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CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

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EDITORIAL

Since our first call for papers, nearly five years ago, *The Journal Jurisprudence* has sought out and cultivated alternative formats for the expression of jurisprudential discourses. We wrote, “The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.”

After five years, I am pleased to include a piece by the essayist and lawyer Stephen Kruger who has skilfully attempted to answer our challenge. In his ‘A Packet of Purported Legal Humor’, Mr Kruger invites us into an alternate legal world, which parodies many of the tribulations of modernity. I welcome his contribution and recognise that he is a brave author who dares us to reconceptualise legal writing.

Additionally, I welcome Dr Xanthe Mallet of the University of New England, who has the honour of being the first scholar to review a work of fiction in these pages.

Richard Hanania, a law student at the University of Chicago, who has proven himself to be a young scholar of tremendous potential, reviews a more serious work on the rule of law in Afganistan. Mr Hanania previously wrote for the Journal in Vol. 13 on the rule of law and humanitarian interventions, an article that was received enthusiastically by our readership.

Dr Joaquín González Ibáñez of Alfonso X University, Madrid, is a great friend of the Journal, who was particularly helpful in providing translations for volume 15, the special edition on international law. He is an authority in the Spanish-speaking world, and beyond, and it is a great honour for us to include his landmark work on the international rule of law in this edition.

The work of Jurgen Habermas has been an important point of debate in the Journal. Professor Lutz-Christian Wolff of the Chinese University of Hong Kong, Thomas Kupka of the University of Bremen and Donna M. Lyons of New York University have all discussed Habermas’ work in these pages. I welcome the contribution of Dr Claudio Bozzi in this current edition and his research adds new depth to the growing intellectual history of Habermas in legal philosophy.

Finally, Mr Alexander Green of University College London writes on a topic dear to my heart: conceptions of ownership from Roman law to equity and to modern common law. Much of my own research has been in this area and Mr Green's article adds significantly to the field. Many scholars have attempted to answer difficult questions in this area of law, particularly related to the definition of property. He inspires new ways of thinking and I am certain that property scholars will receive this article with great interest.

Dr Aron Ping D'Souza
Editor
Melbourne, Australia

**ALL TAKING AND NO GIVING: THE CONCEPTUAL TREND IN
TRANSFERS OF OWNERSHIP**

ALEXANDER GREEN*

We transfer property all the time. Every time we buy a chocolate bar or give birthday presents we engage in the legal process of transferring property. But what does transferring property entail? Most theories of ownership look at transfer as an act typically perpetrated by the original owner. In this article, that assumption is attacked and it is suggested that the Law of Property in fact only ever allows for things to be taken rather than given. The conceptual implications of this mechanic are then explored and it is concluded that they support a conception of ownership that is essentially self-serving.

1. Introduction:

This essay identifies and explores an interesting feature of the transfer of ownership that is common to all legal mechanisms and social institutions. Namely that, whenever ownership is transferred, it is the transferee that has the power or right to transfer and not the transferor.

Before examining this however, I will briefly discuss the concept of ownership. This being done, I will consider several instances where ownership is transferred and illustrate that in every case it is the transferee that takes and not the transferor that gives. I will start with situations in which it is more or less clear that ownership is taken by the transferee. These are: restitution for an unjust enrichment, the rule in *Saunders v Vautier*, hire purchase agreements and through the use of a contractual ‘retention of title’ clause.¹ Moving on from these more simple examples, I will then look at the more conceptually difficult cases of gifting and ‘simple swap’ contracts. Having done this I will show why it is important to keep the nature of ownership in mind when analysing complex instances of transfer. Finally, I will make some observations about what this discussion of transfer could mean for our understanding of property more generally. Specifically, I will suggest that if the act of taking is conceptually significant, then property

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¹ [1841] EWHC Ch J82

should be seen as a basically self-regarding institution, rather than merely a vehicle for resource distribution or sharing.

At this stage it also pays to observe that this essay is concerned with ownership transfer abstracted from systems of registration. The registration of property complicates the issue of transfer, as it can sometimes be used, in addition to its normal regulatory role, as the very means of transferring property. An example of this is the case of shares, where property passes by the act of registration alone. I do not concern myself with such transfers here and restrict my discussion to the more familiar examples of the transfer of chattels and land, for the latter of which I take registration to ‘sit on top’ of the normal legal mechanisms of transfer.

2. Ownership:

Before embarking on the issue of transfer some consideration needs to be given to what ownership is. After all, we need to know what we are transferring before we can discuss the method of transfer.

Ownership is one particular type or collection of property rights that has a certain distinct substance.² So what distinguishes property rights from other legal rights? Robert Stevens, whilst suggesting that there is no exhaustive definition of property available, gives us four common characteristics of a property right.³ The first of these is:

“That the right is in relation to a subject matter that can be transferred independently of the right itself but in relation to which the right can persist after transfer.”⁴

So if you steal my car I no longer have it in my possession but I still hold the right to it, in this case the ownership of it. This tells us something important about ownership. It is a relation, in respect of some ‘thing’ or *res*, between an owner and a certain class of other. It can also be meaningfully described as a relation between the owner and the *res* itself. Whichever one

² The debate still rages in private law between whether property rights can be reduced to a number of *in personam* relations. See for example: P Eleftheriadis, *Legal Rights* (Oxford, Oxford University Press, 2008), 124-125, 138-142; J Penner, ‘The “Bundle of Rights” Picture of Property’ 43 *UCLA Law Review* 711 (1996) 711-820 For the purposes of this paper it is largely irrelevant, as whether one transfers a ‘bundle’ or ‘cluster’ or rights, or one right alone, ownership itself is still transferred.

