Naturechtslehre und Rechtspositivismus', above n 78.

seen as a phoney claim to an objectivity in which an idea will appear as undeniably evident. In the present book, Kelsen makes that sort of criticism emphatically of all religion. In his science of law, he also makes it emphatically of claims to transcendence that are made in theory of law – in all claims to the existence of natural law and in conceptions of positive law that personify the state. Then he has to account for the bindingness of positive law without accepting that it has a basis in transcendence.

The principle of freedom of thought had, for the enlighteners, a political twin: the principle of *freedom of action*. That principle, however, was troublesome: pushed far enough, it could require anarchy. The enlighteners were not prepared to go that far; some of them, entirely or eventually, recoiled even from democracy. Montesquieu opposed democracy beyond the very limited and, as he knew, corrupt system of mid-eighteenth century England; he regarded the common people as 'rabble (*canaille*)' and his preferred rulers were enlightened aristocrats, such as his good self, perhaps serving an enlightened prince.[106] And Diderot's regicidal use for sacerdotal innards[107] is not in the same street as Kant's obsequious (if tactical) attribution to his sovereign of the maxim '*Argue* as much as you like and about whatever you like, *but obey*!'[108]

Regarding freedom of action, Kelsen's life is made even more difficult by his denial – parting company with most of the enlighteners and especially with Kant – of the existence of practical reason. This seems to contradict his strong commitment to democracy: for one might think that the difference between democracy and mob rule is a commitment to practical reason in politics. In Kelsen's perspective, however, this problem does not appear. He accepts that, if there is no practical reason, judgements about ultimate ends, including a preference for democracy, must be irrational.[109] However, he maintains, judgements about means toward ends can be theoretically rational. This is because 'the relationship between

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106 Montesquieu was a political advisor to 'Bonnie Prince Charlie' in his efforts to restore his family and Catholicism to power in Britain. See my 'Montesquieu in England: his "Notes on England", with Commentary and Translation' (2002) *Oxford University Comparative Law Forum* 6.

107 'Et ses mains ourdiraient les entrailles du prêtre, / Au défaut d'un cordon pour étrangler les rois (And his hands will plait the guts of some priest, / If he can't find a rope, to strangle all kings': Denis Diderot, 'Les Éleuthéromanes' (1772) in his *Œuvres complètes* (1875-1877), vol 9, 12 at 16.

108 Immanuel Kant, 'An Answer to the Question "What is Enlightenment?"' (1784) in Hans Reiss (ed) and H B Nisbet (trans), *Kant's Political Writings* (1971), 55.

109 'Foundations of Democracy', above n 41, 97.

means and end is a relationship between cause and effect, objectively ascertainable by science, whereas the recognition of an end as an ultimate value, which is itself not the means for a further end, lies beyond scientific cognition'.[110] Matters of means and end are matters of 'technique' and positive law is rational in that it is a 'social technique'.[111]

In these terms, he claims, democracy – or liberal democracy, the only kind of democracy that he approves – has a 'rationalistic character'. This character is relative, not absolute: liberal democracy is rationalistic not outright but in contrast with autocracy; it is merely more rationalistic than autocracy. That has a positive and a negative side. The negative side is that, while both democracy and autocracy make use of ideologies, the use made by democracy is thinner because democracies have less to hide.[112] The positive and more important side stems from the fact that, in a liberal democracy, procedure predominates over substance: the predominant factor is not liberalism, focusing on individual freedom, but the procedures through which the freedom of each individual is limited in the interest of the freedom of all.[113] Those procedures are established in positive law. Hence:

> The rationalistic character of democracy manifests itself especially in the tendency to establish the legal order of the state as a system of general norms created by a procedure well organized for this purpose. There is a clear intention of determining, by a pre-established law, the individual acts of the courts and administrative organs in order to make them – as far as possible – calculable. There exists an outspoken need for rationalizing the process in which the power of the state is displayed.[114]

These procedural guarantees of freedom of action would include guaranteeing freedom of scientific practice. Kelsen is then able to speak of justice as a combination of such means with the ultimate ends that they serve. He understands as 'justice' a 'relative justice', which is 'that justice under whose protection science, and with science, truth and sincerity, are able to flourish'; this is 'the justice of freedom, the justice of peace, the

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110 Id, 40.

111 Kelsen, 'The Law as a Specific Social Technique' (1941) in *WIJ*.

112 'Foundations of Democracy', above n 41, 30.

113 Id, 3-4, 18; cp the proceduralist conception of democracy in Jürgen Habermas, *Between Facts and Norms* (1992; William Rehg trans, 1996).

114 'Foundations of Democracy', above n 41, 29.

justice of democracy, the justice of tolerance'.[115] Justice in all of these respects is defended in *Secular Religion*.

[115] Kelsen, 'What is Justice?' (1953) in *ELMP*, 24.

Book Symposium

Anthony J Connolly, *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding*

Naturalising Cultural Difference and Law: Author's Introduction

ANTHONY J CONNOLLY[†]

I. Culture, interpretation, and incommensurability

Cultural Difference on Trial: The Nature and Limits of Judicial Understanding[1] is a systematic philosophical inquiry into the nature and limits of the judicial understanding of culturally different phenomena. By this latter term, I mean the thoughts, actions, and associated artefacts of people who are members of a culture (however defined)[2] different from that of the judge presiding over a legal hearing in which evidence of and argument about these things arise.[3] As an inquiry into both the nature *and* limits of judicial practice in this context, the book provides an account of the cognitive and practical *processes* by which judges seek an understanding of culturally different phenomena, as well as the *constraints* – general and legal, psychological and institutional – which operate upon

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1 Anthony J Connolly, *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding* (2010).

2 Whilst acknowledging the controversial nature of the notion of culture within the social sciences, I argue in the book that members of culturally different groups may be identified as such by reference to some combination of factors, including their language, conceptual scheme or world view, genetic characteristics, historical origins and experience, and geographic location, as well as distinctive behavioural and artefactual features. See, for example, Adam Kuper, *Culture: The Anthropologists' Account* (1999) on this.

3 Though one might be tempted to conceive of such proceedings as a relatively narrow class comprising obviously cross-cultural matters such as refugee applications or indigenous and minority rights claims, in fact, cultural difference regularly presents challenges in all kinds of matter, ranging from domestic criminal prosecutions to international trade disputes.

them in this pursuit. Further, to the extent that judicial understanding here may be seen as representative of intercultural understanding by agents within a range of institutional settings – both public and private – the book might also be seen as something of a prototype for a more general work of institutional epistemology and design.

What is most distinctive about the culturally different phenomena in question here, of course, is that they are *meaningful*. The thoughts, actions, and artefacts of culturally different agents and groups are informed by intentional states with propositional and conceptual content. It is in relation to this content that the meaning of these things subsists. By virtue of their meaningfulness, culturally different phenomena must be subject to a process of interpretation on the part of a judge in order to be understood and appropriately responded to within the context of a legal hearing. Such an interpretive response may be called for by a direct evidential encounter on the judge's part with the phenomena in question or by an encounter with testimonial or other indirect evidence or with argument about the phenomena. Either way, both evidence of or arguments about cultural difference demand an interpretive mode of judicial practice.

A judge cannot perform her judicial role and respond appropriately to any such difference without understanding it – to some practically adequate degree, at least.[4] And she cannot understand it without engaging in an interpretive process in relation to it. This book is my attempt to theorise the nature of this dimension of judicial practice. Because such practice takes place necessarily within the practical and regulative context of a legal hearing, we might construe this book as an account of the *interpretive architecture* of the contemporary legal hearing. As I try to show in the latter parts of the book, such architecture presently possesses features facilitative and obstructive of the understanding judges need to gain in order to perform their adjudicative role.

My interest in this topic was motivated in part by a longstanding intellectual and political unease I have felt in regard to the once popular idea of radical cultural incommensurability – the notion that people from different cultures are so different in their conceptual schemes or worldviews that there is no hope of them ever understanding and effectively cooperating with each other – and its operation in the practice of law.[5] From the time of

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4 Except, perhaps, by error or accident. The degree to which she needs to understand a culturally different phenomenon depends in large part on the legally defined character of her role in the matter in question. I have more to say on this below.

5 Dorit Bar-on defines cultural incommensurabilism as the view that 'different cultures view the world through conceptual schemes that cannot be

my undergraduate studies in philosophy, anthropology, and law, I have encountered the idea (in one version or another) that judges and other agents of the dominant institutions of modern liberal democratic nation states such as Australia are so different in their worldview from those culturally different 'others' that come before them that they are unable to understand them and appropriately respond to them and their claims.[6]

My philosophical scepticism about the truth or even coherence of such a claim was only a part of my overall unease here. This is because the truth or falsity of the radical incommensurabilist claim is not merely of intellectual consequence. A great deal of concrete political, social, and economic import hinges on the truth of the claim for the millions of people who constitute the culturally different minorities in question here. For if the incommensurabilist claim – or even something approaching it – were correct, there would be little reason to believe that the legal systems of nation states such as Australia would be able to provide what they purport to provide culturally different groups by way of minority rights and the like – namely, the proper recognition of their ways of life and the effective protection of those ways of life from interference by the dominant society. The reason for this is that any such recognition and protection requires a degree of understanding of such way of life on the part of those legal agents charged with providing that recognition and protection. One cannot properly respond to a set of beliefs or practices which one does not understand – to some sufficient degree, at least.[7] If a radical version of the incommensurabilist claim were correct, it would appear that all legal attempts to address the ongoing disruption of distinctive minority cultures by way of minority rights and the like were futile wastes of effort and resources, doomed to failure. Political and legal quietism in the face of cultural difference would be the only rational course.[8] This struck me as unacceptable. So – eventually – came the inquiry that comprises this book.

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reconciled.' Dorit Bar-On, 'Conceptual Relativism and Translation' in F Siebelt G Preyer, and A Ulfig (eds) *Language, Mind and Epistemology: On Donald Davidson's Philosophy* (1994) 145.

6 Statements of this claim are legion. In the book I survey a number of them, including the Australian legal theorist Penelope Pether who stated that 'it is a commonplace of accounts of indigenous culture … that connection with the land is at its heart, in a way radically incommensurable with the non-indigenous… legal consciousness.' Penelope Pether, 'Principles or Skeletons? Mabo and the Discursive Constitution of the Australian Nation' (1998) 4 *Law Text Culture* 118.

7 Again, except, by error or accident.

8 On the politically and ethically quietistic dynamic of certain so-called 'postmodern' strands of incommensurabilist thought, see, for example, Jurgen Habermas, *The Philosophical Discourse of Modernity: Twelve*

II. Concepts and culture

Perhaps the most important and distinctive feature of the book's analysis is its concept-theoretic orientation.[9] On this approach, judicial understanding is taken to involve the possession by a judge of a *working concept* of a culturally different phenomenon at some point over the course of a legal hearing. To understand a culturally different *practice*, for instance, is – in important part – to possess a concept of that practice.[10] Because, as I argue in the book, possessing a concept of a specific practice involves possessing some set of the concepts actually informing that practice, the judicial understanding of a culturally different practice involves the possession of concepts which are in turn possessed by those very agents engaged in the practice.[11] It involves possessing, what I term, culturally different concepts.[12]

Lectures (1987). Of course, not all postmodernist theorists subscribe to a radical incommensurabilist view.

9 An orientation, in part, provoked by what seems to me to be the concept-theoretic orientation of those advocating the existence of a radical cultural incommensurability in law. I argue in the book that the most plausible way of making sense of claims of cultural incommensurability is to construe them as involving the claim that judges are unable to adequately *conceptualise* the thought and practice (and associated material artefacts) of the members of different cultures. They do not and cannot possess an adequate *concept* of culturally different phenomena. As a result, they cannot acquire or maintain true beliefs about these things. They cannot understand them and respond appropriately to them - in any significant sense. One advocate of the incommensurabilist view, the indigenous Canadian theorist Mary Ellen Turpel, hints at such an orientation in her claim that 'cultural differences are not such that they can be managed within the dominant legal *conceptual*-framework' (my emphasis). Mary Ellen Turpel, 'Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences' (1997) 6 *Canadian Human Rights Yearbook* 3-45. See also Stuart Motha's claim, in the context of a critique of the law of native title in Australia, that 'the European subject was and is unable to recognise the indigenous relationship to land other than *through their own conceptions of it*' and that 'the actual experience and particularity of the [indigenous] other cannot be accessed *through the concepts* we invent' (my emphasis). Stuart Motha, 'Mabo: Encountering the Epistemic Limit of the Recognition of Difference' (1998) 7 *Griffith Law Review* 88.

10 Such a concept may, admittedly, be quite complex. It is for this reason, amongst others, that I am sympathetic to philosophical and psychological accounts of higher-order concepts which conceive of them as a kind of theory. See Susan Carey, *The Origin of Concepts* (2009), for a detailed, as well as scientifically and philosophically sophisticated, theory-theory of concepts. My thinking on this has shifted somewhat since I wrote the book.

11 This is a feature of conceptualising any meaningful phenomena. Because

Where such concepts are not possessed by a judge at the commencement of the legal proceedings in which they arise for consideration – that is, where a situation of *conceptual difference* obtains – then the judge must acquire those concepts by some or other interpretive means over the course of the proceedings. She must learn enough about the culturally different thought, practice, or artefact in question as will enable her to appropriately respond to it and adequately perform her judicial role in the proceedings. In the book I construe this learning (and the process of interpretation which accompanies it) in terms of the acquisition of new concepts. It is the challenge posed by such learning that serves as the main focus of the book. This is to say that I am predominantly concerned in the book with that species of cultural difference which involves *conceptual* difference.[13] For reasons I outline in the book, it is this species of cultural difference which is the most philosophically interesting and practically problematic (from the point of view of legal institutional design).

In light of comments made on this by Glaskin and Edmond, it is important to note that the judicial learning at work here need not be as extensive as that engaged in by the culturally different agents themselves in the course of their own socialisation into their culture. It need not even be as extensive as that pursued by an anthropologist seeking to understand some aspect of a different culture for some anthropological purpose.[14] The judge need only acquire sufficient number or degree of culturally different concepts as will enable her to perform her adjudicative role in the matter at hand. Her only obligation is to acquire, what I term in the book, a *practically adequate* understanding of the culture in question. The actual degree of understanding required of a judge will vary from case to case and may range from the superficial to the relatively deep. Consequently, the

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meaningful phenomena are importantly constituted and individuated by their conceptual content, maintaining a concept of them involves maintaining some set of that conceptual content. Donald Davidson, *Inquiries into Truth and Interpretation* (1984).

12 I have more to say on the notions of culture and culturally different concepts which I adopt in the book in my response to Katie Glaskin's paper below.

13 Amongst theorists there is little disagreement that at least *some* of the concepts informing culturally different phenomena may not be possessed by a judge at the commencement of a hearing involving such phenomena. Those theorists I refer to in the book as radical cultural incommensurabilists deny that *any* culturally different concept is possessed by a judge who is not a member of the culture in question. That is, they claim that all *culturally* different concepts are *conceptually* different as far as such a judge is concerned. A significant part of the book is taken up responding to this extreme view of cultural and conceptual difference.

14 Judges need not be (in Edmond's terms) 'amateur anthropologists or lazy anthropologists'.

interpretive *effort* required of her may vary from case to case and range from the relatively light to the extremely onerous. And in some cases, of course, no learning at all may be required of her in the face of those concepts she might happen to share with members of another culture.[15]

The concept-theoretic approach adopted in the book operates, then, at two levels. It proceeds by way of an inquiry, firstly, into the possession and enactment of a conceptual scheme by culturally different agents and groups and, secondly, into the acquisition of some part of that conceptual scheme by a judge over the course of a hearing. In pursuing these inquiries, the book elaborates a theoretical model of the *nature* of culturally different thought and practice and the judicial understanding of those things. With this in hand, it goes on to explore the *limits* of any such understanding – which is to say, the extent to which and the conditions under which, any such understanding is *possible*. Interrogating the radical claim that by virtue of some set of individual or institutional factors, a judge might be *utterly incapacitated* from understanding a culturally different phenomenon, the book sets out to identify those aspects of judicial practice and legal process which might affect such understanding, either positively or negatively.[16] In many ways, the book is a work of legal epistemology – though the kind of knowing at stake in it is of an interpersonal and intercultural kind: a kind of knowing more akin to hermeneutics than cognition.[17]

III. Philosophical analysis and law reform

I said earlier that the book comprises *for the most part* an inquiry into the nature and limits of judicial understanding in the face of cultural difference. It is, for the most part, a descriptive philosophical enterprise. Additionally, though, and in light of the descriptive account of things it develops, the book also aims to provide a framework for thinking about the reform of judicial practice and legal process in the service of more effective and ethical cross-cultural communication. This is to say that the book is in part a *normative* work, comprising both a critique of current legal practice and

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15 There is a tendency in much discourse surrounding the issue of cross-cultural understanding to think that the only understanding *that matters* is a deep understanding, approaching the self-understanding of the culturally different agents in question. The model of understanding employed in this book challenges that tendency and acknowledges successful understanding is always context-dependent and always a matter of degree.

16 These include things such as the rules of evidence, the selection criteria for appointment to the judiciary, and even the physical architecture of the courtroom. I discuss these in some detail in Chapter 7 of the book.

17 As such, it also falls under the model of social epistemology developed over the past two decades or so by Alvin Goldman and others. See, for example, Alvin Goldman, *Knowledge in a Social World* (1999).

process and a blueprint for institutional reform in the future. Intersecting, as it does, with the political and ethical concerns which originally motivated the project, the book's normative dimension is as important to its integrity as its descriptive aspect.[18]

As should be apparent by the vocabulary and style of my summary so far, the theoretical tradition informing the book is that of analytic philosophy. The book draws substantially on contemporary analytic philosophy of mind, action, and interpretation – as well as associated current theories within cognitive and developmental psychology – with only the occasional nod to related lines of thought within the continental tradition.[19] In the application of these philosophical sub-disciplines to a quite concrete social and legal problematic, the book constitutes a contribution to the increasingly prominent discipline of applied philosophy.[20] Like many within the contemporary analytic tradition, I adopt a philosophically naturalistic metaphysics and methodology.[21] In fact, in pursuing my inquiry I explicitly and systematically employ a rigorously *physicalist* set of metaphysical and methodological presuppositions.[22] Within this philosophical framework, all of the phenomena invoked in the judicial understanding of culturally different actions – concepts, intentional states, actions, cultural difference and the very process of understanding these – comprise an integral and ordinary part of the natural world, metaphysically continuous with all of the other things in the world. Very importantly, though,[23] these higher order discursive things are not crudely

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18 Indeed, the critical project opened up by the book comprises a substantial part of my present research agenda.