³ R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007), 5-6

⁴ *Ibid.* 5

prefers, it is clear that the *res* is of central importance. Competing claims of ownership all settle on whether A or B has a better claim to the *res*. The common law does this through a mechanism referred to as ‘the relativity of title’.⁵ When you steal my car you gain a claim to the ownership of it good against the rest of the world but not against me, who preceded you in time and was wrongfully divested of possession by you. Your claim is relatively good against Bob’s, a third party to our little scenario who wants to say that the car is his, but relatively bad against mine.

In litigation we are seldom concerned with the definitive legal owner of a *res* and usually focus on establishing the stronger title claim. As such, the metaphor of relativity serves the common law well. However, this is not sufficient for an investigation into the theory of Property Law. The common law procedure of appealing to relative title claims clearly does allow for a person who has a claim superior to all others, an ‘owner’ in the true sense of the word, and should not confuse us into thinking that as a matter of law, ownership does not exist.

The second characteristic of property rights identified by Stevens is that, generally, such rights can be transferred. This is obviously of central importance to us, but since it is the main subject matter of this essay, we can move on for the time being.

Thirdly, Stevens tells us that property rights are ‘special rights not everyone else has’.⁶ For example, Professor Steven’s right to his Rolls Royce is a right that only he possesses because only one Rolls Royce is Professor Steven’s Rolls Royce. This seems to be important for us too. The uniqueness of the *res* in question clearly gives rise to a situation in which transfer of specific rights, rather than the creation of rights of equivalent value, is very important. Consider some comparative rights in other branches of law. An *in personam* right to restitutionary compensation as a result of an unjust enrichment targets an equivalent economic value to be detracted from the abstract wealth of the enrichee, not the specific property transferred.⁷ This is because what generally matters to the law of unjust enrichment is the reversal of that enrichment, not the transfer of a specific *res*.⁸ Similarly, in

⁵ B McFarlane, *The Structure of Property Law* (Hart Publishing, 2008), 146

⁶ R Stevens, *Torts and Rights*, 6

⁷ P Birks, *Unjust Enrichment* (Oxford, Oxford University Press, 2005), 5-9, 69-70

⁸ That is not to say the proprietary remedies are not available in a case of unjust enrichment. For an account I find particularly convincing, see K Turek ‘Proprietary (2012) J. JURIS 497

the case of unsecured creditors during insolvency proceedings, it is not a claim of ownership (whether in equity or law) that they are asserting, but merely the debt due to them.

Steven's fourth characteristic of property rights could be said to be somewhat more contentious. It is that property rights are good *erga omnes* (against the rest of the world), which is commonly conflated with the latin phrase *in rem*.⁹ Professor Stevens' right to his Rolls Royce is certainly *in rem*.

It is debateable whether for present purposes there is any useful conceptual distinction between *erga omnes* and *in rem*. Both types of right give rise to duties on the part of the rest of the world, both of which are capable of limitation in certain circumstances. My *in rem* right to stolen property is good against all save the original owner and my *erga omnes* right not to be punched in the face is good against everyone save the individual acting with lawful excuse. To point out that rights *in rem* are distinct from rights *erga omnes* because they make reference to a *res* rather than merely requirements of action or inaction does very little to form such a distinction. In the first place, rights *in rem* all deal with requirements of action and inaction and so are formally identical, even though they are substantively different because they do so in respect of a thing. In the second place it is tautologous when analysing ownership to distinguish *in rem* from *erga omnes* on the basis that the former deals with a *res*. By that logic any right *erga omnes* dealing with a *res* is also *in rem*. For present purposes therefore, these two concepts, whilst acknowledged to be dealing with different substantive groups of rights, shall be assumed logically equivalent.

The fact that ownership is a right *erga omnes* cannot be the distinguishing feature of ownership, because plenty of non-proprietary rights *erga omnes* exist. For example, I have a right *erga omnes* not to be punched on the nose for no good reason.