19 This is not because of any antipathy on my part towards the continental tradition. My concerns (mentioned above) are directed only at certain radical incommensurabilist strands of that tradition. I have more to say on this below in my reply to Davies who identifies a number of issues surrounding the analytic-continental 'divide' in philosophy as importantly implicated by the book.

20 The book was published in Ashgate's *Applied Legal Philosophy* series.

21 In doing so, the book comprises a contribution to the 'program for a naturalized jurisprudence' which these days is most notably advocated by Brian Leiter. This is to say that I think Leiter is on the right track in his naturalistic critique of traditional jurisprudence. The most succinct and effective presentation of his views on the nature and rationale of naturalised jurisprudence are, in my view, to be found in the Postscript to Part II of his 2007 collection of essays, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 183-199.

22 Even if one doesn't accept physicalism, the book may be of value in outlining what a physicalist approach to the question of cultural difference and law might look like.

23 Given the concerns of Davies and Glaskin in their papers that, as a physicalist, I am engaged in an illegitimately reductive project.

reducible to any of those other things. Contemporary physicalists are alert to the defects of earlier, unsophisticated, and overly reductive versions of the approach.[24] In adopting a naturalistic line of this kind, of course, the book diverges from the metaphysical and methodological preferences of many notable theorists within the continental tradition.[25]

An important part of what motivated me in writing this book in this vein was a curiosity about how issues of cultural difference and cross-cultural understanding in law – for so long the preserve of non-analytic (indeed, *anti*-analytic) theorists – might look from a robustly analytic and naturalistic perspective. Analytic philosophy has for decades been subject to a popular misunderstanding that in its objectives, its methods, its style and its values it is an ethically and politically sterile school of thought. This book is my attempt to challenge that view. It constitutes an effort on my part to realise what I have long considered to be the unfulfilled practical and political potential of analytic philosophy and to make a space for it within the theoretical terrain of cultural politics and social critique.[26]

IV. Structure of the book

Very briefly, the book proceeds as follows. Following the introductory scene-setting of Chapter 1, the second chapter draws on certain widely held ideas within contemporary analytic philosophy in order to provide a general, naturalistic, and functionalist account of the object of judicial understanding in this sphere – thought and action (both individual and collective)[27], together with its associated intentional and conceptual content. In Chapter 3, I provide a concrete legal context for the inquiry by providing an overview of an area of law in which the judicial understanding of

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24 On the nature and rationale of non-reductive physicalism, see John Post, *The Faces of Existence: An Essay in Nonreductive Metaphysics* (1987); Jeffrey Poland, *Physicalism: The Philosophical Foundations* (1994); Jaegwon Kim, *Mind in a Physical World* (1998); and Andrew Melnyk, *A Physicalist Manifesto: Thoroughly Modern Materialism* (2003).

25 For example, Levinas, Foucault, Derrida, and Lyotard. See Christopher Norris, *The Truth About Postmodernism* (1993) and Lee Braver, *A Thing of This World: A History of Continental Anti-Realism* (2007) on the influence on these theorists of the dualist and idealist metaphysics of Kant.

26 Of course, numerous philosophers before me have engaged in this kind of project, going back to those members of the Vienna Circle (Neurath and Schlick, for example) for whom the social and political dimensions of their work were as important as the metaphysical and methodological dimensions.

27 The discussion here intersects with developments in the emerging philosophical field of social ontology. See, for example, Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (2011).

culturally different thought and practice is commonly pursued in a number of the world's jurisdictions – namely, indigenous land title law. By virtue of their form and content, indigenous land title claims embody the theoretically significant aspects of virtually all modern legal proceedings involving cultural difference. By outlining a paradigm procedural and conceptual context for the interpretive encounter of judge and culturally different other, Chapter 3 enables the legal and practical relevance of the substantially philosophical chapters to do with concept acquisition, cross-cultural understanding and conceptual incommensurability which follow to be better appreciated.

In Chapter 4, I return to a more substantive philosophical discussion by establishing and elaborating upon the connection between judicial understanding and concept possession referred to above. Drawing upon the physicalist-functionalist theory of action and intentionality articulated in Chapter 2, I outline in this chapter a general theory of the nature of concepts, their possession and their acquisition, drawing, as I've said, on a range of sources in contemporary philosophy and cognitive and developmental psychology. In establishing a basis for making sense of the notion of culturally-based conceptual difference, Chapter 4 also serves to flag the discussion of the *limits* of conceptual and cultural difference which takes place later in Chapter 6.

Chapter 4 argues that where a judge does not possess culturally different concepts at the commencement of a legal proceeding, she must acquire them over the course of such proceeding. In Chapter 5, I follow this up with an argument that the key *means* by which a judge acquires culturally different concepts over the course of a hearing is by interpreting testimonial evidence about those concepts and the culturally different phenomena those concepts implicate. Much of Chapter 5 is devoted to outlining a naturalistic account of the nature of such interpretation. Broadly speaking, my approach to the question of interpretation here is a methodologically monist one, drawing heavily on the 'theory-theory' approach currently influential within much analytic philosophy, psychology and linguistics.[28]

[28] By 'monist' here, I mean that the interpretation of testimony may be seen as constituting a distinctive mode of the naturalistic explanation of higher-order phenomena – in this case, roughly, the explanation of testimonial behaviour with reference to that behaviour's intentional cause – of a kind with other modes of explanation pursued in everyday life and the social and natural sciences. A 'theory-theory' approach to interpretation emphasises the role played in judicial interpretation by a judge's (largely) folk-psychological theory of agency and mind, as well as her theory of the testimonial agent, noting how these theories are implicitly and explicitly

As mentioned, Chapter 6 is concerned with the important question of the *limits* of conceptual incommensurability within the legal sphere – that is, with the extent to which a judge might be incapacitated from understanding culturally different actions over the course of a proceeding. The argument in this chapter proceeds by critically engaging as a physicalist and functionalist with an extreme but heuristically valuable construal of the cultural incommensurabilist view, which I term the radical cultural incommensurability thesis.[29] This thesis maintains that as a matter of theoretical necessity no judge possesses or is able to acquire any culturally different concept. Over the course of Chapter 6, I rely upon various findings in recent neuroscience and developmental psychology, as well as upon certain lines of thought in contemporary analytic philosophy, in order to mount a series of arguments rebutting the two limbs of this thesis – namely, the limb asserting the necessity of a radical conceptual *difference* obtaining between judges and culturally different agents, and the limb asserting the necessity of a radical conceptual-acquisitive *incapacity* afflicting judges in relation to culturally different concepts.

The outcome of the analysis in Chapter 6 is that on a naturalistic and functionalist approach a significant (though not a global) degree of conceptual difference between a judge and a culturally different agent or group is possible, but is not necessitated by any (plausible) metaphysical, natural, or social state of affairs. The degree of difference which obtains in relation to a given judge and a given set of culturally different concepts at a given point in time depends, for the most part, on certain contingent facts to do with the judge's prior conceptual development, the nature and relevance of which I describe in Chapter 6. Likewise, it is contingently possible (but again, it is not necessarily the case) that a judge is not able to acquire a culturally different concept or set of concepts over the course of a legal hearing. Again, whether she can or not depends upon two contingent factors – the concepts already possessed by the judge at the commencement of the hearing and, what I term, the epistemic conditions which obtain over the course of the hearing. Such conditions include the sensory and cognitive capacities of the presiding judge, the availability of evidence about the

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applied by the judge in response to and in interpretation of evidence led at hearing. On this, see, for example, David K Henderson, *Interpretation and Explanation in the Human Sciences* (1993); Peter Carruthers and Peter K Smith, *Theories of Theories of Mind* (1996); and Shaun Nichols and Stephen P Stich, *Mindreading: An Integrated Account of Pretence, Self-Awareness, and Understanding Other Minds* (2003).

[29] As I argue in the book, though there are, in fact, a number of theorists who hold – or at least, seem to hold – the radical view, exploring its plausibility for the purposes of motivating a positive account of the limits of understanding would still be a valuable and legitimate project even if there were no theorists who actually held that view.

culturally different concept or action in question, the legal norms regulating the use of any such evidence, and the quality of the hearing environment.

Simply put, a failure of judicial understanding – even a widespread failure across the whole of the judiciary in relation to all culturally different actions which might be subject to claim – is entirely possible within the legal sphere. But, equally, a *successful* exercise in judicial understanding is possible, for any and all judges and for any and all culturally different actions. Everything here depends upon the content of the judge's conceptual scheme at the commencement of the hearing and upon the epistemic conditions which obtain for that judge (or for judges, generally) over the course of the hearing. As I said earlier, this position is compatible with the views of many, if not most, cultural difference theorists, whether they be of an analytic or a continental stripe. What it is *inconsistent* with is the view of those who hold for a *global* degree of conceptual difference (that is, no concepts in common) or for a *necessary* interpretive incapacitation on the part of judges in relation to any cultural-cum-conceptual difference which might exist.

Following up the normative dimension of the book, what most importantly emerges from Chapter 6 is that the various factors conditioning the capacity of a judge to acquire culturally different concepts and understand culturally different phenomena are not only contingent, they are amenable – in principle, at least – to a significant degree of regulation and reform. Because of the contingency of these factors, it lies within the power of those responsible for the operation of the legal hearing process to affect them to some degree, for the better or for the worse. The legal system is open to the effective reform of its capacity to understand culturally different actions. As a matter of institutional design it is possible for those presently constituting and controlling the interpretive architecture of the legal system to act so as to affect both the contents of the conceptual scheme possessed by its judges at the commencement of those hearings they preside over and the epistemic conditions those judges act under over the course of such hearings.

In the concluding Chapter 7, I pursue this line of thought and attempt to fulfil the modest practical and critical aspirations of the book, which in earlier chapters remain largely implicit, by identifying and reflecting upon a number of key features common to many contemporary legal systems which affect – both favourably and unfavourably – the judicial understanding of culturally different actions. To the extent that a legal system might be oriented towards the improvement of its epistemic and interpretive capacities under conditions of cultural difference, the provision and cultivation of facilitative conditions and the removal or amelioration of obstructing conditions are objectives those controlling and constituting that

system might want to pursue. Whilst noting that it is not the primary aim of the book to elaborate a detailed set of reform proposals in relation to legal process – its primary aim is to provide a philosophically and legally informed *framework* for the development of any such proposals – Chapter 7 does identify a number of areas of potential reform. These include the selection and ongoing education of judges, the adversarial mode of fact-finding, the rules of evidence, and the physical design of the legal hearing space.

V. Making room for difference

One of the more interesting outcomes of the inquiry undertaken in the book – from my point of view, at least – is that the analytic and naturalistic approach to cross-cultural understanding adopted there is quite capable of providing theoretical space for a substantial degree of conceptual and cultural difference to exist between judge and other – indeed, as much difference as most non-analytic theorists would want. That this is so is contrary to a view maintained by many non-analytic theorists that the analytic tradition is somehow committed to an overly universalistic, ethnocentric, or otherwise difference-denying conception of human being, society, and law.[30] It isn't. Consequently, non-analytic theory need not be the *only* option for those intuitively concerned to maintain room in their account of the world for the existence of significant difference between cultures.[31] But, in addition to sustaining a concern for cultural difference, an analytic and naturalistic approach is capable of guiding an effective and appropriate institutional recognition of that difference. As I argue in the book, such an approach can enable theorists of cultural difference 'to pursue their theoretical, ethical and political interests without the great theoretical, ethical and political *costs* demanded by the false and disempowering necessity inherent in some of the more radical accounts of such difference.'[32]

As I mentioned earlier, the modern liberal legal system has, for a number of years now, been subject to a sustained campaign of critique by those concerned to make adequate theoretical and political space for cultural difference within that system. I argue in the book that much of this critique has been based on conceptually and empirically unsound premises. An important part of what this book is about involves rebutting the non-naturalistic approach implicated in this critique: an approach 'which is not

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30 One gets a sense of this view in Glaskin's paper where she expresses concerns about my acceptance of the universal existence of certain innate concepts.

31 Though it is certainly a legitimate option for those so concerned.

32 Connolly, above n 1, 24.

only theoretically flawed but is ethically and politically counterproductive in its implicit promotion and perpetuation of a quietistic pessimism about the possibilities of legal, political and social reform in relation to cross-cultural matters.'[33]

The aim of the book is not to defend liberal democratic legal systems from critique in relation to cultural difference but to provide a sounder basis for any such critique. Having worked in the field of indigenous rights law in Australia for a number of years, I share the general concern of many critics of the liberal democratic legal system in regard to the capacity of its agents to adequately understand culturally different action and to properly recognise and protect culturally different ways of life. However, any diagnosis of the legal system's deficiencies on this score must proceed on the basis of our best account of how the world actually is. This is, in my view, a philosophically naturalistic (and, thus, scientific) account. Only on such a basis can we hope to persuade those maintaining control over a legal system to make changes. Only on such a basis can we hope to make an ongoing and effective difference in the world. For some (analytics and continentals alike), this kind of language and sentiment may seem foreign to the contemporary analytic philosophical endeavour. It is a premise of my book that it need not be.

[33] Ibid 23.

Trajectories and Trials

MARGARET DAVIES[†]

Recently I have rekindled an early interest in physics by subscribing to *New Scientist* magazine and reading the occasional popular science book – activities which satisfy some degree of curiosity without the need to work through difficult proofs, experimental data, and equations. I was very excited therefore when I read the first few pages of Tony Connolly's book to find that he thinks physics has 'epistemic priority' in our understanding of the world, and that even judicial reasoning is ultimately reducible to physics. However, this is not a book which is populated by mass, gravity, and force, let alone gluons, quarks, string theory, antimatter, or even strange matter.

Despite the (probably fortunate) lack of actual physics in the book, it is an extremely impressive read, argued with extraordinary care and detail. It addresses a significant question, and does so in a way which is intellectually demanding and frequently enlightening. I disagree with some of it, though I have to confess I did not follow all of the reasoning. Perhaps, rather than disagreement, it is more a question of approaching the subject matter quite differently. And on this point, I would like to start by saying that there are different types of cultural difference. One type – not Connolly's concern in the book – is that between different academic disciplines. There is a cultural difference between analytical philosophy and the continental sort, which I am more accustomed to reading. This difference now clearly cross-cuts its nominal though perhaps not actual source – the divide between the continent and Anglophile analysis – and is embedded within English-speaking academic discourse. Tony speaks – or writes – a language and deploys concepts which are different from the language or paradigms of continental philosophy. Reading such a book, and not being entirely acculturated in the analytical world, one has to try to develop concepts at the same time as reflecting upon them and finally judging them. I think Connolly would agree that this is a task which will often be achieved imperfectly when we start with large conceptual differences and are constrained by a lack of time. As he says in chapter 4: 'Concept acquisition under conditions of conceptual difference (to any degree) is potentially more time consuming and cognitively demanding than concept acquisition under conditions of conceptual similarity.' (p 109, see also p 161) Of course, like many cultural differences, that between

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analytical and continental philosophy *can* be bridged to some degree and will undoubtedly become more of an intersectional fuzzy zone rather than a bright line as we see work by more scholars who have had the benefit of an education in both fields. But they are still often divided by language or, since we are all speaking English here, perhaps it would be more accurate to say 'discourse' – the second order constructions which shape our interactions with our philosophical material.

And this gets to the crux of Connolly's cultural difference and mine. He speaks in the language of concepts and I speak in the language of language. He speaks of intentional states, causation, environmental stimulants, necessity, sufficiency, physicalism, and agents whereas I tend to speak of symbols, signification, critique, discourse, power, and subjectivity. It is important to remember here, though not everyone will agree, that language treads the line between physical and abstract things – it has the substance of sounds, signs, and graphic forms which are, however, ultimately inseparable from the abstractions they produce and represent. Both Tony and I speak of concepts, culture and difference, though I am not persuaded that we mean the same things by those terms, a point to which I will return. I will also come back to language shortly, because it is so critical to any discussion of cultural difference. For the moment though I think it is instructive to observe that two scholars living in the same country and researching in roughly the same field – though a somewhat undefined and disparate one – can approach their material so differently. (Not that I have exactly approached *this* material, but were I to do so, I would do it very differently.)

We are, of course, different agents or subjects, with different educational pathways, different genders, and possibly different religious beliefs, different politics, and different social backgrounds. There is no particular reason for us to use the *same* conceptual language, though that would clearly be a possibility. Nor do any of these differences make communication impossible, though they may, as Tony indicates, make it more difficult. In this context, I was very much taken by his discussion of the trajectories of knowledge-acquisition in Chapter 4. Overt metaphors are few and far between in this book and here was one – the trajectory through time and space – that I could closely identify with. (It also has the added attraction of raising the profile of physics). Here is what I think is the first mention of a trajectory:

> One way to usefully – though, rather metaphorically – think about what is a highly complex set of conditions for the acquisition of a concept is in terms of the judge having taken a distinctive (though not unique) concept-

> possessing environmental and intentional *trajectory* through time and place.[1]

Does Connolly apologise here for using a metaphor? I leave that question aside: it is likely that I have also often apologised for metaphors, as though they are somehow illegitimate and avoidable tricks of argument, which of course they are not. [2] It is the *trajectory* I wish to focus upon – the idea that one is physically flung into a chaotic time-space void, gathering concepts, ideas, beliefs, and *I* would say self-identity, before crash landing at a conceptual destiny – the point at which the judge needs to make a decision to the best of his ability.[3] It is, of course, a life-long trajectory, punctuated by moments when one must stop, take stock, and act – or in the judge's case – decide. I am of course translating Connolly's point and shamelessly extending his very cautious metaphor and it would be fair enough if he objected that he does not recognise that rendition as remotely reflecting his argument. For one thing, there is nothing chaotic about the time-space journey of Connolly's judge (though there is nothing chaotic about chaos either, any more than there is anything completely empty about a void, while we are back on the theme of science). He is not flung anywhere, but is rather provided with evidence and does not do anything as imprudent as form his *identity* but is carefully learning – acquiring concepts – under conditions of conceptual difference. Were I truly expert in continental philosophy (which I am not) I would be tempted to enter into a discussion comparing Connolly's 'trajectory' with Heidegger's discussions of the way

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1 A Connolly, *Cultural Difference on Trial: The nature and limits of judicial understanding* (2010) 97, emphasis in original; see also 102-103.

2 To quote one of my favourite passages of Nietzsche: 'What then is truth? A mobile army of metaphors, metonyms, and anthropomorphisms – in short a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people: truths are illusions about which one had forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins.' From 'On Truth and Lie in an Extra-Moral Sense' in Walter Kaufmann (ed) *The Portable Nietzsche* (1954) 47. See also Jacques Derrida 'White Mythology: Metaphor in the Text of Philosophy' in *Margins of Philosophy* (1982).

3 I note that all of Connolly's judges are female. In the interests of equity and because I don't believe in completely disguising the fact that in Australia around 70% of judges are still actually male, I reverse the gender. Nonetheless, as a feminist I appreciate Connolly's gesture because it demonstrates the importance of merely symbolic interventions. Actually *having* a more diverse bench would, of course, be preferable. See Kathy Mack and Sharyn Roach Anleu, 'Women in the Australian Judiciary', in Patricia Easteal (ed) *Women and the Law in Australia* (2010).

that we are thrown into the world.[4] Unfortunately I am not able to offer even a tentative opinion on whether there is anything more than a lucky coincidence of expression here – after all, having been thrown, one must surely follow a trajectory.[5]

In a more pedestrian and for me familiar terrain, I could not help but recall Lyotard's famous description of the self as 'located at "nodal points" of specific communication circuits' or as 'located at a post through which various kinds of messages pass'.[6] Connolly's metaphor of the trajectory is far superior to Lyotard's post, which gives the impression of the self being concreted into the ground and reliant on things that happen to come one's way. A post gets rained on, splashed with mud, burnt in the sun, is bumped, painted, nailed, and then sniffed or worse by passing dogs. A trajectory, on the other hand, besides being a thing of beauty and infinite variation, is intrinsically temporal and dynamic – it suggests constant movement, a solo being-in-the-world who passes through and absorbs novel experiences and therefore cannot settle into any certain knowledge about herself or her place. (Again, I am over-extending.) However, I do wonder why the trajectory mentioned by Tony is not *unique*. Perhaps I have missed something here, but I would have thought that everyone necessarily has a different beginning, gathers different experiences or environmental stimulants (to use Tony's language), and has a different end. We share certain parts of our journeys, for sure, and as Tony clearly goes on to explain (once again, not in this language), through culture we develop somewhat congealed views about the world which are different from the views of people who have lived in other groups and other circumstances. For this reason it is often possible and necessary to speak broadly of such cultural differences as, for instance, the difference between Indigenous Australians and Anglo-Australians.

But difference also has far more complexity and many finer grains, down to intra-cultural difference such as that between analytical and continental philosophers, and between individual persons with their unique trajectories. Speaking singularly of cultural difference can also obscure the dynamism of culture and the increasing fact of cultural hybridity – context as usual is important. By saying this I certainly do not want to marginalise the large and fundamental differences which continue to lead to so much

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4 See generally Martin Heidegger, *Being and Time* (1962) 174-175.

5 A point which does at least seem consistent with Sartre's existentialism – a far more readable, if less profound version, compared to Heidegger. Sartre also said we are thrown into the world. See Jean-Paul Sartre, *Existentialism and Human Emotions* (1987).

6 Jean-François Lyotard, *The Postmodern Condition: A report on knowledge* (1984),15.

misunderstanding and pain (and in this class I would place not only cultural and racial difference, but also many other differences such as gender, sexual orientation, and ability-status.) I merely wish to draw attention to the complexity of difference, and – ultimately – the impossibility of knowing that you have an *exact* match in understanding a particular thing.

And on the point of an exact match in concept acquisition, it is worth pointing out that Tony and I seem to have different concepts of a 'concept': Tony's idea of a concept appears to be relatively self-contained – as though it is a thing with defined boundaries, comprised of sub-concepts, and their sub-concepts. It is an atomic or individuated notion of the concept (not that atoms *are* individuated). Given enough time, cognitive effort, and the right interpretive steps, a person can learn another's concept (see pp 160-161). It is even possible for people to share identical concepts (p 169). My idea, drawn as it is from continental philosophy, is that a concept is much looser and more contingent:[7] it is ultimately reliant on language (after all, we have no way of defining a concept without language) and is therefore completely contextual and dynamic – not subjective of course, since language and therefore concepts are things that we share and which circulate and transform through our networks of meaning. Given enough time, cognitive effort, and the right interpretive conditions (including translation) a person may be able to *approach* an understanding of another's concept, but that understanding will be contingent and necessarily interpreted by reference to our own trajectory, which is uniquely ours. The greater the difference in our initial starting positions, the less likely that the concept will have retained its nuance and specificity. In the process, it may have become something quite different, or only a rough approximation – the best we can do without learning a new language, Perhaps Tony and I do not think so differently after all (see, for instance, p 180). On the other hand, perhaps there is a world of difference between us.

Nonetheless, and despite the clear possibility of an *approximation* of another's concept or conceptual world, misunderstanding and pain often does accompany the process of intercultural communication. The causes do not reside only in whether it is possible actually to understand the other, but also in matters, not Tony's primary concern here, but which are addressed

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7 See, for instance, Gilles Deleuze and Felix Guattari, *What is Philosophy?* (1999), 23: 'Concepts are centers of vibrations, each in itself and every one in relation to all the others. This is why they all resonate rather than cohere or correspond with each other. There is no reason why concepts should cohere. As fragmentary totalities concepts are not even the pieces of a puzzle, for their irregular contours do not correspond to each other... From this point of view, philosophy can be seen as being in a perpetual state of digression or digressiveness.'

briefly in the final chapter. The most significant of these matters is ingrained power and disempowerment, manifested most starkly in the legal context by the fact of colonisation: the law which is being applied is the law of the colonisers and the language being spoken is a non-Indigenous language. As Michael Detmold said in an early and insightful article written about *Mabo*, 'Aboriginal and European are treated equally except in the matter of the law before which they are treated equally.'[8] No matter how carefully and sensitively evidence is gathered and heard, it is eventually rendered in a colonial legal language not an Indigenous language, it is interpreted through the framework of colonial law, and the colonial system has effectively all of the power and control of the situation and the outcomes. Concepts may well be somewhat commensurable in the sense that they can be roughly rendered in the other context, but the contexts are incommensurable, translations are imperfect, and most importantly, the differences of power are institutionalised and backed up by the power of the state. Just as importantly, interpretation does not in my view often happen under conditions of 'epistemic austerity' (p 149) but under conditions of a surplus of meanings, including cultural preferences and prejudices which cannot be easily shed, though they can be challenged by interpreters with motivation to reflect on their own privilege.

And it is for this reason that activism – however difficult – is always required, whether that is undertaken by judges in the process of interpreting and applying the law, by politicians in negotiating and formulating new laws, or by the community in drawing attention to injustices and resisting current law. For me, activism means challenging the status quo and, in the context of relations with Indigenous Australians, finding ways to resist the prejudices and disparities of power which so often frame our interpretations. It also requires open and ongoing dialogue. Quietism is never an option.[9]

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8 Michael Detmold, 'Law and Difference: Reflections on Mabo's Case' (1993) 15 *Sydney Law Review* 159-167, p163.

9 I was surprised to read that anyone thinks it is. Tony clearly does not think so, but he does argue that belief in cultural incommensurability can lead to quietism or paralysis. The idea is essentially that if there is incommensurability, there is no point in doing anything, because nothing *can* be done (pp 3, 23). That may possibly be the case if we lived in worlds of completely different concepts with no means of translating and communicating. Total incommensurability *would* mean that we could not speak to each other let alone translate and understand each other. There may be a few people who hold this belief, but as I have said, it is possible to speak of incommensurability without subscribing to such an absolutist view. Since that is the case, dialogue is always required, while turning one's back on the issue would simply be irresponsible.

Concepts, Culture and Experience

KATIE GLASKIN[†]

My response to this work is informed by my experiences as an anthropologist who has worked on litigated native title claims,[1] and as an anthropologist interested in psychological processes. Most of what I have to say is directed towards Connolly's approach to culture, although I discuss native title litigation briefly towards the end of my response.

Connolly says he commits to a 'theory-theory approach to the interpretation of action… to explore the role played in judicial interpretation by the judge's (largely) folk-psychological theory of agency, theory of mind and theory of testimonial agent'.[2] A 'theory theory' approach emphasises the 'essentially cognitively mediated processing of other's observed behaviour by means of implicit folk-theoretical knowledge,' and contrasts with a 'simulation theory' approach, 'the embodied ability to experientially simulate the experience of another'.[3] Part of my response to this book, which I elaborate below, is that this emphasis on the cognitive at the expense of the experiential has the effect of rendering culture and cultural difference as some kind of disembodied 'thing' that can be acquired in abstract form. On the basis of his physicalist approach, for example, Connolly is able to say that 'to the extent that the phenomena posited by dualistic cultural incommensurabilists in their account of understanding and difference are not physically realized, then their account is an illegitimate one'.[4] Once a disembodied 'thing', culture and cultural difference (in the physicalist account) cease to have 'legitimacy'. I am going to argue that it is the emphasis on cognition in contrast to experience that appears to be responsible for an understanding of culture's embodied dimensions apparently vanishing here. Cultural difference becomes, instead,

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1 Most particularly on the case that finally resulted in the Full Federal Court decision *Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26.

2 Connolly, AJ *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding* (2010) 8.

3 Hollan, D & Throop, CJ 'Whatever happened to empathy?: Introduction' (2008) 36 *Ethos* 4, 388.

4 Connolly, *Cultural Difference on Trial*, 13.

'conceptual difference', contingent upon 'the environmental-intentional trajectories… [that] agents take over the course of their lives'.[5]

Connolly is concerned to argue against what he calls the 'radical cultural incommensurability thesis', the '(admittedly) extreme but heuristically valuable construal of the cultural incommensurabilist position'.[6] This is the idea that in some cases (at least) it is impossible for someone of one culture to really understand (or 'acquire') the 'concepts' held by someone of another culture.[7] Cultural incommensurability or its 'extreme' relative, 'radical cultural incommensurability', can, then, appear as a kind of cultural relativism which insists that culture can only be understood within its own terms (not through the terms of another). Through a theoretical application of a physicalist theory and method, Connolly concludes that the cultural incommensurability thesis cannot be sustained; that judges (innately) possess the 'acquisition-adequate sub-conceptual content'[8] that allows them to acquire culturally different concepts where the 'epistemic conditions' are favourable to them acquiring that concept. It is significant that in this book, 'culture' tends to morph into 'concepts'; 'cultural difference' into 'conceptual difference'.[9]

At the heart of Connolly's concern about cultural incommensurability is what can be seen as a tension between universalism and cultural relativism, or perhaps more precisely a tension between the universality of a common human biology, which underpins our ontogenetic development and shared species existence, and the idea of cultural constructionism, the view that important aspects of human existence are created and maintained within specific cultural contexts. Needless to say, this reflects the old 'nature'/'nurture' debate. Connolly comes out of this debate, it seems, with a leaning towards universalism. He argues that humans share 'innate categorical concepts'[10] (and these are made evident through, for example, human developmental stages). These 'innate categorical concepts' are the foundation upon which all other concepts are acquired and mean that it is possible – at least in theory – for any human to acquire the concepts of another, if they are sufficiently broken down (sub-concept by sub-concept); and if favourable epistemic conditions obtain. Connolly's reference to 'favourable epistemic conditions' is, I think, a significant caveat in this formulation, for it points importantly towards the direction of

5 Ibid 180.
6 Ibid 8.
7 Id.
8 Ibid 191.
9 Ibid 177, where the 'radical cultural incommensurability thesis' has become the 'radical conceptual difference thesis'.
10 Ibid 174-6.

environmental and other factors that might affect the acquisition of 'concepts', including culture and experience: what Connolly refers to as the 'individuating environmental or intentional inputs which typically cause each of the background states'.[11] He is careful to note that 'favourable epistemic conditions' include 'the internal capacities of the judge or the external circumstances surrounding the judge'.[12]

Notwithstanding the important dimensions of the 'favourable epistemic conditions' that Connolly identifies – and which ultimately go to the possible reforms that he proposes at the end of this book – the basis on which his argument proceeds is that 'innate categorical concepts' (a universal biology) allows concept acquisition to take place under the right conditions. From the outset, then, Connolly claims a universal truth for the world, one in which all things are 'indeed, in a sense, *reducible to* – the theories and claims of science and, ultimately, physics'.[13] What this might mean for cultural difference is signalled early on, where Connolly introduces readers to his views concerning physicalism, the 'brand' of naturalism that he draws on in this book.[14] According to Connolly, physicalism says that:

> Everything is either part of the physical base or is ontologically related to that base in the requisite sense as a more complex, so-called higher order phenomenon. There is nothing which exists in the world that is not physical in this sense. The world is ontologically closed. *There are no ghosts, supernatural substances or properties, or immaterial minds or meanings or cultural differences,* as many religious, philosophical and commonsense accounts of the world… have maintained over the years.[15]

Although I first read this as Connolly saying that there are *no cultural differences* (amongst other things), he has clarified that what he meant by this is 'there are no immaterial minds or immaterial meanings or immaterial cultural differences'.[16] Connolly does argue, then, 'for the existence of materially based minds, meanings and cultural differences'[17] – it is the 'immaterial' ones that do not exist – and this is a formulation which would appear to recognise the embodied dimensions of culture. Despite this, I

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11 Ibid 95.
12 Ibid 100.
13 Id (original emphasis).
14 Ibid 11.
15 Ibid 12 (my emphasis).
16 This communication by email to author, 2/8/2011.
17 Ibid.

remain concerned that culture, as presented here, has become 'concept', and that regardless of the *intention* involved in rendering it thus, its *effect* is to render culture as largely cognitive, and as strangely disembodied. To respond to this, I draw on Hallowell's account of the relationship between social interaction, self-awareness and culture.[18]

An anthropologist interested in the psychological dimensions of human experience, Hallowell illuminates in important ways that cultural difference might indeed be understood as having a physical basis. Our experiences, our perceptions of these experiences, our memory of these experiences and the learning that occurs through them rely on the fact that we have physical bodies – sensory perceptions, neural processing, and so on. We fundamentally experience the world and indeed our 'selves' as a consequence of our physical embodiment. Thus far, then, there is no significant disagreement with the physicalist argument. Yet it is important to also consider where culture sits within developmental processes. As Hallowell says, these developments occur in a 'social milieu', in which 'intimate and continuing contacts with other human beings are the major sources which mediate the influences that mold [sic] the development of the child'.[19] He describes the 'basic orientations provided by culture' as including 'self-orientation';[20] 'object orientation' (cosmological or metaphysical understandings, such as those concerning the existence of ghosts, fall into this category);[21] 'spatiotemporal orientation',[22] motivational orientation,[23] and a normative orientation: 'values, ideals, standards', which are 'intrinsic components of all cultures'.[24]

Connolly too speaks about the 'basic categorical concepts which, arguably, structure our very perception of the world'.[25] He specifically refers to 'the single agency concept of causation' as involving 'metaphysical concepts – those of object, time, relation, change and so on'[26] – the kinds of concepts that Hallowell argues are among the basic orientations that culture provides the self. Just how our socialisation and enculturation really affects our perceptions and indeed accounts for the acquisition of 'concepts', is barely visible, though, in Connolly's account. An example: Connolly does speak of socialisation, noting that 'whilst there

18 Hallowell, AI *Culture and Experience* (1967 [1955]).
19 Ibid 81.
20 Ibid 89.
21 Ibid 91.
22 Ibid 93.
23 Ibid 100.
24 Ibid 105.
25 Connolly, *Cultural Difference on Trial,* 172.
26 Ibid 173.

is an innate interpretive capacity whose developmental staging is the same across cultures, it is surrounded by a variable body of cultural accretions and concepts'.[27] But this is quickly followed by discussion of 'a universally endured process of learning and socialization', connected with 'a single theory of agency' which he concludes 'is possessed by all interpretive agents – including culturally different ones' – this being 'consistent with 'all we know about the way the world is as physicalists'.[28] 'Cultural accretions and concepts' here are downplayed, their capacity to affect our perception of 'what is', muted. Just how encultured 'assumptions about the nature of the universe become, as it were, a priori constituents in the perceptual process itself'[29] become ghostly vestiges of the physicalist paradigm. Culture and cultural difference are largely dealt with at a cognitive level, not a perceptual or experiential level: as comprised of 'concepts' that can be broken down into disembodied sub-concepts.[30] Yet if there is a physical basis to all of our experience, as neuroscientists Solms and Turnbull argue, then there is a physical basis to 'culture' too:

> The brain comes into the world with innumerable *potential* patterns of detailed organization, as reflected in the infinite combinations through which its cells *could* connect up with each other. The precise way they do connect up, in each and every one of us, is largely determined by the idiosyncratic environment in which the brain finds itself. In other words, the way our neurons connect up with each other depends on what *happens* to us. Modern neuroscience is becomingly increasingly aware of the role played in brain development by experience, learning, and the quality of the facilitating environment – and not only during childhood.[31]

Throughout this book, the example that Connolly uses for the acquisition of a culturally different concept is the acquisition of the concept of ochre, which is broken down into its sub-concepts: ochre is yellow (in fact much of the ochre that is of ceremonial significance to Indigenous Australians is

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27 Ibid 128.

28 Ibid 129-130.

29 Hallowell, AI *Culture and Experience* (1967 [1955]), 84.

30 While time and word constraints preclude me exploring this in detail here, there is some ambiguity in Connolly's treatment of this, too, for 'environment' is sometimes juxtaposed against 'reasoning' as a means through which an agent may acquire a concept. Eg see Connolly, *Cultural Difference on Trial,* 191.

31 Solms, M & Turnbull, O. *The Brain and the Inner World: An Introduction to the Neuroscience of Subjective Experience* (2002) 11 (original emphasis).

red), ochre is a powder, and so forth.[32] This cognitively-based approach to the acquisition of a concept and its sub-concepts would, I suggest, be more difficult to sustain if matters such as the complex interplay of orientations that culture provides the self – self-orientation, object-orientation, spatiotemporal orientation, motivation, and values, ideals and standards – were considered. I should make it clear that I am not subscribing to a cultural incommensurability thesis by arguing this, but I am arguing for the recognition of significant cultural differences – where they exist – which may reflect many of the basic orientations that culture provides the self.