James Penner argues that rights *in rem* can be seen as normatively grounded in a general duty to not interfere with the property of others.¹⁰ Whether duty is logically prior to right or not, the notion that no one has the liberty to

Remedies for Unjust Enrichment: An Impossibility?, *Cambridge Student Law Review* (2009), 158-166

⁹ R Stevens, *Torts and Rights*, 5

¹⁰ J Penner, *The Idea of Property in Law*, 26

interfere with another's property is common sense.¹¹ Where this gets counterintuitive is the case of a chose in action, like a right in a bank account. If Professor Stevens sells his Rolls Royce and gets £50,000 paid into his bank account, by his own criterion he has swapped his right *in rem* against the car for a right *in personam* against the bank. That would mean he has no property any more. The layperson might find this a little hard to swallow. Penner argues that there might be an alternative means of looking at this situation. If we dispense with the idea that property rights have to be rights *in rem* and instead hold them to be rights that make one a beneficiary of a duty *in rem* to not interfere with the *res*, then Professor Stevens is still the owner of his bank credit. This is because he indirectly benefits from the general duty owed to the bank.¹²

There is of course a problem. If the bank goes insolvent Professor Stevens becomes an unsecured creditor. It is clear the law of insolvency doesn't regard this right as a property right. We are left with an odd situation in which we can either accept that Professor Stevens is not the owner of the money in his bank account, which might seem counterintuitive, or we have to stamp our feet at the law of insolvency until someone changes it.

In considering this puzzle and what it may mean for the concept of ownership, let us go back to our two examples of unjust enrichment and unsecured creditors. Just like these right holders, what a person with bank credit has is a certain amount of money owed to them. They do not already 'own' the money in question. Of course, this won't solve the layperson's disquiet. For if Professor Stevens were to sell his car for cash and then 'pay in' that cash to his bank, the common sense thought might be that he is merely moving his property from his wallet to his bank account. The fact that what he is actually doing is transferring his property to the bank with the consideration of receiving a promise to pay plus certain benefits seems a little steep, especially with the uniformly poor rate of interest in current accounts these days.

¹¹ Personally, I do not subscribe to Penner's inverse-Razian view that in this circumstance the duty grounds the right; however it is useful to consider this perspective as an *ethical*, as opposed to *moral*, proposition, simply because people tend to think that way. For my own view on the logical structure of rights and their place within the larger framework of legal concepts, see A Green 'A Philosophical Taxonomy of European Human Rights Law', *European Human Rights Law Review* (2012), Issue 1, 47-56

¹² J Penner, *The Idea of Property in Law*, 129-132

The important thing seems to be that owned objects are unique (and therefore valuable to their owners) because they cannot be replaced in themselves. Their loss is only capable of being dealt with through compensation. Debts themselves, whether simply unsecured, in the form of a chose in action or money due as a result of an unjust enrichment, cannot claim such uniqueness because credit or currency is by definition generic rather than unique. Once the metaphysical uniqueness of the *res* has been identified as the value which morally grounds the provision of an *in rem* right, it can be seen that Stevens is correct to argue that property rights must be *erga omnes*. This is not however because the *erga omnes* nature of the right has some deep conceptual importance but rather that this feature stems from another factor that possesses such importance: metaphysical uniqueness in the *res*.

That suffices as to the form of ownership, but what of ownerships' substance? This is important for the issue of transfer because the substance of a right will indicate how it should be treated.¹³ I take ownership, following Penner's definition, to be the legal state in which one has a right to exclusively determine the use or disposition of a *res*.¹⁴ Such a definition accords enough with common sense for us to accept it as the substance of ownership in a very general way. An important point to note is that several legal principles seem to sit very well with this notion. One good example is *nemo dat non quod habet* (no one can give what he does not have). If ownership exists to assert a owner's dominion over a *res* then it very obviously follows that no one else should be permitted to exercise dominion over that thing in his place. The substantive nature of straightforward ownership, as opposed to other and more complex forms of that right, is of central importance for the analysis that follows.¹⁵

3. Restitution, Trusts, Hire Purchase Agreements and Retention of Title Clauses:

Now we know what ownership is we can consider how it might be transferred. The first case I will consider is that of restitution for an unjust enrichment. If you give me thirty pounds under the misapprehension that you have a duty to do so then you have been unjustly enriched at my

¹³ See Section 5 below.

¹⁴ J Penner, *The Idea of Property in Law*, 68-75

¹⁵ For present purposes I take tenancy in common and joint ownership to be instances where the 'owner' is in fact two or more persons as a team and therefore fitting into the definition of ownership posited, albeit in a more complex way.

expense.¹⁶ In this situation you have a right against me that I reverse this enrichment. This allows you to claim ownership of an equivalent amount from my general resources. This classic example illustrates that restitution vests the ability to transfer in the transferee and not the transferor.

Let us turn now to the case of trusts. The rule in *Saunders v Vautier* operates so that when the beneficiaries of a trust are of legal age, equity allows them to claim the legal title of the trust property from the trustee, terminating the trust.¹⁷ Here we are indisputably dealing with taking by the transferee and not ‘giving’ by the transferor. Once more there is a power to take: the beneficiary can choose either to claim the trust property from the trustee or leave them with legal ownership.

Thirdly, let us consider the case of a contract with a retention of title clause. If we contract for the sale of a book and agree that ownership shall remain mine until two weeks after you have paid me the asking price, then I am duty bound to surrender the book after those conditions have been fulfilled. In such a situation you possess a right (not a power as in the two previous situations) to take the book from me. If I frustrate the exercise of that right it is your positive claim I am interfering with: I do not breach my duty by failing to take a positive step. Although this distinction may seem trite, it is reflected by the fact that if you sue for breach you will receive your expectation loss and be put in the position that you would have been were the contract correctly performed.¹⁸ In the case of specified goods, such as *my* copy of the book rather than *a* copy of the book, this guarantee of expectation is even clearer because instead of damages your right to the book is upheld.¹⁹ This once again shows that the taker of ownership is the one that positively affects transfer, rather than the party that is generally described as ‘handing it over’.