Much of what Connolly speaks about here in terms of concept acquisition can be explained through schema theory, in which 'culture' is seen as 'shared schemas… [and] the shared world of acts and artefacts that people holding common schemas collectively produce'.[33] As D'Andrade explains, schemas are 'mental patterns of abstract representations of environmental regularities', patterns of neurons activated by external stimuli and developing as a person interacts with their social, cultural and physical environment.'[34] Developed schema fill in missing data; are self-reinforcing, and create expectations that shape our experience of the world. While schemas are learned, they can change with experience, and include the consciously articulable as well as cultural orientations that exist at an unconscious level (and which are thus far more difficult to consciously render). Schema theory then is not fundamentally at odds with a physicalist approach: as Connolly describes this, the idea that 'everything is either part of the physical base or is ontologically related to that base'.[35] Notwithstanding that its basis is also physical and neurological, a schema theory approach accounts for cultural difference, rather than rendering it ultimately as concept.

I finally turn now to part of this book that is specifically concerned with the limits of judicial understanding. In his very last chapter, Connolly makes some suggestions for law reform, and in doing so, provides the reader with a sense of some of the structural issues that might affect the giving and receipt of applicant evidence in litigated native title cases. I would have liked to have seen the kinds of issues highlighted in this chapter taken up much earlier in this book, because much of the preceding discussion occurs within a highly theoretical space in which the very real impediments to judicial understanding that occur in litigated contexts, while noted, are almost backgrounded within the overall text. It would have been

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32 Eg, Connolly, *Cultural Difference on Trial,* 98-9,159.

33 Quinn, N 'Universals of child rearing' (2005) 5 *Anthropological Theory*, 478-9.

34 D'Andrade, RG *The Development of Cognitive Anthropology* (1995) 136.

35 Connolly, *Cultural Difference on Trial*, 12.

interesting to look at the kinds of issues that judges are asked to adjudicate in relation to the evidence in such cases (some of these issues are extraordinarily complex, for example, in the native title context, they include the issue of cultural continuity, cultural change and the concept of 'society').[36] Of course, judicial determinations are not simply based on applicant evidence either, although judges have consistently said that this is what is given the greatest weight. In adversarial legal contexts, it is common for lawyers acting for respondent parties to seek to influence judicial understanding by isolating small portions of applicant evidence (and indeed expert evidence) from the overall context which provides that evidence with its full meaning, in order to argue that the evidence actually means something else. In other words, I would argue that coming to understand a concept alone is not sufficient for judicial understanding: what is required is the ability to contextualise and understand those concepts within the overall body of evidence.

Anthropologists have long made the point that no culture is hermetically sealed from any other and that the life-worlds that indigenous claimants of land rights and native title inhabit are in fact intercultural contexts, in which 'culture' and 'cultural difference' are relationally constituted, at times elicited, interactively through engagements with the state and others.[37] One of the problems motivating Connolly early in this book is a claim to cultural incommensurability. Had Connolly subjected the claim to an analysis that took into account such factors as history, power, structural inequality, and global movements for indigenous rights, then the claim, I think, becomes more comprehensible.

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36 Eg, *Yorta Yorta v the State of Victoria* [2002] HCA 58; and see Glaskin, K & Dousset, L 'The asymmetry of recognition: law, society, and customary land tenure in Australia', (2011) 34 *Journal of Pacific Studies* 2/3.

37 Eg, see Merlan, F *Caging the Rainbow* (1998); Weiner, J F & Glaskin, K (eds) *Customary Land Tenure and Registration in Indigenous Australia and Papua New Guinea: Anthropological Perspectives* (2007).

After Incommensurability

GARY EDMOND[†]

1. Introduction

It's a great pleasure to be invited here to comment on this fine work of analytical legal philosophy. I was invited as someone 'able to discuss some of the legal and theoretical issues surrounding the role of the law of evidence which the book deals with at various points.' In my comments here today, consistent with this remit, I intend to focus on the final parts of Connolly's monograph, particularly the implications of the rejection of the radical cultural incommensurability thesis. While I intend to speak mainly about the implications of Connolly's work for procedure and proof in native title and heritage protection litigation (and implicitly criminal law), it is my intention to say a few things about scientific evidence because that is where I normally work and Connolly's monograph possesses several non-trivial resonances.

Initially, it's probably appropriate to disclose something of my intellectual lineage. I am a direct intellectual descendent of Thomas S Kuhn. My honours thesis, in the history and philosophy of science, was supervised by John A Schuster. Schuster was a PhD student at Princeton University from 1969-74 under the direct supervision of Kuhn. This rather arcane information might be revelatory because Kuhn was responsible for stimulating interest in incommensurability through his seminal work *The Structure of Scientific Revolutions* (1962, republished 1970). Kuhn's theorisation was derived largely from his work in the history of science, primarily chemistry and planetary astronomy—notably his earlier study of the emergence of the Copernican heliocentric universe and its gradual success over its Aristotelian natural philosophical rivals in Europe during the 16th and 17th centuries. After studying the history and philosophy of science, I studied law and most of my subsequent work has been in *post*-Kuhnian science studies (the sociology of science, especially the sociology of scientific knowledge (SSK) and science and technology studies (STS)) and evidence law, particularly expert opinion evidence. This background is, to varying degrees, relevant to what I will say today. The references to Kuhn and his influence are significant because his work (and simultaneous work by Paul Feyerabend and others) seems to have stimulated a good deal

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of late 20th century thinking about incommensurability.[1] Though, unlike Connolly, Kuhn discussed incommensurability within *the* Western intellectual tradition.

2. Toward 'thin' acquisition

It is a credit to Connolly's patient and meticulous scholarship that my discussion is primarily oriented to the final chapters and the implications of the rejection of the *radical cultural incommensurability thesis*. The radical cultural incommensurability thesis:

> … maintains that as a matter of theoretical necessity no judge possesses or is able to acquire any culturally different concept. This is to say that there is no theoretically possible world in which any judge possesses or acquires any culturally different concept or that the possession or acquisition by a judge of a culturally different concept is theoretically impossible.[2]

The strong version of the thesis seems to have few necessary implications. It might, depending on background assumptions, encourage recognition of the sovereignty of others. Though it might, just as easily, legitimate subjection (and even decimation). The inability to comprehend aspects of cultural difference is really a doctrine of pessimism, particularly following colonisation where a return to original conditions or full sovereignty are not realistic (and may not even be desirable) options. In the absence of indigenous autonomy or sufficient sympathy (remember the thesis suggests that empathy is not possible) from the dominant cultural and political group(s) there is nothing to do. In a kind of neo-social Darwinism those who are culturally different are responsible for themselves (and possibly subject to the whims of others). According to the radical version of the thesis, ('our') indigenous peoples must be the authors or victims of their own inferior cosmologies and abilities (whatever the cause) and their inability to adapt (by acquiring, accommodating or overcoming Western

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1 H Sankey, *The Incommensurability Thesis* (1994); R Harris (ed), *Rhetoric and Incommensurability* (2005).

2 A Connolly, *Cultural Difference on Trial: The nature and limits of judicial understanding* (2010) 165, 9. I am sympathetic to the physicalist-functionalist account of intentionality, action and interpretation. I accept, without being particularly familiar with the philosophical literatures, Connolly's argument about shared human 'hardwiring' for the acquisition of concepts and understanding of agency (what is known, fashionably, as 'mind reading') through a range of sensory and communicative abilities (drawn from evolutionary biology).

ideas, values and technologies).[3] If we took the cultural incommensurability thesis seriously there is nothing that law ought to do in terms of procedure and proof, other than adopting, or perhaps enforcing, a paternalistic attitude in the way endangered animals or children (eg *in loco parentis*) might be treated.[4]

The strong version of the incommensurability thesis is implausible and – importantly for a book on the nature and limits of judicial understanding – irreconcilable with the assumptions and foundations of proof in all contemporary Western legal systems. So-called 'rational' approaches to evidence and proof, following Jeremy Bentham (1748-1832), James B Thayer (1831-1902) and John H Wigmore (1863-1943), require an ability to acquire concepts in order to understand and assess evidence.[5]

Moreover, the incommensurability thesis is inconsistent with contemporary biomedical and psychological research, particularly following shared evolution, as well as lived experience. On the latter, members of minority groups from cultures radically different to mainstream or dominant cultures seem to understand, occasionally perform well and even thrive in a variety of non-*traditional* (let's say Western) settings. Ethnographic research indicates that in some situations those who are relatively disadvantaged and powerless, such as servants, the poor and we might extrapolate to slaves, often have quite sophisticated practical understandings of dominant groups that enable them to get by – if not always flourish (in the Aristotelian sense of *eudaemonia*).[6] There are numerous exceptions – both historical and contemporary – to the radical version of the thesis and its implications and, as Connolly quite properly concedes, perhaps few serious proponents. Consequently, the radical version of the thesis is inconsistent with our actual ability to communicate across cultures. It seems to make little sense diachronically, is incapable of

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3 I accept that the relativists defending the strong version of the incommensurability thesis might not frame their approach in terms of a hierarchy, particularly inferiority.

4 On the question of what substantial law might look like, the inability to assimilate would require reserves and management. This reinforces the poverty of such a theory as well as some of the ideology underpinning some historical practices.

5 W Twining, *Theories of Evidence: Bentham and Wigmore* (1985); R Allen and J Miller, 'The Common Law Theory of Experts: Deference or Education' (1993) 87 *Northwestern University Law Review* 1131; see also eg *Evidence Act* 1995 (NSW) ss55, 56.

6 Historically, those with power have not been particularly interested in acquiring the concepts and perspectives of the weak: JC Scott, *Weapons of the Weak: Everyday forms of peasant resistance* (1985). Those 'below' tend to have perspectives about those in power that should not be ignored or trivialised by those wielding power or managing institutions purportedly dispensing justice.

accounting for cultural change (and most conspicuously progress), let alone the development and acquisition of concepts within cultures – also a problem for Kuhn.

Connolly offers a formidable technical critique of the radical incommensurabilty thesis. He nevertheless emphasises that we should recognise that weaker variants of incommensurability – or the practical implications of degrees of commensurability – create very serious difficulties in our everyday world, particularly for indigenous peoples embroiled in legal disputes within the mainstream legal institutions. These problems are not created by our biological condition, but rather by the way our cognitive and sensory abilities interact with our experiences and the particular concepts we acquire as well as the rules and procedures developed around particular legal entitlements and rights, along with our social and institutional arrangements. They are created and perpetuated by different concepts, ideology, related experience and social histories. Nevertheless, degrees of incommensurability or difficulties in understanding cultural differences (or acquiring foreign concepts) continue to create practical problems for legal institutions. They create problems in areas such as native title, heritage protection and criminal law, but they also create difficulties with other types of exogenous (ie non-legal) knowledges – such as scientific and medical evidence (see section 5).

Initially, I want to say something about indigenous knowledge and judicial acquisition of concepts, then I will turn to scientific evidence and subsequently the legal system and reforming legal practice.

3. Overcoming conceptual deficits and communication problems

Once the theoretically suspect and empirically untenable radical version of the thesis is abandoned, the hard work of actually understanding cultural difference, the agency of others and acquiring and understanding the cultural significance of concepts for legal decision making begins. The first thing to recognise is that notwithstanding the fact that 'thick' or deep concept acquisition or cross-cultural understanding is possible it is often difficult and probably exceptional[7]. It would seem to be particularly unusual in courts. Our legal institutions have not, after all, developed with such ends in mind. Rather, legal institutions and practice tend to reinforce or reproduce existing socio-economic hierarchies[8].

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7 C Geertz, *The Interpretation of Cultures* (1973).

8 D Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591.

Our legal systems did not evolve to accommodate, and have only relatively recently attempted to adjust to, exogenous knowledges.[9] Problems with standing and recognition meant that indigenous knowledges and perspectives were often ignored, elided or treated as legally irrelevant. In their initial responses, attempting to accommodate indigenous knowledge, perspectives and beliefs, Australian legal institutions have approached indigenous knowledge as basically a variant of other evidence. They have endeavoured to adapt existing rules and procedures (ie adjectival law) in order to enhance the provision and comprehension of indigenous claims – in the context of contested proceedings.

Having dismissed the strong version of the thesis, Connolly's monograph turns to grapple with the persistent difficulties of inter-cultural exchange and understandings. Through the persistent example of ochre we can appreciate the failings of strong incommensurability, and yet the reader might feel that a description of ochre as a yellow powder, used in certain ceremonies and for painting, might not adequately capture the complex metaphysical and indeed epistemological and cultural elements in play.[10] (In saying this, I don't think Connolly would disagree. Though it does seem to have direct relevance to the possibility of understanding – and what understanding actually means for legal practice.) Having concepts explained, and even acquiring a basic or provisional impression (or 'understanding') of their context or significance does not necessarily entail 'thick' comprehension or even very much at all.[11]

Many years ago I was struck by Peter Goodrich's[12] account of Haida First nations people giving evidence in *Delgamuukw v British Columbia* (1991) in an attempt to forestall commercial logging on their traditional

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9 In the case of experts, the 18th century sees the modern beginnings. Recognition of land rights and substantial interest in indigenous knowledge and perspectives emerged only in recent decades. See T Golan, *Laws of Nature, Laws of Men* (2004) and B Keon Cohen, 'The *Mabo* litigation: A personal and procedural account' (2000) 24 *Melbourne University Law Review* 893.

10 We might say the same about Micronesian navigation (D Turnbull, *Masons, Tricksters and Cartographers* (2000), the classification of animals by tribes in Papua New Guinea, the rejection of second-hand hearsay accounts by several South American indigenous peoples, and even explanation of the double helix.

11 I do not mean to suggest that perfect or full comprehension of concepts is necessary for meaningful exchanges or even understanding. See for example the use of 'boundary objects' by S Star and J Griesemer, 'Institutional Ecology, "Translations" and Boundary Objects: Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39' (1989) 19 *Social Studies of Science* 387-420

12 Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (1990) 182-4.

lands. The Haida were allowed to explain their 'symbolic dress, mythologies, masks and totem poles as well as the legends, stories, poems and other forms of interpretation that such art and mythology implied'. Ultimately, this evidence seems to have been ignored by the trial judge.[13] There is, after all, very little in the rational tradition of evidence scholarship that would equip a judge to evaluate the evidentiary implications of a dance, or a piece of art or even some creation myths or traditional stories. What, after all, is a judge to make of a dance, its nuances and subtleties, cultural registers or cosmological implications?

What we can say about indigenous concepts or activities (such as the significance of ochre, a dance or tracking an animal) is that even if we have them explained or provide institutions where they may be explained and explored they may still seem foreign and we may have profound difficulty understanding them let alone accommodating them within substantial legal categories and using them as proof.

It is possible to appreciate that a dance has some relationship to place, tradition or cosmology – in ways that may be legally significant in a purportedly rational Western legal procedure concerned with procedural fairness and the need to consider all relevant *evidence* – but it might be difficult to understand, in a way that resembles the understanding of those reared in the 'traditional' way – whether dancing, watching or customarily excluded.[14] It is not obvious that indigenous concepts (and practices) will necessarily make legal sense or even permit the drawing of relevant inferences.[15] (It may be that being told that a dance signifies or embodies something about a tradition or a relationship to a place or set of actions provides a sufficient basis to draw inferences. If so, this would seem to be an impoverished or indirect form of 'understanding'. It operates as some kind of implicit corroboration to link people to a tradition or location or to value some animal, plant or other resource – without necessarily appreciating its deep significance in the lifeworld or to the cosmology.[16])

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13 This was addressed, in part, in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

14 I don't want to suggest that traditions are even homogenous or completely shared within cultural groups. Different experiences and differential levels of exposure to secret-sacred knowledges will create disparities within (claimant) groups, but they will usually be more conversant than 'outsiders'.

15 Here, I'm reminded of Wittgenstein – 'If a lion could talk, we could not understand him' L. Wittgenstein, *Philosophical Investigations* (1968) 223. Although this seems to imply a more radical version of the thesis – albeit in relation to a specific context.

16 It may be that judges do not actually need to, or in the alternative rarely do, understand culturally different concepts or their broader cultural significance. This, however raises questions about their application of the

What I think we can say – and this follows from Connolly's critique – is that while judges have the *potential* to acquire a range of culturally foreign concepts (including an understanding of agency), in reality they are likely to acquire only rudimentary impressions, even if such (limited) understandings are generally socially desirable – and very expensive – quasi-public *tutorials*. Current rules and procedures are not designed or operationalised to facilitate much more than superficial understandings. That is, concept acquisition during the course of the few days, weeks or months of a trial is unlikely to capture the complex metaphysics and epistemology of culturally different others. Judges are not, after all, anthropologists.[17]

Connolly does not discuss, at least in much detail, how concepts, concept acquisition, and therefore the possibility of understanding, are linked to sensory perception and experience:[18] what used to be described as the theory loading of observation.[19] Because our perceptions seem to be based, substantially, on theories, experiences and expectations, it might be quite difficult (and much more difficult) for some individuals to acquire or fully understand foreign concepts (especially where they depend on long sensory exposure, cultural immersion and tacit knowledge).[20] The world is perceived and understood in terms of our previous experiences and concepts and this may make it difficult – though not impossible – to acquire sophisticated understandings of culturally foreign concepts.[21] It may,

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law – to underlying 'facts', which might be controversial and difficult for non-indigenous persons to assess. It might also be read to imply that law might not be especially accommodating. That is, lawyers and judges may force foreign concepts into more familiar legal categories. You don't have to know the local metaphysics of ochre (and its uses) to recognise that it might suggest some association with particular tracts of land and traditional cultural practices. If people still, albeit occasionally, rub ochre on themselves or paint with it, then an ongoing relationship with certain areas might be credibly inferred without much of an appreciation of the practices or their significance to the culture or tradition.

17 G Edmond, 'Thick decisions: Expertise, advocacy and reasonableness in the Federal Court of Australia' (2004) 74 *Oceania* 190-230.

18 G Bowker and S Star, *Sorting Things Out: Classification and its consequences* (1999).

19 A Chalmers, *What is this Thing called Science?* (1982); J Berger, *Ways of Seeing* (1972).

20 This is implied in the assertion that: 'A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it' – T S Kuhn, *The Structure of Scientific Revolutions* (1962) quoting Max Planck.

21 It might be possible to mount a qualified argument about incommensurability on this basis, but it would be limited by particular experiences, exposures and ages.

however, be easier to acquire some kinds of foreign concepts than others and may be practically impossible in some legal settings to actually acquire much in the way of understanding. If socialisation and experience shape perception and the practical ability – as opposed to the innate (in)capacity – to acquire concepts, then judges may be in a position where it is practically difficult (and sometimes extraordinarily difficult) for them to understand foreign concepts notwithstanding good will and attempts to embrace or develop more sympathetic procedures.[22]

4. Legal institutions, statutes, rules, procedures and proof

Having rejected the radical version of the incommensurability thesis it is illuminating to consider some of our current rules and procedures from the perspective of the objects of the federal *Native Title Act* 1993 ('the Act'). According to section 3:

> The main objects of this Act are:
>
> (a) to provide for the recognition and protection of native title; and
>
> (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
>
> (c) to establish a mechanism for determining claims to native title; and
>
> (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

[22] Learning a second language might be a useful analogy. Generally, the more language a person possesses the easier it will be to understand what others are saying and intending. Usually, time spent in country or with native (or experienced) speakers is necessary to learn to use language and become conversant in a way where communication is fluent and effective. By analogy, judges seem to get a little 'language' and are expected to understand (for law's purposes). The understanding might be better than without exposure, but it seems unlikely that they can appreciate the complexity – which must be part of the conceptual apparatus. Those who are not fluent are unlikely to appreciate subtlety, allusions, jokes and so on. The limits are largely a function of experience, opportunity and ability – rather than the impossibility of learning – but the practical realities as opposed to the possibilities for acquisition and understanding would seem to be non-trivial.

There is scope to recognise native title over land, tidal zones and fisheries, along with a range of cultural practices and rights. It is not obvious, however, that adjectival law (ie rules, procedure and burdens of proof) are conducive to facilitating these objects. Here, cultural difference and its significance continues, along with the substantial law (eg the burden of proving unbroken 'traditions' and limits on what can actually be claimed), to raise serious and sometimes practically intractable difficulties for individuals, groups and institutions[23]. While, *in theory*, these might be transcended, because of resource and time constraints, legal rules and procedures, disinclination (whether from indigenous groups, lawyers or judges), cognitive abilities, and various motivations, they are unlikely to be *practically* overcome – at least consistently. Nevertheless, some and potentially many, aspects of cultural difference may be grasped, or grasped sufficiently to have (what might be represented as) a practically adequate understanding (ie 'thin' concept acquisition). Moreover, because we are not in a position to *objectively* evaluate legal decisions – because this requires knowing both 'the law' and 'the facts' – legal decisions may appear reasonable even when they do not rise above superficial or even misguided impressions.

Because it seems theoretically possible, we tend to assume that judicial concept acquisition is practically adequate and that simply tweaking our adjectival law will enable our rational tradition to accommodate foreign concepts and beliefs. Connolly, in the final chapters, explores some of the recent interventions and possibilities that might improve or facilitate cultural understanding – such as the value of a charitable hermeneutic (ie 'principle of charity'), enhanced judicial education, architectural reform, and a range of adjectival adaptations including more inquisitorial (and therefore less adversarial) procedures, respect for secrecy and scope for restricted proceedings, the provision of evidence in groups and holding hearings on site to facilitate participation, views and performances.[24]

In addition to proposals considered by Connolly, recent statutory amendments in many jurisdictions, including the Commonwealth, NSW and Victorian *Evidence Acts,* following recommendations by relevant law reform commissions, introduced exceptions to the exclusionary hearsay and opinion rules for indigenous witnesses.

Section 72 Exception: Aboriginal and Torres Strait Islander traditional laws and customs

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23 P Burke, *Law's Anthropology: From ethnography to expert testimony in native title* (2011).

24 Connolly, *Cultural Difference on Trial,* 152-156.

> The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.
>
> *Section 78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs*
> The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

These exceptions to exclusionary rules are designed to enable members of Aboriginal or Torres Strait Islander groups (but not anthropologists) to express opinions or repeat hearsay about 'the existence or non-existence, or the content, of the traditional laws and customs'.[25] They were intended to ease the provision of evidence and proof in native title and heritage protection litigation (and will also apply in criminal proceedings). They may help to prevent objections, sometimes innumerous, from well-resourced interests contesting the existence or continuity of title.[26] They make it easier and effectively uncontroversial for indigenous persons to present evidence, especially evidence of a kind that might be derived from the group or handed down over generations.[27]

It is difficult, and would be inappropriate, to argue against these statutory responses, or Connolly's suggestions, as techniques that might enhance the likelihood of acquisition. It is, however, important to recognise their highly conventional nature, particularly when set against the espoused objects of the *Native Title Act*, the history of violent dispossession, earlier legal dispositions (eg the sham of *terra nullis*) and persistent disadvantage experienced by the first Australians.

What we do not know is whether the new rules, and even the existing practices, readily facilitate or dramatically improve the understanding of cultural differences. There are good reasons to think that holding hearings

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25 '*Traditional laws and customs'* of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

26 See eg *Harrington-Smith v Western Australia (No 7)* [2003] FCA 893; *Neowarra v Western Australia* [2003] FCA 1399; *Daniel v Western Australia* (2000) 178 ALR 542; *Jango v Northern Territory (No 2)* [2004] FCA 1004.

27 This was tentatively permitted via an anthropologist in *Milurrpum v Nobalco* (1971) 17 FLR 141, 159-60.

on site, allowing claimants to speak in groups, allowing groups to rely on hearsay or express opinions about traditions and customs might all enhance the understanding of cultural differences by lawyers and judges (and of law and legal practices by indigenous and other Australians). However, what all of these approaches seem to do is provide mechanisms that *might* enhance communication and understanding but with few ways of assessing whether that is actually achieved. Significantly, because the burden of proof is imposed on those asserting title, or some interest or right (so-called claimants), *the risk that the decision-maker may not understand or may misunderstand* – where understanding is too limited, too frail or simply wrong or naïve – *lies with the claimants*.

While these reforms and proposals are all welcome, especially in the years after the *Native Title Amendment Act 1998* (Cth), there is scope for more radical action that is consistent with, and more likely to obtain, the objects of native title (at the very least). Rather than tinker with adjectival reform we may need to re-consider the substantive law, burdens of proof and even our institutional arrangements.[28] I want to briefly consider the burden of proof and the configuration of our decision-making institutions. Because proof lies with the claimant, the risk of incommensurability (whether full or partial) and failure to satisfy the standard of proof (ie on the balance of probabilities) lies largely with indigenous peoples (ie claimants). The failure of a decision maker to fully, or adequately, understand some concepts or appreciate their complex entanglement in cosmologies may contribute to claims failing – and the practical extinguishment of title, rights and the permanent loss of traditions. It is far from clear that legal representation, facilitating site visits or admitting hearsay and indigenous opinions will overcome such difficulties or dangers. There are reasons to consider re-ordering legal practices in ways that redistribute the risks and implications of cultural misunderstandings and judicial and procedural limitations.

It strikes me that if we are serious about recognition of native title (or even the objects of the Act), heritage protection and a range of legally enforceable rights then we should reverse the burden of proof in native title and heritage protection litigation so that the risk of non-comprehension and a lack of (documentary) evidence ought to lie with the state – rather than the claimants. That is, we should require the state to persuasively show that there is no native title or rights or explain how they have been positively extinguished or abandoned since European settlement.[29] That way, continuing relations with land and traditions might be presumed to exist and be continuing and the real danger of misunderstanding concepts would be

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[28] B Keon Cohen, 'The *Mabo* litigation: A personal and procedural account' (2000) 24 *Melbourne University Law Review* 893

[29] Obviously claimants could contest evidence, but would not be obliged to bear the risk of non-persuasion.

less important (and less detrimental) to any outcome. This seems to make more sense given that indigenous cultures were largely oral, relevant documents may have been lost, destroyed or strategically drafted by those with competing interests in resources, access and ownership (such as the state, settlers, farmers and miners). It should be conceded that such an approach might be inferior, in terms of cultural exchange (and recording the details of traditions and practices), but it would transfer important risks. The state (or some other interested group) would be obliged to demonstrate, on the balance of probabilities, that there is no ownership, continuing relationship, heritage or legally recognisable rights.[30] We should require unambiguous proof of extinguishment rather than attempt to interpret whether culturally different concepts and practices support continuity in traditions. This approach is not only consistent with the objects of the *Native Title Act*, but it gets around *some* of the dangers of misunderstanding and the difficulties of proof. Shifting the burden of proof also recognises that an error in recognition of title may, as in the case of loss of access to lands or resources, or the suspension of practices, actually compromise or extinguish dynamic traditions.

We must be very careful before we allow our legal institutions to 'find' that there is no tradition. It might, for example, be better that some exaggerated claims and questionable traditions are formally recognised, with the limited entitlements they confer, than risk not recognising genuine traditions particularly where they might be impaired or lost forever. This resonates with the very old idea, underpinning modern forms of criminal justice, that it is better to let ten guilty persons go free than imprison someone who is innocent. In parallel with the criminal law's Innocence Projects, that recognise disturbingly frequent wrongful convictions, in the aftermath of two decades of native title and heritage protection litigation we may need *Ownership Projects* to revisit some of the outcomes, procedures and assumptions used to resolve claims – for all time.

In addition, we might wonder about the form of legal proceedings and whether adversarialism is generally the most appropriate way to operate a process aimed at ascertaining a range of factual issues associated with

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30 To take but one prominent example: the burden might shift from the Yorta Yorta having to persuade a trial judge that a 'contract' between an aboriginal youth and a white colonist exchanging tribal lands for some tobacco in the mid nineteenth century was unsound, to the government (or others challenging title) having to prove that a self-serving diary entry accurately encapsulated a credible exchange based on a legitimate contract that was not impugned by misunderstanding, deception or coercion. See A Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' (2000) 28 *Federal Law Review* 453–75; *Members of the Yorta Yorta Aboriginal Community v. State of Victoria* [1998] FCA 1606; *Members of the Yorta Yorta Aboriginal Community v. State of Victoria* [2001] FCA 45.

recognising, respecting and protecting indigenous persons, their cultures and evolving traditions. This is not a critique of adversarialism so much as a question about the symbolism of persistent formal challenges from governments and a range of private (ie commercial) interests supported by political and lobby groups (eg Minerals Council of Australia and the National Farming Federation). It may also be important to consider some of the dispute resolution techniques recommended by indigenous elders and leaders in devising a scheme that will facilitate the objects of various legislative regimes along with respect of peoples and cultures. In terms of respect, an inquisitorial approach or inquiry, perhaps supplemented by additional personnel (more below) might be preferable: more conducive to recognising title and perhaps facilitating the understanding of cultural differences (and foreign concepts). It may be that different processes would enhance the social legitimacy of outcomes.[31]

There are even more radical possibilities. We could, for example, have indigenous persons (from Australia or elsewhere) sitting with legally-trained judges on a panel. In the 21st century it seems anomalous to have white men sit in judgment over a range of very foreign concepts, issues and peoples. It might be argued that indigenous Australians have an interest in native title such that they could not credibly hear and decide a case with sufficient independence (ie *nemo iudex in causa sua*). There is also the question of whether indigenous peoples are well positioned to acquire the concepts of other indigenous groups. There are several possible responses. Concerns about self-interest and independence seem to be questionable when it comes to claims made by *other* indigenous groups. Would it mean that we could not have an Aboriginal judge hearing a native title proceeding (where she was not from the particular group)? We might, moreover, wonder whether European Australians have less of an interest (albeit more indirect)? Why shouldn't indigenous persons from other parts of the country sit alongside judges to hear and assess claims? There are good reasons to think that indigenous Australians are at least as likely as judges to acquire or comprehend non-local concepts and beliefs. If nothing else, they might be able to convey to lawyers and judges concerns about conventional legal processes and categories and their potential for violence.

5. Other exogenous knowledges: Incriminating forensic science evidence

At this point it is useful to make a digression that might help to illuminate how similar sorts of issues arise elsewhere and how difficult it is to stimulate change even where there are explicit objectives and putatively correct understandings (or appropriate methods and practices) or more

31 T Tyler, *Why People Obey the Law* (1990).

scope to ascertain them, and the concepts (or knowledge) constitute part of the mainstream intellectual tradition.

Much of my scholarship has focused on the reception and non-reception of non-legal forms of knowledge, primarily forms of incriminating expert opinion evidence in legal settings. Originally, I was trying to understand what went on. More recently, in response to continuing problems with the forensic sciences in criminal proceedings, I have begun to think more about intervention.[32] At first, it might seem that the relations between law and science, and the forensic sciences in particular, are a long way away from judicial efforts to acquire indigenous concepts. Once you begin to think about it, however, similar conceptual problems arise in relation to the judicial (and jury) acquisition of many types of scientific, biomedical and statistical knowledges.

Interestingly, there are problems with the epistemic foundations of many forensic science techniques. As the National Academy of Sciences (US) recently explained, there are serious doubts about the research underlying many comparison sciences routinely admitted and relied upon in criminal proceedings.

> With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.[33]

In addition, there is strong evidence that prosecutorial ethics (and restraint), codes of conduct for experts, cross-examination, rebuttal experts, limiting the ways evidence is expressed, judicial instructions and warnings, and judicial review have limited ability, individually or in combination, to identify or adequately convey the weakness of many types of forensic science evidence.[34] In consequence, evidence derived from techniques that

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32 National Research Council (NAS), *Strengthening the Forensic Sciences in the United States: The Path Forward* (2009); G Edmond, 'Actual innocents? Legal limitations and their implications for forensic science and medicine' (2011) 43 *Australian Journal of Forensic Sciences* 177-212.

33 NAS, *Strengthening*, S-5-6. The criminal justice system is awash with 'expert' opinions that are questionable in terms of their epistemic value and the manner in which they are expressed. These include: mixed DNA results, fingerprints, hair, footprints, ear prints, bite marks, voices, images, blood spatter, handwriting and so on.

34 Law Commission of England and Wales, *Expert Evidence in Criminal Proceedings in England and Wales*, 34 Law Com. Report No 325 (2011); G Edmond and M San Roque, 'The cool crucible: Forensic science and the

are unreliable and often obtained in circumstances that ignore notorious methodological, statistical and cognitive dangers (eg forms of contextual bias or the use of misleading terminologies) is routinely admitted and presumably relied upon in trials and appeals.[35] It is left to the parties and the judge, in the context of an adversarial proceeding, to manage any problems notwithstanding that the trial and its safeguards seem inadequate to the task.

Having some insight into a range of methodological and practical issues enables observers to appreciate some of the problems with contemporary practice, at least in the criminal sphere with respect to the acquisition of exogenous knowledge – here scientific and technical evidence. We can appreciate how the primary aims (or objects) of criminal justice, concerned with truth (ie rectitude of decision, after Bentham), the need to avoid convicting the innocent (better to let the guilty go free), and the goal of fairness ('doing justice in the pursuit of truth'), are not embedded in actual legal practice.[36] For, unreliable forms of incriminating expert opinion evidence are routinely admitted and presumably relied upon, and the trial mechanisms seem inadequate as a form of regulation or management. The problem is how should courts engage with exogenous scientific and expert knowledges in ways that will achieve their goals, if these ideas (truth, err on the side of non-conviction, and fairness) are the dominant aims or principles guiding criminal justice practice. In a similar way, the objects of the *Native Title Act* do not seem to be well served by existing procedures, the burden of proof and institutional structures. This example has obvious resonances with understanding cultural difference in the context of indigenous knowledge and cultural practices.

The difficulty for our criminal justice system is how do we change things so that we achieve our goals – of which understanding, or sensitivity to the risks of misunderstanding and non-comprehension, form a significant part. While I have been arguing for reform, particularly the imposition of a reliability standard to keep unreliable expert evidence out of the courts,[37] it is my impression that judges are not in a good position to respond, and even the exclusion of unreliable evidence does not substantially enhance understanding, it merely reduces the likelihood that a person will be convicted on the basis of unreliable expert evidence. The issue is not simply

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frailty of the criminal trial' (2012) 24 *Current Issues in Criminal Justice* 51–69

35 I Dror, D Charlton and A Peron, 'Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications' (2006) 156 *Forensic Science International* 74.

36 Like the objects of the Act, these criminal justice objects may not be facilitated through practice and the way rules have evolved and are applied.

37 G Edmond, 'Specialised knowledge, the exclusionary discretions and reliability: Reassessing incriminating expert opinion evidence' (2008) 31 *UNSW Law Journal* 1-55.

the difficulty of acquiring foreign concepts, but also how do these needs align with substantial law as well as existing legal practices, values and beliefs.

6. Partial knowledge

One of the difficulties with acquiring foreign concepts and understanding, as well as law reform, whether adjectival or substantive, is that a range of ideological, professional and institutional concerns seem to impact upon legal, and particularly judicial, practice.[38] By way of example, criminal justice practice suggests that judges have a strong – though ultimately unsustainable – faith in the efficacy of trial safeguards and tend to admit incriminating expert opinion even where it is unreliable or speculative.[39] They tend to be more sceptical in their responses to expert opinions adduced by criminal defendants (notwithstanding the objects of criminal proceedings) and interestingly, tend to be quite distrusting of expert evidence adduced by plaintiffs in civil proceedings. Revealingly, many judges have been quite dismissive of claimant anthropology in native title and heritage protection litigation.[40] This suggests the importance of ideology, along with professional and institutional factors that, in many cases, make it difficult for judges to recognise native title and confer substantial rights. Judges (and legislators) are embroiled in difficult social decision making where there is a need to balance the legitimacy of the institutions and outcomes with public and economic sensibilities as well as evidence and substantive law, and the interests of indigenous Australians.

Judging is always bigger than the ability to acquire and apply concepts (or facts) to law.[41] Indeed, a theory of limited commensurability is unlikely to explain judicial practice because judging is such a complex socio-epistemic activity. Judges are not amateur anthropologists or lazy anthropologists and our current institutional structures are not particularly well suited to acquiring concepts, although they have certainly adapted and continue to do so. Moreover, our current rules and processes, as the discussion of the burden of proof neatly illustrates, are not arranged in a

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38 Perhaps a final irony is how little we know about our legal institutions, the effectiveness of procedures, and the actual reasons for decision-making. This is ironic because many of our indigenous peoples have been studied more intrusively and systematically than our judges, lawyers and legal practices.

39 G Edmond, 'Actual innocents? Legal limitations and their implications for forensic science and medicine' (2011) 43 *Australian Journal of Forensic Sciences* 177-212.