The inverse of this position is mortgage by legal charge, whereby a mortgagor retains ownership of the property until the debt is repaid.²⁰ In the event that the mortgagor defaults and a possession order is granted, ownership passes to the mortgagee as of right. Again however, it is clear

¹⁶ P Birks, *Unjust Enrichment* (Oxford University Press, 2005), 9

¹⁷ *Ibid.* nt. 1

¹⁸ *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676

¹⁹ In simple terms this scenario covers transactions that do not fall under section 20A of the Sale of Goods Act 1979. See also: *Tarling v Baxter* (1827) 6 B. & C. 360; *Gilmour v Supple* (1858) 11 Moore P.C. 551, 556; *Seath v Moore* (1886) 11 App. Cas. 350, 370

²⁰ Section 85, Law of Property Act 1925

that the logical operator here is the transferee, who gained the right in this instance as consideration for the money lent.

Finally, let us turn to hire purchase agreements. These are superficially similar to contracts with retention of title clauses but are distinct in that possession is vested in the transferee before ownership passes to them. Once again we are dealing with a right to claim ownership from the transferor. Similarly, this arises when the conditions of the contract have been fulfilled. When I have paid all the instalments on my new wide screen television it becomes mine and I have a valid claim to ownership against the store. Yet again it is the transferee that pulls the property in, rather than the transferor that pushes it away.

4. Gifts and Simple Swaps:

It might seem odd that the above examples are far less paradigmatic than the two to be discussed now. However, as I will attempt to illustrate, it is logically much more difficult to explain transfer in these more simplistic cases than it is in the previous, more niche examples.

First let us consider gifting by way of the following example. I own a glass full of beer. I want to transfer the glass of beer to you. I put it down on the table next you and tell you that it is yours. You pick it up, say thanks and drink it. But at what point exactly does the glass of beer cease to become mine and become legally owned by you? It is clearly not before I put it down next to you. I am still in possession and have merely the intention to transfer. Similarly it is clearly not only when you have drunk it. If it was, then by picking it up and consuming it you have committed conversion. So it must be at some stage in between.

It might be the case that it becomes yours when I put it down in front of you and communicate to you that it has become so. But imagine this situation: I put it down in front of you and tell you that it is yours, but you can't hear me because you have long since become unconscious. Along comes Bob and, devious third party that he is, he picks up the drink and slurps it down. Who's right *in rem*, has Bob violated, mine or yours? English law requires acceptance of a gift for transfer to take place, so the right violated is mine.²¹ So how do we explain this in terms of juridical instances? One option is that I, as the owner of the beer, have a legal power to divest myself of ownership and vest it in you. This, 'simple view' as I shall call it, is

²¹ *Glaister-Carlisle v Glaister-Carlisle* [1968] Times 22nd February, CoA 450 (2012) J. JURIS 502

the general explanation that you will find in almost every property law textbook.

The simple view is nonetheless conceptually flawed. It completely ignores the power of the transferee to accept the gift. If I own the beer, in order for it to be transferred to you that ownership must be extinguished. Unless this is the case there will be an odd temporal overlap in which we both own the beer at the same time. If ownership means that the owner has exclusive dominion over the *res*, when I transfer ownership of the beer I cannot mean to create a joint or co-ownership simply in order to do so. An alternative explanation might be that I alienate my right in the beer first and *then* vest an identical right in you. This similarly cannot be true. To endow someone with a right that I do not possess is a direct violation of the *nemo dat* principle. How can I give you a property right that I do not possess myself? Neither explanation supports the simple view that the power to gift rests with the transferor.

Penner suggests that we can explain some instances of transfer through something called ‘directional abandonment’.²² The best way to understand this proposed mechanism is through the relativity of title. Under this theory, when I make a gift of my beer to you it is not the case that my ownership stops and yours begins but rather that our claims *in rem* get respectively weaker and stronger until your claim is greater than mine and then ownership is vested in you by operation of law. In the case of a simple gift, this happens very quickly. There is still a logical ‘gap’ here however because at some point our claims to ownership will be equally strong. Is it the case that we both own the beer at that point? Clearly not. By introducing the relativity of title we have in fact made the situation worse, because neither of us can claim ownership whilst another has as good a claim to it. So as long as we accept that the power to gift rests with the transferor we must accept that there is a logical gap where neither of us owns the beer.

Whilst Bob could be excluded from claiming the beer by our equally strong title claims, this is not an indication of ownership. This would be to confuse ownership with a strong title claim. Such an argument is analogous to claiming that if a licensee of land can exclude others save for the licensor, this fact makes him the owner of that land. Oddly, Penner seems to think that this is to some extent true. He suggests that in addition to the

²² J Penner, *The Idea of Property in Law*, 84-85

directional abandonment approach, property can be passed by way of licensing and vesting in the licensee a power to sub-license.²³

It is true that such a theory leaves no conceptual gap between right holders. However, whilst such a method might be said to transfer a right of some sort, it cannot be understood as a transfer of *ownership* in any meaningful sense. This is because the licensor can simply revoke the license whenever he wishes. Furthermore, as pointed out by Gaus, certain licensees cannot enforce exclusion upon a third party and have to rely on the licensor to do so for them.²⁴ Penner dismisses this objection on the basis that the licensee remains a beneficiary of a general duty of non-interference.²⁵ In support of his position Penner suggests that the question of who has the right to obtain a court order enforcing a duty is a matter of remedies and not relevant to the question of who holds a property right.²⁶ This conclusion seems too quick. If an ownership right is being claimed then it is a mistake to think that the question of ‘remedies’ is separate from the question of the nature of the primary right.²⁷ Upon the breach of an ownership right a secondary right comes into existence, requiring some form of compensation through a correlative duty.²⁸ Observing to whom this obligation arises is more than just a matter of remedies. It tells us something important about the nature of the primary right that has been breached. The fact that the licensee has to rely upon the licensor to redress his grievance indicates a special relationship between the licensor and the *res*. If the capacity to exclusively determine the use or disposition of the *res* post-license now rested with the licensee, what reason would there be for not allowing him to enforce? By Penner’s own criteria of what makes ownership valuable, the limitations of the licence model of transfer call it into question.

Penner offers a third explanation of transfer that is unique to the institution of gifting. He suggests that when one makes a gift one transfers on the basis that the giftee’s use or assignment of the property is treated as one’s own.

²³ J Penner, *The Idea of Property in Law*, 85

²⁴ G F Gaus, ‘Property, Rights and Freedom’ *Social Philosophy and Policy*, Vol 11 Issue 2 (1994), 209-240

²⁵ J Penner, *The Idea of Property in Law*, 86

²⁶ *Ibid.*

²⁷ I personally find Penner’s reduction of secondary rights arising from the breach of primary obligation to ‘remedies’ to simplify matters too much. The award of damages or restitution can be meaningfully referred to as a remedy. The creation, through operation of law, of secondary right and obligations seems to come at a logically prior stage.

²⁸ R Stevens, *Torts and Rights*, 287

Whilst this would undoubtedly jump the gap identified above, by causing an overlap of wills between the giftor and the giftee, there are substantive moral issues with this justification of gifting.

When one gives a gift one does not do so in order to exercise one's autonomous control over the *res* but to publicly recognise that one no longer enjoys anything like autonomous control over it. Penner's example of the parent gifting to the wayward child is intended to illustrate that it might be in one's interests to abandon autonomy to another. A parent might want to abdicate control so that their interest in their child properly developing as a person is realised. However, it still remains that when the parent gives £10,000 to their child, they do so in order to further their meta-interest of ensuring that their child develops 'properly' in some richer sense, even if they might 'shudder' to think of the risk they are taking.²⁹ However, they take that risk on the basis that doing so is compatible with their interest in their child's wellbeing. If they did not, then taking the risk would not be a rational choice. After all, no parent in their right mind would give a drug addicted child £10,000.

Penner's mistake comes from assuming compatibility between the immediate intention of giving a gift, that of surrendering to the autonomy of another, with the meta-intention of gaining the benefit of the act of giving. If the child develops a drug habit as a result of a gift of money intended to secure that child's positive development, then why should the gift not be revoked? If we are to accept this link between the immediate and meta-intentions of gifting, then there seems no reason why it should not be. That would make the parent's 'gift' look more like a conditional loan. Gifting only makes sense if its moral justification stems from the desire to revoke ownership to another and accept that one has no longer any interest in how that *res* is used. Any attempt at making a connection between the act of gifting and the meta-intention that caused the previous owner to gift merely confuses the issue, as proved by considering the parent/child example.

Since none of these theories of transfer can pass muster in the case of the gift, let us consider whether transfer by taking can provide a better explanation of how the law works. Due to the fact that gifts can be refused, it is clear that the giftee has a power rather than a right. However, unlike the previous examples there is no commonly articulated legal rule that stipulates

²⁹ J Penner, *The Idea of Property in Law*, 88-90

under what circumstances that power arises. My suggestion is that the power to take arises following the exercise of another power. This primary power is a power *in rem* of the transferor to create in the transferee a legal power *in rem* to transfer ownership. Once again, this suggests that ownership itself confers no power of transfer, only the power to create a power to transfer.

When I put the beer down on the table and say you can have it, I create a power in you to claim ownership of the beer. This means that we never reach a situation in which either we both own the beer or neither of us do. When I create the power in you to claim ownership of the beer, ownership is still vested in me. It continues to be so until you exercise your power, instantaneously claiming ownership for yourself by unilateral act whilst extinguishing mine at the same time. I never have to give up ownership because it is divested from me through your use of the secondary power. As such, there can be no gap of the sort that arose on the simple view, when I paradoxically might have been thought to give up ownership before vesting it in you or allowing it through directional abandonment.