40 G Edmond, 'Thick decisions: Expertise, Advocacy and reasonableness in the Federal Court of Australia' (2004) 74 *Oceania* 190-230.

41 J Frank, *Courts on Trial: Myth and reality in American justice* (1949).

manner that appropriately recognises the very real difficulties in both producing evidence and the risk that even where adduced it might not be understood and valued in relation to traditions and their legal implications.

Cultures, Disciplines, and Differences: Author's Response to Commentators

ANTHONY J CONNOLLY[†]

I. Introduction

A notable feature of the book *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding*[1] is its cross-disciplinary ambition. It is a work of philosophy that is informed by the insights of legal theory, psychology, and anthropology. Its subject matter demands such scope. As a result, it is a work that is susceptible to engagement and critique on the part of practitioners across a range of academic disciplines. I am pleased that the three distinguished commentators on the book who participated in this symposium reflect some of that range of perspectives. Each of them embodies one of a number of distinct schools of thought which, historically, have maintained a deep interest in cultural difference, cross-cultural understanding, and the workings of the legal system. Their respective identities as continental philosopher, anthropologist, and socio-legal theorist not only lend a distinctive flavour to each of their papers but also work to generate a multifaceted yet mutually resonant set of insights into the issues raised by the book. I am grateful to each of them – Margaret, Katie, and Gary – for taking the time to read the book and articulate a view on it. Their comments will be of immense value to me in my ongoing thinking about cultural difference and the law.

In formulating a reply to their papers, it is just not feasible, of course, for me to address each and every one of their comments and concerns. What I propose to do here, then, is serially comment upon what I take to be a key concern of each of the papers. What struck me as central to Margaret Davies's paper is the question of the relationship between the analytic and continental traditions of philosophy. Katie Glaskin's paper raises a number of issues surrounding the nature of culture and its relationship to its conceptual base. In doing so, she too implicates questions of cross-disciplinary understanding. Finally, Gary Edmond's paper explores both the theoretical potential and the theoretical limitations generated by my concept-theoretic analysis of judicial understanding and institutional design.

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1 Anthony J Connolly, *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding* (2010).

In this pursuit, he picks up on similar concerns raised by both Davies and Glaskin.

II. Philosophical traditions and cultural differences

In the introduction to the book, I deliberately and quite strategically proclaim its philosophical pedigree to be that of the analytic, as distinct from the continental, tradition in contemporary Western philosophy.[2] No doubt, a long discussion could be had in regard to how we might define and distinguish the two schools.[3] Further, we need to be careful about falling into too simplistic a dichotomy in regard to the state of contemporary philosophy – particularly given the developing rapprochement between the two traditions over the past few decades.[4] Nonetheless, it remains, I think, a legitimate strategy – in certain theoretical contexts, at least – both to make a distinction between the two traditions and to choose to rely on the linguistic and conceptual resources of one of them over the other.

My choice in favour of analytic philosophy in dealing with a subject that has for a long while been the predominant preserve of its putative rival is motivated by what I perceive to be the capacity of an analytic approach to make sense of and inform a response to the issues under consideration in a way that is just not available to many lines of thought within the continental tradition. It is a core hypothesis of the book that contemporary analytic philosophy offers something distinctive and valuable to our understanding of these issues.[5] As I say in the book, the source of this potential lies to a significant extent in the collaborative orientation of analytic philosophy (in

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2 Discussions of the history and nature of the two traditions and the so-called 'divide' between them may be found in Peter Hylton, *Russell, Idealism and the Emergence of Analytic Philosophy* (1990); Michael Friedman, *A Parting of the Ways: Carnap, Cassirer, and Heidegger* (2000); and Simon Glendinning, *The Idea of Continental Philosophy: A Philosophical Chronicle* (2006).

3 Some of that discussion is rehearsed in Friedman and Glendinning, above n 2. I intend to avoid a discussion of definitions and differences here and proceed on the assumption (I hope not too unreasonably) that readers know instances of the two schools when they see them, even if they can't readily define their differences.

4 Despite their disagreements, Habermas and Rorty are two notable mediators in this regard. More recently, see the recent collection of articles on this topic in (2012) 50 *The Southern Journal of Philosophy* – especially those by Sara Heinamaa and Iain Thomson.

5 This is not to say, of course, that certain strands of continental philosophy do not offer valuable insights of their own.

its dominant naturalistic mode) to important new lines of thinking about cognition and cultural difference within the contemporary sciences of cognitive and developmental psychology, linguistics, and sociology. A not unimportant consideration here has also been my sense that a study of the issues articulated in the vocabulary and style of analytic philosophy (with that tradition's explicitly pro-science orientation), is likely to be more effective in informing and influencing lawmakers, judges, and legal practitioners – key protagonists in the book and key targets for the book's reformist agenda.[6]

As I read her piece, Davies agrees with me about the existence of a valid distinction between the two traditions, as well as about the legitimacy of making a commitment to one or the other of them.[7] Her choice has been for the continental side of the spectrum and I am grateful to have the benefit of a view from that side in this symposium. Rather than engage in a systematic critique of the analytic tradition I have chosen or of the argument elaborated in the book, Davies directs her attention to the important question of the very grounds of understanding and communication between representatives of the two traditions – in this case, she and I. In the context of commenting on a book about cross-cultural understanding her approach here is nicely ironic and, consequently, quite continental. More broadly than this, though, Davies raises the more general question of interdisciplinary communication and collaboration within the academy and beyond. In doing so, she implicates the relationship between philosophy and the social sciences raised by Glaskin's anthropologically informed critique of the book's theoretical presuppositions and methodology, as well as the relationship between law and science addressed in Edmond's discussion of the judicial understanding of scientific expert evidence.

Davies frames the difference between us and our respective schools of philosophy in terms of the maintenance of different languages, rather than different conceptual schemes.[8] I am happy with this framing of things

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6 On the relationship between science and legal practice, see, for example, Tai Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (2004).

7 Of course, neither of us thinks that one *has* to make a choice – only that making a choice is a legitimate theoretical practice. One could legitimately draw on compatible resources from both traditions – say, as someone like Habermas has done over the years. I must say that I am sympathetic to such a syncretic approach. Indeed, there is a growing body of opinion amongst philosophers that this may be the way of the future in philosophy. See above n 4

8 At p 2 of her paper she says, 'He speaks in the language of concepts and I speak in the language of language.'

because I am not convinced that there is that much *conceptual* difference between us and our schools – merely (substantially?) a difference in vocabulary.[9] Indeed, it is the existence of a significant degree of conceptual proximity, I think, that underlies the rapprochement between our two schools which has been underway these past two decades or so. This does not mean that there are no challenges of interpretation at work here – there are. However, we (and our schools) are not enmeshed in a situation of disciplinary (cultural) incommensurability as I define it in the book. Rather, we maintain philosophical worldviews which differ to some degree in their operating vocabularies and underlying conceptual schemes but which are ultimately commensurable in the sense that any such difference can (with a degree of effort) be interpretively overcome - in some cases merely by a process of translation and in others by a more onerous process of conceptual supplementation.[10]

The fact that Davies is able to offer such a subtle and thoughtful analysis of the book is evidence enough of this. Her sensitivity to and sympathy with the central notion of 'trajectory' I use throughout the book demonstrates more than anything, I think, my claim about the extent of this common ground. Her paper's poetic improvisation on the theme of a trajectory nicely enhances my rather staid (and for her, no doubt, stylistically quite analytic) presentation of the idea in the book. Though I don't pick up the point in the book, I am quite happy with the idea of a judge actually forming her identity (or, at least, a significant part of it) as a result of her conceptual development case by case over the course of her judicial career. Further, I have no doubt that much of my analysis of this process could be – as she suggests – usefully reinterpreted in Heideggerian (or even Lyotardian) terms.[11] Despite its predilection for preciseness and certainty, analytic philosophy *at its best* does maintain a profound recognition of the chaotic, vast complexity of the mind and the world. There is, then, I think, more than 'a lucky coincidence of expression' in Davies's and my conception of things here.

On this question, Davies's concern that she and I seriously differ in relation to the very idea of a concept is, I think, misplaced. Davies believes

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9 Of course, a substantially shared conceptual scheme does not entail a substantially shared set of beliefs. It is at the level of propositional claims about how things are that the differences between our two schools are most operative

10 I hold the same view in regard to the discursive relationship between analytic philosophy and Glaskin's school of anthropology.

11 The recent work of Jeff Malpas on Heidegger and Davidson comes to mind here. Jeff Malpas, *Heidegger and the Thinking of Place: Explorations in the Topology of Being* (2012).

that I hold that concepts are self-contained, stable, and determinate. I don't – nor do most contemporary analytic philosophers. In fact, my view appears to be quite consistent with the brief account of concepts she herself provides in her paper. Within current analytic philosophy of mind, as well as cognitive and developmental psychology, concepts are theorised as components of propositional states. These, in turn, subsist within the highly dynamic and open-ended context of an agent's cognitive and behavioural interaction with the world and internal mental activity (reasoning) – all of which is comprehended by a common-sense or folk theory of the agent, of human agency in general, and of the world at large. There is nothing particularly self-contained, stable, or determinate about concepts within such an ontological context.

In addition to this, though, our way as interpreters to the identification of the concepts possessed by an agent is through a complex and always incomplete theoretical reconstruction of that agent's past and present engagement with the world and of their reasoning (broadly construed).[12] What is available to us by such interpretation (if successful) is an understanding of the other that realises our contingent and highly situated interpretive and communicative ends, whatever they might be. We don't need Cartesian certainty about another's mental states in order to understand them. Interpretation has not been conceived of as *translation* (in this rigid sense) in the analytic tradition since Quine.[13] To put it crudely, all successful interpretation demands on the analytic approach I subscribe to is that we be able to 'get by' in the array of communicative practices we engage in day by day. Such getting by is a pragmatic and highly contingent enterprise capable of failure and all the interpersonal and social consequences that go with failure. My sense is that all of this – drawn as it is from current mainstream analytic philosophy – is consistent with much of Davies's own account of concepts and that part of the continental background she draws on.

The extent to which I am right on this issue of shared ground may be evaluated with reference to any of a number of recent philosophical studies which have attempted to explore the degree of conceptual similarity and difference existing between representative thinkers and works across the two traditions. Two notable examples of this kind of work are Samuel Wheeler's essays on Derrida and Davidson on truth, language, and

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12 Henry M Wellman, *The Child's Theory of Mind* (1990); David K Henderson, *Interpretation and Explanation in the Human Sciences* (1993); Shaun Nichols and Stephen P Stich, *Mindreading: An Integrated Account of Pretence, Self-Awareness, and Understanding Other Minds* (2003).

13 Willard Van Ormond Quine, *Word and Object* (1960); Donald Davidson, *Inquiries into Truth and Interpretation* (1984).

meaning[14] and Lee Braver's systematic exploration of the anti-realist commitments of virtually the whole of the Continental canon from Kant to Derrida – all through the lens of contemporary analytic metaphysics.[15] In these works we see rehearsed an interpretive encounter between the two traditions involving the translation of the vocabulary of the one into that of the other and the glossing of the concepts utilised by the one in terms of the conceptual repertoire of the other – an encounter not unlike that engaged in by the interpretive judge of my book (or by Davies and I, for that matter, in this exchange).

III. Concepts and Culture

It is not surprising that Glaskin's concerns as an anthropologist focus on the notion of culture and the model of the understanding or interpretation of cultural phenomena which I elaborate in the book. These two issues are central to the anthropological endeavour. She is worried that I have failed to adequately capture the nature of these two things – at least, as they are seen from the anthropological perspective – by virtue of my taking an overly conceptual and cognitive approach to them. To the extent that my orientation towards these things arises out of my grounding in contemporary analytic and naturalistic philosophy her comments implicate the question of interdisciplinary differences raised more overtly by Davies. I won't address this aspect of Glaskin's paper to any significant extent here, though. Much of my reply to Davies could be relied upon in this regard. Whilst not indifferent to the findings of the discipline of anthropology in relation to its subject matter, the book is, at the end of the day, a work of applied analytic philosophy – not anthropology – and draws relatively rarely on anthropological theory.[16] However, because both disciplines have been influenced by findings in cognitive and developmental psychology, a naturalistic philosophical approach to culture and its interpretation may be expected to be quite compatible with a great deal of the anthropological literature on these things – though, as with the continental tradition in philosophy itself, there may be a degree of terminological and even conceptual difference at work in the two discourses.[17] Attending, then, to Glaskin's critique, let me briefly elaborate and defend the approach I take in the book to the fundamental questions of culture and interpretation.

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14 Collected in Samuel C Wheeler, *Deconstruction as Analytic Philosophy* (2000).

15 Lee Braver, *A Thing of This World: A History of Continental Anti-Realism* (2007).

16 For the record, there is mention in the book of the work of the anthropologists Sapir, Geertz, and Clifford.

17 The various resonances Glaskin herself detects between our respective views speak to this, I think.

Glaskin's concern in relation to the notion of culture I operate with in the book largely flows from the concept-theoretic approach I take to it there. She worries that by construing cultural difference in terms of conceptual difference I render culture too cognitive, insufficiently experiential, and, as a result, 'strangely disembodied'.[18] By her use of these terms, I take her to mean that on my account culture is too much a matter of what is *in the heads* of those who enact it and not enough a matter of their immersion in the concrete world – their *embodiment* in an (ultimately) physical body, set of behaviours, and a natural and social environment. Additionally, in my focus on the conceptual and its constitutive propositional and intentional context, she claims that my account of the mental aspect of culture fails to recognise the wider spectrum of mental states at play there – emotional states, for example.[19] At base, she calls me to account for my failure to acknowledge the richness of culture and its transcendence of the 'merely' conceptual.

There is no doubt that I approach the question of culture, cultural difference and the interpretation of culture from a concept-theoretic perspective. My choice of this perspective is, in my view, though, entirely legitimate. It is a truism of any sound account of culture – anthropological or philosophical – that it is comprised most fundamentally by the thoughts, actions and artefacts of a group of people.[20] Even Glaskin acknowledges this. On such a construal, culture has a mental dimension together with a material dimension. In the context of an inquiry into the *understanding* of cultural phenomena (the subject matter of this book), it is the former of these dimensions that is of most importance. It is in the mental dimension of culture that the *object* of understanding or interpretation – namely, meaning

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18 Glaskin says at p 3 of her paper, '…culture, as presented [in my book], has become "concept," and that regardless of the *intention* involved in rendering it thus, its *effect* is to render culture as largely cognitive, and as strangely disembodied.' Later at p 4, she reiterates this concern, saying that in my book, '[c]ulture and cultural difference are largely dealt with at a cognitive level, not a perceptual or experiential level: as comprised of "concepts" that can be broken down into *disembodied* sub-concepts.' (my emphasis) She holds (at p 1) that it is the book's 'emphasis on cognition in contrast to experience that appears to be responsible for an understanding of culture's *embodied dimensions* apparently vanishing here' (my emphasis).

19 Here her concerns intersect with her related critique of my theory-theory approach to the interpretation of culture and her implicit advocacy of what she sees as the more holistic and experiential simulation theory approach. I will have more to say on this below.

20 My initial orientation towards the question of culture is by way of an action-theoretic approach.

– most prominently resides.[21] It is, therefore, to the mental dimension of culture that any study into its interpretation must be oriented. If a judge were to look at an indigenous religious artefact and articulate her understanding of it solely (or even predominantly) in terms of its physical features ('It is red and round') or to look at an indigenous dance and articulate her understanding solely or predominantly in terms of the behavioural features of the participants or the physical features of the environment in which the dance takes place ('Four people are on a hill, waving their arms back and forth') we would not take her to have *understood* that artefact or practice in any proper sense. She would have failed to take something very important to understanding into account.

It is in the realm of the mental that the kind of meaning we are talking about here resides. And in the context of the kind of interpretive understanding a judge is involved in over the course of a legal proceeding, the most important part of the mental realm of the culturally different agents and testimonial witnesses she encounters is the *intentional* part. Intentional states together with their conceptual components are not only crucial to the actual *practice* of intercultural understanding – judicial or otherwise – they are fundamental in any credible *account* of that understanding and its cultural objects. As I argue in the book, where cultural difference obtains in such an encounter, that difference is best conceived of in terms of conceptual difference because it is this kind of difference – not difference merely in behaviour or even belief – that generates the incommensurabilist anxieties that preoccupy theorists and legal practitioners.[22] Consequently, it is difficult to see how a concept-theoretic approach along the lines conducted in my book could be misguided as a methodological matter and how or why an alternative approach – specifically along the lines hinted at by Glaskin – would be preferable in this context.

In any event, whether methodologically justified on these grounds or not, my concept-theoretic approach does not render culture *disembodied* in any real sense. Part of the problem with Glaskin's analysis of my concept-theoretic approach is that she imputes to it a stark contrast between the conceptual on the one hand and the embodied on the other. That is, she thinks that concepts, as referred to within my book, are not embodied and that an approach which construes culture in terms of these will be an

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21 It shouldn't be forgotten that on a functionalist account of the mental of the kind I adopt in the book, both behavioural and environmental aspects of cultural phenomena are ontologically and epistemically implicated.

22 In the context of an inquiry not merely into culture but cultural difference, I am led to derive a concept-theoretic approach from my initial action-theoretic approach.

approach that construes culture as disembodied.[23] She is, however, wrong to do so. First, as I make clear early on in the book, and as I elaborate to some length later on, concepts, as components of the intentional states within which they subsist, are real phenomena in the world. As real phenomena they are *physically realised*. They are given their ontological status in the world (as well as their theoretical status in my book) by virtue of being realised by physical, chemical, biological and other higher-order concrete phenomena. They are fundamentally embodied in this sense.