Similarly, at no stage do we both own the beer at the same time because the effect of you exercising your power is to simultaneously divest me of my ownership and vest it in yourself. The advantage of this explanation is that this simultaneity is not the same as the illogical simultaneity that arose when I had to divest myself and vest in you. This is because in that situation I would have to be in a position of owning and not owning at the same time. Through the use of your secondary power you simply gain ownership at the same time that I lose it, which is not inconsistent at all. This is so because the power to transfer does not stem from the right being transferred. Instead the power is created by the previous owner as a separate juridical instance altogether.

Finally, should the devious Bob attempt to jump in at any point he will either be breaching his *in rem* duty to you or to me. He will be liable to me if he does so before you exercise your power *in rem*; once the beer is drunk the *res* is extinguished so your power goes with it but not his liability to me for conversion. After you exercise your power *in rem* however, ownership passes to you and Bob has violated your rights. There is no gap for Bob to exploit. In this mechanic of transfer then, we have found a vessel capable of safely transporting ownership.

If I create a power in you to divest me of ownership, I am liable to you until you refuse the use of that power and so extinguish it. As already stated, this accounts for the fact that gifts have to be accepted in order for ownership to pass. It also makes moral sense: as the holder of the primary power, my dominion is over the *res*, not you.

The case of the simple swap is conceptually very close to that of a gift and employs the same basic structure. Taking a modified version of the example used above to illustrate the retention of title clause, imagine that I contract with you to exchange my book for your ten pound note here and now. I exercise my primary power to give you the secondary power to take the book from me. You do the same thing in respect of the money. We then both exercise our secondary powers and ownership passes. This of course happens very fast, usually in the time it takes to pass the physical objects from one hand to another. However, the logical structure of this transfer, through the use of a power to take, prevents the conceptual conflicts of the simple view interfering with this everyday occurrence.

What emerges from the discussion in the last two sections is that in the transfer of ownership there are two basic logical structures that enable the transaction to occur. On the one hand, A can either have a right or a power to claim ownership from B through the coming to pass of some legally significant event, such as the fulfilment of contractual terms, coming of age or suffering an unjust enrichment. On the other hand, A can gain a power to claim ownership as a result of B's exercise of a primary power embedded in ownership itself: the power to permit A to take the *res* if they wish. In both cases however the operative party in the transfer is A, the transferee. It seems therefore that ownership can never be given but only taken.

There are more complex instances in which we can see the dual power model used in combination with the simple ability to take. One example of this is the now uncommon instance of mortgages by demise.³⁰ Here I abdicate ownership of my house to the mortgagee in consideration for a loan. I exercise my primary power and they their secondary power in respect of the house, and vice versa in the case of the loaned money. However, due to the existence of the mortgage agreement, when I have repaid the debt I gain a right to claim back ownership of the house ('redemption'). This example illustrates that although the basic structure of transfer is quite

³⁰ This is now unavailable in respect of registered land through section 23 of the Land Registration Act 2002.

simple and the operative ability is always that of the transferee, complex legal relationships can exist through a combination of different forms of transfer.

5. The Substance of Ownership and the Complexities of Taking:

There is a remaining issue in the shape of when, in more complex situations, the act of taking has actually happened and in what form it occurs. In these situations it becomes all important to bare the substance of the right in mind: are we dealing with straightforward ownership or something more complicated? Consider the following example. You and I go for a meal in a restaurant and order some food, which we then eat. At the end of the meal the waiter gives us the bill and we have to decide who should pay. Since we did not know who was to pay before eating the food, did either of us take ownership of it before eating it? If so, which of us?

If I am your host and clearly going to pay from the outset, the contract will be between me and the restaurant even if ownership passes directly to you when you accept the gesture.³¹ However, what happens when the issue of payment has not been decided and I run out, leaving you to pay the bill?

Practically, dine-and-dash incidents can be dealt with as misrepresentations: if we sit down, eat and then leave without paying we have misrepresented our intention to pay.³² In this case the contract is voidable and rescission can be sought. This get-out however, fails to answer the deeper conceptual issue of when ownership is transferred if the contract is actually valid.

The position in contract is that each of us would be individually liable to the restaurant for the food ordered, regardless of the arrangement between us. This stems from the fact that both of us are deemed to have separate contracts with the restaurant in respect of the entirety of the food.³³ That we are separately liable might suggest that we at no stage *jointly* own the food. It would be commonsensical to think that if we had entered into a contract as a team we would be jointly liable and this is not the case. This conclusion might be too hasty however. There is nothing conceptually preventing us from holding that joint ownership can arise as a result of two separate contracts between the joint tenants and a third party. Given that in this

³¹ *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468, 1473

³² *Ray v Sempers* [1974] A.C. 370

³³ *Lockett v Charles* [1938] 4 All ER 170

situation at least one of the contracts is going to be implied³⁴ and the remaining one will be poorly evidenced, what prevents us from concluding that both contracts made provision for ownership through joint tenancy? If this is the case, then both parties would be individually liable but hold the property together.

Joint tenancy would not explain why I can send my food back or consume it without doing you any wrong. A possible solution is that we own the food as tenants in common from the point at which it arrives. Although in doing so I am alienating or destroying my undivided share of the whole, I am not interfering with your use and enjoyment of your share and so am not interfering with your right. Such an example is distinct from us owning a car in common and me selling it without your permission. In the latter case you have a claim to either the money made by me or the car, as through the act of selling I have illegitimately infringed your stake.³⁵ You would however have no such right when, in the restaurant example, I consume the food, as that would be a legitimate use of my share of the meal. It is possible that this would also account for why you would be liable in contract were I to eat and run. Because tenants in common own *both* an undivided share and the whole property as a team, it is arguable that your duty to pay upon my refusal is grounded in your responsibilities as communal owner of the entirety. If this is the solution to the restaurant example then we might conclude that ownership is claimed as tenancy in common when the food arrives and accepted by both parties.

Contrast this with a different explanation. The requirement that you pay for my dine-and-dash could be an implied term of your contract and not something arising from the proprietary nature of your interest in my food. This seems to fit better with the contractual basis of the rule. However, this incurs the additional problem of the need to define that implied term. Are you liable in respect of those you go to the restaurant with or does it also cover people that join your table half way through the meal? What about annoying relatives that turn up by coincidence and you would rather not be eating with at all? It would be simple enough for this to be settled by general rule of contract limiting the class of persons for which you are responsible to those engaging with you in the social enterprise, or those with whom you arrived. The salient point for present purposes is to observe that, under this

³⁴ Ibid.

³⁵ *Baker v Barclays Bank Ltd* [1955] 1 WLR 822, 527
(2012) J. JURIS 509

explanation, ownership could pass to each diner at different times, depending on when the food was accepted.

What emerges from this discussion is that in order to work out when ownership passes from a transferor to a transferee, we need to know exactly what manner of ownership we are talking about. In this respect, the form of transfer can only tell us so much without a deeper understanding of the substance of ownership. Imagine that I have already dashed off and you are left with a half finished steak in front of you and a very irate waiter. Acknowledging that you have to pay, you decide that you might as well have the benefit of what remains of the steak. Whether the nature of the ownership is identified as straightforward ownership (under the implied term explanation) or tenancy in common, will affect how the transfer occurs and indeed whether it occurs at all. If it is the case that I had sole ownership of the steak and have just abandoned it, then you are taking unclaimed property. If on the other hand it was owned in common, then your pre-existing interest operates to 'suck in' my abandoned share. In both cases you as transferee are the legal catalyst but on the one hand you only gain ownership after your positive action in taking and on the other, your pre-existing right vests it in you before you reach out your fork. It is therefore clear that when explaining how and when ownership is taken, we need to be clear about both the form and substance of what is being claimed.

6. The Act of Taking and the Idea of Ownership:

This paper has sought to illustrate that ownership is something that is taken from the external world, be it from no one in particular or from another, with or without their consent. The act of taking and being able to declare 'this is mine' is something intuitively understood by us from a very early age. Most toddlers understand the idea of 'mine' a long time before they learn to respect things that are not theirs. Whether there is something psychologically important to the act of taking, and a concurrent explanation of the concept of ownership therein, is beyond the scope of this paper. What might be said here however is that this trend gives us reasonable grounds to ask whether the act of taking is of *philosophical* importance to the concept of ownership.

The ability to hold property has been recognised as an important element of personal liberty by statesmen throughout history and enshrined in documents such as Article 1 of the First Protocol to the European Convention on Human Rights. However, the link between the value of *having* property and *claiming* it is not immediately obvious. For Grotius, the

act of taking was the normative starting point for the concept of property and grounded the duty of exclusion. He argued that ‘whatever each had thus taken for his own needs another could not take from him except by an unjust act’.³⁶ This notion that rights to property are founded in their acquisition was common to many subsequent theorists such as Locke, who focused on developing theories of fair acquisition in order to justify the notion of exclusive possession.³⁷ This basis for property has however generally declined in popularity, with theorists such as Robert Nozick speaking of ‘justice in acquisition’ as an important *element* of property but not in itself *foundational*.³⁸

Nonetheless, the insight that *taking* is a conceptually universal element of ownership may have some philosophical value. It is clear that the act of taking something for yourself is a bold expression of your autonomy. By demarcating a material domain a person defines their personality, power and to a certain extent their interactions with others. Leaving the stricter confines of analytical philosophy behind, we might consider in this regard the Nietzschean idea of a Will to Power present in the essentially self-serving act of taking property from another and adding it to our own domain.