And from a functionalist perspective this is even more the case. Recall that on the physicalist and functionalist theory of mind I adopt in the book, intentional states and the concepts that comprise them are realised by brain states that meet certain conditions or fulfil a certain role or function defined by an appropriate (largely, folk) theory of mind. These ontologically relevant conditions have to do, amongst other things, with the environmental inputs and behavioural outputs experienced and enacted by each of the agents constituting the culture over the course of their lives.[24] Intentionality and *conceptuality* are, then, on my account, fundamentally embodied in the natural world, including the bodies, behaviours, and external environments of the culture-bearing agents in question. They ontologically implicate these things by their very nature as functional phenomena. In this light, my account of things seems quite compatible with the views of Hallowell that Glaskin endorses in her paper. She quotes Hallowell as holding that '…cultural difference might indeed be understood as having a physical basis. Our experiences, our perceptions of these experiences, our memory of these experiences and the learning that occurs through them rely on the fact that we have physical bodies – sensory perceptions, neural processing, and so on. We fundamentally experience the world and indeed our "selves" as a consequence of our physical embodiment.' Exactly why Glaskin thinks I don't hold to something like this view is not clear to me. Elsewhere in her paper, she appears willing to expressly acknowledge the credentials of my concept-theoretic model in

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23 Contrary to Glaskin's take on this, it is precisely those incommensurabilists who consciously or unconsciously hold to a metaphysical dualism about mind and world that are committed to *disembodying* mind and meaning, as well as the cultural phenomena informed by these things. It is only if one believed that I held intentionality to be a non-physical and metaphysically distinct kind of thing – that is, it is only if one thought I was a mind-body dualist – that one might construe my intentionality-based and concept-theoretic model of culture as rendering culture disembodied. But as I make clear in the book, as a physicalist I utterly reject a metaphysical dualism of this kind.

24 This is where the notion of 'trajectory' discussed in Davies comes into play.

this regard.[25] Again and consistent with my reply to Davies, I suspect that a more sustained effort of cross-disciplinary communication on both our parts would clarify things.

In addition to her concerns about my concept-theoretic view of culture, Glaskin is also sceptical about the theory-theory approach I take in the book to the understanding of culturally different phenomena. As with my account of culture, she appears to believe that my theory-theory of interpretation renders the process of cross-cultural understanding – and, indeed, enculturation, more generally – too cognitive. Again, she appears to use the term 'cognitive' here to connote a model of interpretation which is too much 'in the head,' in the sense of over-emphasising the theoretical identification by interpreter of the propositional states of the interpretee at the expense of the emotional and imaginary and embodied engagement of the one with the other.[26] That this is the nature of her concern is indicated, I think, in her alignment early in the paper with the key rival of theory-theory in analytic philosophy, the simulation theory of interpretation, which she takes as approximating her preferred experiential and (again) embodied model.

I don't intend to justify here my preference for a theory-theory approach to interpretation over a simulation-based approach.[27] I refer the

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25 For example, she states on page 3 that 'Connolly does argue, then, "for the existence of materially based minds, meanings and cultural differences" – it is the "immaterial" ones that do not exist – and this is a formulation which would appear to recognise the embodied dimensions of culture.'

26 Glaskin says at p 1 that my 'emphasis on the cognitive at the expense of the experiential has the effect of rendering culture and cultural difference as some kind of disembodied "thing" that can be acquired in abstract form.'

27 Nor do I intend to explain in any detail the nature of and differences between the two approaches. Very simply, theory-theory conceives of the interpretation of the actions and utterances of others as involving a process of theoretical reasoning on the basis of a set of beliefs, including a folk psychological set of beliefs – all in a manner analogous to the way we come to know things in other epistemic contexts. Simulation theory downplays the role our folk psychology plays in interpretation and emphasises our practical capacity to simulate the experience of others – to imagine ourselves in the shoes of others – in order to explain or predict their actions. It is in this capacity for simulation or empathy that a role may be seen for those affective elements of mind Glaskin thinks important. See Martin Davies and Tony Stone, *Folk Psychology: The Theory of Mind Debate* (1995) for a useful collection of essays on this issue. See also Peter Carruthers and Peter K Smith, *Theories of Theories of Mind* (1996). Robert Gordon, Jane Heal, and Alvin Goldman are important advocates for the cause of simulation theory (see their essays in Davies and Stone (1995)).

reader to Chapter 5 of my book where I address this in some detail. Not only is simulation theory less compatible than theory-theory with the increasing body of empirical (psychological) evidence about interpersonal understanding amongst human beings,[28] it suffers from a number of independent and important theoretical defects compared to the theory-based model.[29] In addition to this though, a significant motivation for my adopting a theory-theory approach to interpretation is its compatibility with the physicalist methodology and its functionalist account of agency, action and intentionality which grounds the book as a whole.[30] The simulation theory of interpretation does not share this advantage to the same degree.

It is in light of the superiority of a theory-theory approach over a simulation theory approach that I pay relatively little attention to the role played in the process of interpretation by the non-cognitive dimensions of mind implicated in some versions of simulation theory. It is for the reasons just outlined that I don't agree with Glaskin's claim that I should have highlighted these things. Theory-theorists (including me) don't deny that emotions and the like may have a role to play in interpersonal interpretation. But I would want to see more evidence that, and how, this is the case before I was prepared to revisit my present view on this. I must also mention on this point that *even if* a simulation theory of interpretation were to be demonstrated to be correct, my sense is that only a part of my overall analysis of the judicial understanding of cultural difference would need revision. Much of the book's argument and analysis would stand

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[28] See, for example, Wellman, above n 12; Peter Carruthers, 'Simulation and self-knowledge' in Carruthers and Smith, above n 27; Nichols and Stich, above n 12; and Susan Carey, *The Origins of Concepts* (2009).

[29] Botterill and Carruthers, for example, argue that 'theory theory not only furnishes us with a philosophical account of what conceptions of mental state types are: according to theory theory it is also the folk psychological theory which supplies the ordinary mindreader with those very conceptions. Simulationism, cannot very well just borrow this functionalist account, according to which such states as belief, desire, hope and fear are understood in terms of their general causal interactions with other mental states, characteristic stimuli, intentions and subsequent behaviour. Simulationism has to give up on the functionalist account of how we understand concepts in the vocabulary of propositional attitudes and intentional states – because such an account effectively involves implicit grasp of a theory. This looks like a serious gap unless the simulationist can come up with an equally plausible account of how we might conceptualise the propositional attitudes.' George Botterill and Peter Carruthers, *The Philosophy of Psychology* (1999) 81.

[30] I argue in Chapter 5 of the book that theory-theory is more consistent than simulation theory with the epistemic and methodological monism underlying physicalism.

relatively unaffected by this debate – most importantly, my conclusions in relation to the limits of difference and the possibility of and strategies for interpretive law reform.

Finally, a related concern Glaskin has here is that in outlining the role played in judicial understanding by concepts, conceptual development, and concept acquisition, I am excessively individualistic in my methodological orientation and fail to make room for the important role that socio-cultural structures play in our conceptual development and cognitive activity, more generally.[31] Relying on Hallowell, she expresses concern about the way social structural phenomena feed into the developmental processes that I rely on in making sense of concept development and acquisition and about my failure to take adequate account of this. Implicated in this is her concern that I fail to address the way that culture is not only constituted by the actions and intentional states of its participants but that, in its more structural manifestations, it also informs those actions and intentional states in a complex feedback loop.[32]

In response to this, I do not believe that my model of concept development ignores the role of pre-existing cultural and social structures on individual psychology. Though I will admit to an individualist orientation in my account of human concept development (without doubt, an artefact of my analytic philosophical tendencies), the findings of developmental and cognitive psychology, which I rely on so heavily throughout the book – particularly in the key chapter on this, Chapter 6 – demand that I attend to those pre-existing and socially situated sources of conceptual learning which act upon the developing mind. Indeed, Glaskin herself notes this when she concedes, 'Connolly does speak of socialization, noting that "whilst there is an innate interpretive capacity whose developmental staging is the same across cultures, it is surrounded by a variable body of cultural accretions and concepts."' Other parts of the book speak too of the profoundly collective and social features of culture and understanding.[33] This is to say that I am not sure that Glaskin and I actually

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31 For example, she states at p 3 that 'it is important to also consider where culture sits within developmental processes' and at p 4, claims '[j]ust how our socialization and enculturation really affects our perceptions and indeed accounts for the acquisition of "concepts," is barely visible, though, in Connolly's account.'

32 She speaks at p 4 of cultural differences reflecting 'many of the basic orientations that culture provides the self.'

33 Examples include the extensive discussion of the nature of culture-constituting collective and joint actions in Chapter 2, the collegial nature of much judicial reasoning and decision making in Chapter 3, and the institutional, social, and economic factors affecting judicial understanding in

disagree in any serious sense on the social dimensions of conceptual development and acculturation. Even so, I am sure that my account of these things could benefit from supplementation with some of the concepts and insights of anthropology – including those of Hallowell, D'Andrade, and Glaskin herself.

IV. The Limits of Interpretive Law Reform

Edmond comes to my book as (amongst other things) a theorist of the role and epistemic status of expert scientific evidence within the legal context. One of the important questions his paper raises is how the model of judicial understanding I develop in the book might be extended from situations involving alien cultures to those involving scientific phenomena and associated scientific discourse – what he terms 'other exogenous knowledges.' In asking this question, he raises a number of issues I have been concerned with of late. As both he and I recognise, his ongoing empirical and socio-legal inquiries into the nature and value of expert scientific evidence might usefully supplement (and might usefully be supplemented by) my nascent and more philosophically oriented study of the institutionalised interpretation of such evidence.

Though my concern in the book is with cross-cultural understanding and the judicial acquisition of culturally different concepts, in fact, the judiciary is called upon to acquire new concepts quite regularly. In a range of contexts the proper performance of the judicial role requires that judges learn new things and, as a result, conceptualise the world in a way which differs (admittedly only slightly in many cases) from the way they conceived of things before the hearing commenced. This is most notable in those contexts in which scientific phenomena (including medical and novel technological phenomena) are at stake. For example, over the course of a product liability case a judge may be required to gain a concept of the new or complex product alleged to have caused injury to the plaintiff in order to ascertain whether its manufacture involved an unreasonable risk of injury. Likewise, in a medical malpractice or other torts claim a judge may need to acquire for the first time a concept of the rare, newly discovered or otherwise unfamiliar illness or disability suffered by the plaintiff in order to determine whether its occurrence has been caused by the actions of the defendant.

In every situation in which a judge is required to reason about some phenomenon – an illness, a pharmaceutical, a technological device – say, to evaluate its comprehension by a legal definition or other standard or to infer as a matter of fact from its nature or structure to its causes or effects, the

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Chapter 7.

judge must possess a concept of that phenomenon. She must have an idea of the thing. This is a necessary condition of reasoning about things. We reason with concepts. Where the phenomenon in question has not previously been encountered by the judge (whether directly through sensory experience or indirectly through the interpretation of texts or the testimony of others) and where, as a result, the judge does not possess a concept of the phenomenon at the commencement of the hearing in which it becomes an issue, the judge must *acquire* such a concept over the course of the hearing if she is to adequately perform her adjudicative role. For this to happen over the course of a hearing, the hearing process – its norms, its participants, its physical architecture, even – must realise or enable conditions conducive to such acquisition. It must provide an environment which facilitates this mode of judicial reasoning – the largely tacit, micro-reasoning of concept acquisition which occasionally informs the often more conscious macro-reasoning of deciding a case. Edmond and I both agree that the conditions under which judges think and act over the course of a hearing are not always as conducive to concept acquisition as they could or should be. By virtue of the kind of agent judges typically are and by virtue of the rules and other norms they are subject to and the physical environment they practice within over the course of a hearing, judges may be constrained in effectively acquiring the concepts they need to acquire in adjudicating matters before them. As a result, the quality of the justice they purport to provide those who come before them may be compromised.

In our respective work, both Edmond and I have sought to understand the nature of and reasons for this epistemic failure on the part of the legal system and identify those loci within the legal system where the risk of such failure is most acute. In my book I seek to provide a theoretical account of the nature of judicial concept acquisition, in general – to describe the cognitive and practical process by which new concepts are acquired by judges, to identify those aspects of the legal system which bear on the success or failure of that process, and to provide a framework for thinking about the reform of the legal system so as to better facilitate this important mode of judicial reasoning (subject, of course, to the demands of the other ends and values a legal system is also designed to serve). Where Edmond and I differ, though, it would appear, is in our sense of what the interpretive limits of a legal system such as ours might be – specifically, how much interpretive reform a legal system such as ours might be capable of. This is the second major issue in Edmond's paper – an issue also raised to some extent by Davies and Glaskin.

In my book, I am concerned with the possibility of judicial understanding *as a philosophical matter*. In addressing the once popular claim of a radical conceptual incommensurability existing within the law, I set out to explore just what degree of difference and interpretive incapacity

is necessitated or rendered possible in a legal system, given the truth of a philosophically naturalistic and scientifically informed theory of things. I am interested there in issues of theoretical possibility and necessity. As I have mentioned, what I conclude is that though a significant degree of conceptual difference between a judge and a culturally different agent or scientific expert is possible, it is not necessitated on this theory of things. The degree of difference which obtains in relation to a given judge and a given set of alien concepts at a given point in time depends, for the most part, on certain contingent facts to do with the judge's prior conceptual development.[34] Likewise, it is possible (but again, it is not necessarily the case) that a judge is not able to acquire an alien concept or set of concepts (cross-cultural or scientific) over the course of a legal hearing. Whether she can or not depends upon two contingent factors – the concepts already possessed by the judge at the commencement of the hearing and, what I term in the book, the epistemic conditions obtaining over the course of the hearing – things such as the sensory and cognitive capacities of the judge, the availability of evidence, rules of evidence, and so on.

Again, a local or widespread failure of judicial understanding is, on this account, entirely possible within the legal sphere. But, equally, a *successful* exercise in judicial understanding is possible, for any and all judges and for any and all culturally different actions. Everything here depends upon the content of the judge's conceptual scheme at the commencement of the hearing and upon the epistemic conditions which obtain for that judge (or for judges, generally) over the course of the hearing. In the book I argue that *theoretically, at least*, the epistemic conditions which obtain at a legal hearing may be conducive to a practically adequate degree of cross-cultural or scientific understanding. It is theoretically possible that the interpretive architecture of a given hearing or of all hearings (of the legal system, at large) may facilitate judicial understanding. But it is not necessarily the case that it will. A range of options are available within the limits of theoretical possibility I sketch in the book. Whether any of them are realised in any actual legal system is a contingent matter dependent upon the will and the resources of those responsible for the quality of judicial practice and legal institutional design within that system.

In his paper, Edmond discusses a number of reasons why, in fact, the kinds of interpretive reforms which he and I believe might be appropriate to a communicatively more effective legal system – whether in regard to the understanding of scientific phenomena or indigenous culture – are *not* likely to be realised in the Australian legal system. Edmond – rightly, I think – detects in my book an attitude towards the likelihood of the interpretive

[34] The nature and relevance of which I describe in Chapter 6 of the book.

reform of Australian law that is more sanguine than his. Though he never explicitly claims these impediments to understanding are necessitated in any strong sense, he clearly appears to believe them to be much more deeply rooted and less likely to be altered than I do. Which of us is more justified in our position here is a matter of evidence and argument and not something I address in any depth in the book. These are primarily questions of actual world likelihoods rather than theoretical possibilities.

Finally, one of the factors that Edmonds identifies in his paper as affecting a legal system's potential for interpretive reform is the political ideology and associated power relations that inform judicial practice and the legal system at large. In raising this issue, his comments intersect with comments made by both Davies and Glaskin concerning what they construe as a failure on my part to seriously address the role of ideology and political power within the legal system – particularly, in relation to the claims of indigenous and other marginalised peoples. I don't believe that such a construal is justified, however. Though I don't discuss the operation of ideology and power in the law in any great detail in the book, this should not be taken as evidence that these things are not taken seriously there as relevant to the quality of cross-cultural understanding and recognition. That ideological factors may play out – or actually do play out – in the practice and design of any given legal system is entirely provided for in my account. I make it very clear in Chapters 6 and 7, for example, that the worldview, as well as conceptual scheme, which a judge brings to the hearing is a key factor in the success of her interpretive endeavours. Such a worldview will necessarily be ideologically influenced – though, again, I admit I do not explore this to any significant degree. Likewise, a number of the categories of epistemic conditions affecting judicial understanding at trial implicate the operation of a judicial ideology.[35]

Recall that the purpose of the book is to explore what is theoretically possible as far as interpretive reform is concerned – not what is likely or politically feasible. The book seeks to clear away certain philosophical obstacles – including exaggerated incommensurabilist views about law – in order to clarify the potential for law reform and, by virtue of that, contribute to a rationale for pursuing reform. In this sense, it is fundamentally informed by the same 'politics of recognition' that motivates the views of all three commentators. It is true that I do not describe the actual ideological constraints which contingently operate on law's communicative enterprise in any specific jurisdiction. But as I clearly say in the book, such is beyond my brief in writing it. I expressly leave the detailed consideration of the precise obstacles and constraints actually at work in any given legal system

[35] These include the processes of judicial selection and education which are described in some detail in Chapter 7.

– whether ideological or otherwise – to others, as well as to future inquiries on my part. Of course, all the interpretive reform in the world won't assist the legitimate claims of marginalised people if the very aims and objectives – the ideological orientation, if you like – of the legal system itself are ranged against them. Though understanding is a necessary condition of an appropriate mode of legal recognition of claimants, I state clearly in the book that it is not a *sufficient* condition. But necessary it is and well worth pursuing, both theoretically and practically. I am grateful to the participants in this symposium for providing me with insights which will assist me in my ongoing pursuit.

Book Reviews

Theorising the Global Legal Order

Andrew Halpin & Volker Roeben (eds)

Hart Publishing, 2009

The essays in this collection[1] began as contributions to a conference that, according to the editors, sought 'to bring together a number of disparate and often inchoate concerns about theorising law in the global context'.[2] The outcome is a rather disjointed, yet occasionally stimulating, volume, on which Andrew Halpin and Volker Roeben, in their closing remarks,[3] strive to impose coherence by searching for a peculiarly *legal* theory that is 'capable of supporting further fruitful work in this intellectually challenging and normatively significant arena.'[4] They look to Neil MacCormick's 'institutional' account of law for guidance.[5] Unfortunately, their intriguing turn to his theory serves to emphasise the relative absence of such enquiry from the rest of the book.

In the first of three 'scoping' papers on the general significance of globalisation for law, H. Patrick Glenn identifies a contemporary shift, of which he approves, to more cosmopolitan legal orders, whose lawyers he depicts as opposed to closure of several kinds.[6] He claims that each of these practitioners is not only open to alternative laws and legal beliefs, but also to the past and the future of his or her own order. This loyalty to a particular system may seem anti-cosmopolitan, but Glenn supposes that it is 'inherent

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1 Andrew Halpin & Volker Roeben (eds), *Theorising the Global Legal Order* (2009).

2 Halpin & Roeben, 'Introduction', above n 1, 2.

3 Halpin & Roeben, 'Concluding Reflections', above n 1.

4 Halpin & Roeben, above n 2, 23.

5 See Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007).

6 H Patrick Glenn, 'Cosmopolitan Legal Orders', above n 1.

in [law's] ordering function.'[7] He concludes his sketch by noting the normative character, the multivalent logic and the ambivalence towards theory of cosmopolitan legal thought.

William Twining is the author of the second 'scoping' paper.[8] Although his summary of legal-academic assumptions that globalisation challenges may be overly familiar to readers of his other work,[9] his caution regarding 'global' talk is still welcome, as is his suspicion of grand theories, presumably including those 'liberal institutionalism' and 'social constructivism' on which Stefan Oeter, with scant (other than biographical) explanation, relies, in presenting international law as fragmented, problematic, but nevertheless vital.[10]

The remaining papers examine 'particular concerns'. They begin with Ko Hasegawa's exploration of the transfer of legal ideas from one system to another, with specific reference to the introduction of the notion of rights in modern Japan.[11] Hasegawa elaborates on the 'of course debatable' view that 'the incorporation of a foreign legal system [into domestic law] generally begins in the adaptive efforts of intellectual elites over basic legal ideas, and then these ideas and values pervade systematically first into the central part of social institutions and later toward the rest of society'.[12] He develops this hypothesis by suggesting a method of interpretation through which thinkers produce 'a new horizon of language for society.'[13] His optimism regarding the influence of these scholars contrasts, as the editors observe,[14] with Catherine Dupré's disquiet at the increasing reliance of judges on foreign law.[15] Given the 'externality' and 'plurality' of the sources of this material, Dupré classifies it as 'postmodern natural law' and emphasises the need for critical scrutiny of its application.[16] She contends not merely that its use should be transparent, systematic and culturally appropriate, but also that judges ought to discriminate between different models of foreign law with

7 Ibid 28.

8 William Twining, 'Implications of "Globalisation" for Law as a Discipline", above n 1.

9 See William Twining, *Globalisation and Legal Theory* (2000) and *General Jurisprudence: Understanding Law from a Global Perspective* (2009).

10 Stefan Oeter, 'Theorising the Global Legal Order – An Institutionalist Perspective', above n 1.

11 Ko Hasegawa, 'Incorporating Foreign Legal Ideas through Translation', above n 1.

12 Ibid 85.

13 Ibid 94.

14 Halpin & Roeben, above n 2, 15.

15 Catherine Dupré, 'Globalisation and Judicial Reasoning: Building Blocks for a Method of Interpretation', above n 1.

16 Ibid 116-117.

reference to norms that depend on the (curiously *modern*) ideals of 'justice, democracy and fairness'.[17]

In their chapter on the regulation of international trade, Ari Afilalo and Dennis Patterson argue that the current policy of comparative advantage supposes the persistence of the liberal-democratic nation-states whose strategic goals led to the agreement at Bretton Woods.[18] Because this accord generated a global marketplace and, with it, new state-interests, Afilalo and Patterson claim that another approach is now required. Here is their suggestion:

> We identify the new international norm that we believe is needed as the 'global enablement of economic opportunity,' and we believe that a new institution dedicated to unleashing and giving concrete expression to this norm is needed. We call this organisation the 'Trade Council,' and we believe that its membership should include representatives from the principal trading nations as well as from industry and other private interests with a stake in any of the given projects that the Trade Council would undertake. As an international organisation, the Trade Council will step into the regulatory vacuum of the postmodern era and implement programs intended to spread economic opportunity to the vulnerable middle classes of the new epoch, regulating on an *ad hoc* basis in a system based on incentives rather than top-down legislation.[19]

Whatever the substantive appeal of this recommendation, the connection between Afilalo and Patterson's essay and the editors' theoretical project is not evident. The relevance of Oxana Golynker's chapter is even more difficult to identify.[20] If her discussion of migration within the European Union has jurisprudential implications, they are well-hidden from the reader (or, at least, from this one).

Déirdre Dwyer's paper appears somewhat more germane.[21] Her topic is 'the theoretical basis on which a supranational legal entity might proceed with harmonising aspects of adjective law vertically and horizontally within

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17 Ibid 122.

18 Ari Afilalo & Dennis Patterson, 'Statecraft, trade and Strategy: Toward a New Global Order', above n 1.

19 Ibid 137.

20 Oxana Golynker, 'European Union as a Single Working-Living Space: EU Law and New Forms of Intra-Community Migration', above n 1.

21 Déirdre Dwyer, 'The Domestic Enforcement of Supranational Rules: The Role of Evidence in EC Competition Law', above n 1.

its boundaries, in order to promote the enforcement of substantive law.'[22] She looks closely at a proposal by the European Commission to standardise the rules of evidence for Competition Law in the European Community and bemoans its lack of principle. Dwyer then introduces a 'jurisdiction-agnostic' model of three 'paradigms' of civil evidence that furnishes criteria for the assessment of potential reforms. She doubts that harmonisation can succeed without reference to this model, whose paradigms –'genealogical positivism', 'rationalism' and 'natural law' – raise 'fundamental philosophical questions about what evidence law is actually *for*'.[23]

Whether the United Nations' Declaration on the Rights of Indigenous Peoples indicates the development of a global legal order for indigenous peoples is the question to which Stephen Allen gives a negative response in his chapter.[24] He starts from the premise, which he assumes that Martti Koskenniemi has established, that international law is formal as well as normative and deduces that the principles of the Declaration 'can only attract legal validity when incorporated into national law'.[25] He thus insists on acknowledgement of 'the practical limitations of recourse to positive international law' and maintains that '[t]he best way to ensure that normative developments in the international sphere are observed at the national level is by incorporating them into municipal law via domestic legislation'.[26]

John Gillespie is also concerned with local responses to international norms.[27] His paper examines the East Asian reception of 'global scripts', which include laws, procedures and other communications. Following a brief survey of analytical approaches to legal globalisation, Gillespie draws on regulatory theory to argue that the domestication of these scripts is contingent on the interaction of local actors, such as states, businesses and citizens, in a 'regulatory space' that comprises constitutional, non-state and deliberative mechanisms. He accentuates the role of 'epistemic communities' in this process, which may generate different results in different countries. For him, 'legal homogenisation and universalism are only some of the possible outcomes of legal globalisation.'[28]

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22 Ibid 167.

23 Ibid 180.

24 Stephen Allen, 'The UN Declaration on the Rights of Indigenous Peoples: Towards a Global Legal Order on Indigenous Rights?', above n 1.

25 Ibid 196.

26 Ibid 206.

27 John Gillespie, 'Developing a Framework for Understanding the Localisation of Global Scripts in East Asia', above n 1.

28 Ibid 209.

In his contribution, Nicholas Dorn focuses on international administrative governance in the Western Balkans.[29] He does so after identifying 'several parallels between the debates on state pluralism and cosmopolitanism, debates on security governance and criminological debates on "uncertainty" and "risk"'.[30] Even if these connections are less obvious than he supposes, his interest in theory is palpable, which cannot be said of Christian Walter, whose review of judicial reliance on comparative materials is the final paper in this diverse collection.[31]

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29 Nicholas Dorn, 'Governance Through Corruption: Cosmopolitan Complicity', above n 1.

30 Ibid 238.

31 Christian Walter, 'Decentralised Constitutionalism in National and International Courts: Reflections on Comparative Law as an Approach to Public Law', above n 1.

Basic equality and discrimination: reconciling theory and law
Nicholas M Smith

Ashgate, 2011

The idea of Equality, Nicholas Smith observes in his insightful new book, Basic Equality and Discrimination Reconciling Theory and Law, is both concrete and ambiguous at the same time. It is concrete in that the elemental outlines of what basic equality is can be recognised and understood, in spite of the fact that in particular circumstances it may be difficult to determine whether a chosen legal or political action respects basic equality. It is ambiguous because it is used to justify and often substantiate the moral, substantive and instrumental aspects of vastly different divergent philosophical and jurisprudential perspectives. At the same time, it is used as rhetorical lubricate for all types of political programs or legal decisions. This rhetoric finds proponents of gay marriage, affirmative action for ethnic Malays, aboriginal autonomy in Bolivia, women advocating for the equal rather than the 'complementary' nature of the sexes advocated by religious conservatives in the Tunisian constitution, the expiration of a law that allowed thousands of ultra-Orthodox Jews to be exempted from military duty, and support for traditional family values, all using the language of equality and equal rights for vastly different political and social programs.

For Smith, such muddle obfuscates the underlying moral dimension of what he calls 'Basic equality.' This equality is a 'deep principle', a universal moral principle which transcends the idea that only classes of individuals need to be treated alike or that some version of substantive equality is the appropriate measure of equality. Rather, it requires policymakers to take into account the interests of all affected parties, including the whole good of the parties whose interests are taken into account, as a moral imperative when making law. Basic equality is an independent value against which policy and law may be measured as well as a structural value because it 'has something to say in the construction and application of all our values'[1] such as liberty and the fundamental freedoms, which are prized in the liberal state. In order to promote Basic equality, law may be enacted to restrain private practices by making these practices conform to its equality provisions in certain areas of communal life or 'aim at achieving a particular equality with provisions that may apply to both government and private parties.'[2]

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1 Nicholas M Smith, *Basic equality and discrimination: reconciling theory and law* (2011) 49.

2 Ibid 109.

Armed with this moral concept of Basic equality, Smith carefully analyses the justifications and affects in the most philosophically and jurisprudentially problematic areas of public policy and law: where various groups seek exemptions from a general rule because of specific cultural beliefs or practices, the determination of what constitutes 'discrimination' or inequality under various Bill of Rights, and affirmative action. He grounds his discussion with various Bill of Rights and legal decisions in a way which illustrates the problems faced by courts and policy makers when confronting these issues.

For Smith, the justification and concern of Basic equality is the individual as a moral being. Our nature as individual moral beings is a large part of how and why we consider ourselves each other's equals despite our differences. It is the individual then, who has a moral entitlement to equal consideration of her interests by policy-makers and the law. It the individual who suffers discrimination, due to for example race or sex, an unfair moral assessment of her actual behaviour or beliefs, or membership in a particular racial, ethnic or religious group. As such, the remedies which may be used to rectify discrimination and inequality must be scrutinised for the inequalities they may create for individuals who may bear a disproportionate share of the cost of remedying the inequality. From this perspective, Smith insists that both the class of individuals who suffer an alleged inequality and the purportedly discriminatory act be rigorously defined and analysed to avoid excluding other individuals or creating additional inequalities in the remedy for those individuals. This definitional rigor is evident in his discussion of those situations where discrimination is alleged against a group or where a group presses claims for exemptions to general rules (commonly things such as religious holidays, Sunday closing laws, conscientious objector exemptions to military service) because of their cultural or religious distinctiveness. These claims have increased in recent years with the official embrace of multiculturalism by many governments as well as the idea each culture is sui generis and as such immune from moral assessment of its particular practices. Smith quite rightly argues that cultural differences can and should be accommodated 'but we should still think carefully before accepting proposals for different treatment on these grounds because they too have been grounds on which people are typically discriminated against.'[3] Moreover, in these cases policymakers should consider whether the exemption should only apply to the particular group but also to other individuals who may be burdened by a rule for other equally valid reasons based on alternative beliefs and individual conscious.

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3 Ibid 100.

Similarly, Smith is leery of far reaching claims finding of discrimination or anti-discriminatory remedies which trench upon an individual's moral right to Basic equality. This is not so much because the principle itself is abstract and difficult to apply. Rather the determination of what constitutes 'inequality' or 'discrimination' in an admittedly unequal world of unequal individuals and groups where other concomitant or antithetical values are affected is less readily apparent than political rhetoric, jurisprudential theorising and legal rules generally acknowledge. Moreover, remedies to such inequalities may impermissibly trench upon the fundamental precept of 'basic equality' even where it is apparent that individuals and groups have be subject to discrimination. For example, while he rightly dispenses with justifications for affirmative action programs based on past discrimination, such as that suffered by African Americans in the United States, he finds that such programs may be morally justified and factually substantiated by the present day de facto segregation and structural difficulties of black Americans. Nevertheless, policymakers embarking on an affirmative action program need to consider that while the program may provide general social benefits and long term racial justice due to improved social integration, 'they do sacrifice the more immediate interests of some' to achieve those results. Thus if the program is effective, it is justified and moral. If not, Smith argues attempt some other approach which burdens furthers the Basic equality of individuals, without resorting to intellectual legerdemain to support a particular political or ideological program.

The pragmatic, empirical and balanced nature of Smith's thought is evident throughout the book. This is evident in his discussion regarding the relationship between equality and liberty:

> …[L]iberty and equality must be taken seriously, together, at the same time. We are in danger of losing sight of something important, not when we fail to take seriously proposals which promote a certain equality or liberty and which are justified without reference to countervailing concerns. We are, rather, at peril when we pursue liberty without thought of equality, or some procrustean equalizing project without regard for the autonomy of persons. (p70)

He does not seek to provide a general remedy to these difficult issues but his justifications for equality and analysis of various programs to address discrimination and inequality would be useful to any policy-maker and legal theorist. Moreover, his analysis and conclusions in this book provide basic and fundamental insights which are often lost in the spirited jurisprudential and political debates surrounding the issue of equality. First, that Basic

equality and the objections to inequality have a humanist moral dimension. Second, Law and legal decision-making in this area is bound up in this moral process. Legal puzzles in Bill of Rights and human rights law which he cites from Canada, New Zealand, South Africa and the United States are jurisprudential and moral puzzles which reflect the difficulty of translating and justifying abstract concepts into concrete rules and decisions. And finally, that when crafting legislation or deciding legal disputes, decision makers should consider the costs and burdens which a proposed action will have on each individual's Basic equality as well as the benefits.

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A Legal Theory for Autonomous Artificial Agents

Samir Chopra and Laurence F White

(University of Michigan Press, 2011)

The blurb on the back cover of this book claims that it is about artificial intelligence and the law. This fails to do justice to it. This is a book about artificial *agency* and the law, not artificial *intelligence* and the law. The distinction is important. As the authors say, 'we deprecate the terms *intelligent agent* or *artificial intelligence* as we wish to emphasize the embedded, social, real-world nature of artificial agents, rather than merely their disembodied intelligence'.[1] Although this is *in part* a work of speculative legal theory about how the law can and should respond to anticipated technological developments, it is also about the here and now. It makes the case, very persuasively in my opinion, that (at least partially) autonomous artificial agents are already with us, and that the law needs to catch up with this fact. What is more, it makes a wide variety of always interesting, and often compelling, suggestions about how that might happen, at the core of which is the argument of Chapter Two that artificial agents should (at least in certain circumstances) be treated as legal agents.

Although, this is a book about the law, profound philosophical issues are never far away. Chapter Three addresses questions about knowledge and artificial agents. In particular, it addresses two questions: 'In what circumstances should we attribute knowledge to artificial agents?', and 'In what circumstances should we attribute the knowledge of an artificial agent to its principal (that is the person, human or corporate, on behalf of whom the artificial agent is acting)?'. The authors offer an analysis of knowledge for artificial agents which draws on ancient philosophical debates about the nature of knowledge, as well as contemporary debates about the practice of law. This requires 'a delicate balancing act in trying to devise an analysis of knowledge for artificial agents that meshes with intuitions, while not introducing undue complications to the law'.[2]

Not content with a purely theoretical analysis of knowledge for artificial agents, Chopra and White go on to apply their analysis to a variety of practical legal issues. One of the most interesting of these applications is their discussion of whether email filters can literally be said to read email,

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1 Samir Chopra & Laurence F White, *A Legal Theory for Autonomous Artificial Agents* (2011) 28.

2 Ibid 75.

and whether companies like Google can violate their customer's privacy by acquiring and using information when no humans have access to that information.

Chapter Four is about Tort Law. Here the authors draw on philosophical debates about the nature of causation, going back to Hume, to discuss the circumstances in which artificial agents should be held legally responsible for harms, and the circumstances in which holding them responsible would 'break the chain of causation' so as to alleviate responsibility from the designer, operator, or owner of the artificial agent.

The fifth and final chapter is about whether, and in what circumstances, the law should treat artificial agents as people. It draws on longstanding philosophical debates about the distinction (or alleged distinction) between the concept of *a person* and that of a *human being*. It also draws on the fascinating history of the evolution of the legal concept of *a person* and the distinction between dependent and independent personhood. The authors make it clear that the personhood of artificial agents need not be an all or nothing matter. Artificial agents may be treated (as corporations and a host of other entities have been treated) as legal persons for some purposes, but not for others. This chapter is important, not so much for the conclusions it reaches, as for the questions it raises. The authors do not offer (or attempt to offer) any precise criteria artificial agents would have to meet in order to be treated as legal persons, nonetheless they do make it clear that there can be no good *a priori* reason to rule out the possibility or desirability of ever treating artificial agents as people.

Although it's both an academic book and a law book, *A Legal Theory for Artificial Autonomous Agents* is almost entirely free of both academese and legalese. It does, of course, contain some technical vocabulary, and even a bit of Latin, but these things are always explained clearly in plain English. What's more, the writing style is lucid and engaging. The only serious flaws are flaws of omission. For example, there is no chapter on military law, despite the growing importance of artificial agents (such as drones) to military strategy. There is also no chapter on criminal law, although the discussion of responsibility in tort law in Chapter Three has some clear implications for our understanding of criminal responsibility. Such omissions are inevitable in any work, such as this, which opens up a genuinely new field of research, and I look forward to seeing them remedied in future editions.

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Contributions

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Use (sic) for errors in a quotation.

Footnotes

Within the text, use automatic footnotes with the footnote number placed after the punctuation.[1] Reference styles are as follows:

Book:

1 Andrei Marmor, *Interpretation and Legal Theory* (1992) 171.

Edited collection:

2 Judith Shklar, 'The Liberalism of Fear' in Nancy L Rosenblum (ed), *Liberalism and the Moral Life* (1984) 5.

Article:

3 Paul F Campos, 'A Text is Just a Text' (1996) 19 *Harvard Journal of Law and Public Policy* 327.

4 Ibid 328—same as immediately preceding footnote but from a different page.

5 Ibid—reference exactly the same place as the immediately-preceding footnote.

6 author's name, above n note number—not immediately preceding footnote, eg: Campos, above n 3, 330.

Case:

7 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Lonrho v Fayed* (No 5) [1994] 1 All ER 188, 190.

Statute:

8 *Health Insurance Act 1973* (Cth), s 61(2)

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