Underkuffler describes ownership as ‘that which gives the individual a bulwark of isolated independence from her fellows’.³⁹ For Hegel, the claiming of property was one means by which a being with a will could ‘translate his freedom into an external sphere’ and thereby define himself in his own (and others’) eyes.⁴⁰ This could explain the otherwise intuitively strange notion that we have some form of property in ourselves: if ownership is a supreme exercise of our will upon the external world, our personal inviolability mirrors that and might lead to us thinking about our bodies in proprietary terms.⁴¹

³⁶ H Grotius, *De Jure Belli ac Pace Libri Tres* (translated by F Kelsey, 1925), II.2.ii.1

³⁷ J Locke, *Two Treatises on Government and a Letter Concerning Toleration*, I Shapiro ed. (Yale University Press, 2003), 111-121

³⁸ R Nozick, *Anarchy, State and Utopia* (Basic Books Inc, 1974), 150-153; 157-158

³⁹ L Underkuffler, ‘On Property: An Essay’, 100 *Yale Law Journal* (1990) 127; 147

⁴⁰ G Hegel, *The Philosophy of Right* (translated with notes by T Knox) (Clarendon Press, 1942), paragraph 21

⁴¹ S Munzer, ‘Kant and Property Rights in Body Parts’, 6 *Canadian Journal of Law & Jurisprudence* (1993) 319

If ownership is linked to an exercise of our will in this way, then it is also possible that it relates to our desire to dominate the social, as well as the material, world. As explained by Roger Cottrell:

...property treats those attributes which make human beings grossly unequal as separate from them and conceptualised as ‘things’ that they own...[s]ubjects are equal (in legal doctrine and ideology) but the distribution of assets is not.⁴²

Viewed in this light, the rules surrounding acquisition, including the various situations in which taking becomes permissible (many of which have been discussed above), may be explicable as not only a means of controlling but also of satisfying what Nietzsche deems ‘our strongest drive, the tyrant in us’.⁴³

In the spirit of experimentalism, it pays to briefly consider what a Nietzschean interpretation of this discovery might reveal. Such a reading of the legal concept of property would of course have to be in the spirit of his work rather than through a direct application of his writing, as Nietzsche has comparatively little to say about the law.

In *The Gay Science*, Nietzsche describes law as a limitation on, rather than a facilitation of, the will of the tyrannical individualist.⁴⁴ It is however also possible to locate in his writing the idea that law exists to protect the noble from the *ressentiment* of the masses.⁴⁵ Under the latter model, the logical importance of the act of taking to ownership might be seen as evidence of the protection of the capacity to manifest one’s will in the world. In the *Genealogy of Morals* Nietzsche describes this acceptance of legal rules as limitations that ‘the will to life in its quest for power provisionally imposes on itself in order to serve its overall goal: the creation of *larger* units of power’.⁴⁶ On the back of this, a radical interpretation might characterise an

⁴² R Cottrell, ‘Power Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship’, *Journal of Law and Society*, Vol. 14, Issue 1, (Spring 1987), 77; 82

⁴³ F Nietzsche, *Beyond Good and Evil* (translated by R Hollingdale) (Penguin Books, 2003), 103

⁴⁴ F Nietzsche, *The Gay Science* (translated by W Kaufmann, 1974) aphorism 43

⁴⁵ F Nietzsche, *On the Genealogy of Morals* (translated by D Smith) (Oxford University Press, 1996), 25-28

⁴⁶ Nietzsche, *On the Genealogy of Morals*, 57

element of ownership as concerned with the domination of others through the wresting of things from them.⁴⁷

Even if we do not subscribe to such a radical view, it is undeniable that the importance of taking to the mechanics of transfer seems to lead away from, rather than support, justificatory theories of property rooted in sharing.⁴⁸ This intuitional ‘nudge’ becomes clearer when one combines the universality of taking with the substance of ownership as a right to exclusively control, containing the all important right to exclude.⁴⁹ Even the most tentative of conclusions following the above examination must recognise the shadow of self-regard that goes hand in hand with property at the most basic level.

Legal scholars not engaged in an avowedly postmodernist critique of institutions such as property tend to stay well clear of philosophers such as Nietzsche. There is good reason to do so. Not only is analytical philosophy more methodologically commensurable with the complex structure of private law but it also gives the impression of a more positive or optimistic approach. The invocation of thinkers like Nietzsche is seen to lend itself to a reduction of law to a system of arbitrary power.⁵⁰

This assumption is unfortunate however; as one does not have to ascribe to Nietzsche’s world view in order to benefit from his undeniable insight and understanding of people.⁵¹ In the present case, relating the conceptual trend of taking (and its observable connection with ownership) to a manifestation of a self-defining will, might tell us important things about property. We can still accept, for example, that there is an overriding moral interest in the just redistribution of property whilst acknowledging that ownership itself is conceptually self-regarding. In fact, it is plausibly *because* ownership is self-

⁴⁷ Some basis for this might be found in the words of Zarathustra: “The best belongs to my own and to me; and if it is not given us, then we take it: - the best food, the clearest sky, the strongest thoughts, the most beautiful women!” in F Nietzsche, *Thus Spoke Zarathustra* (translated by Graham Parkes) (Oxford University Press, 2005), 249

⁴⁸ See for example: J Penner, ‘Ownership, Co-Ownership, and the Justification of Property Rights’, T Endicott, J Getzler, and E Peel (eds.), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006), 166-188

⁴⁹ On this see: A Honoré, ‘Rights of Exclusion and Immunities against Divesting’, *Tulane Law Review* (1959-1960), Vol. 34, 453-468

⁵⁰ D Litowitz, ‘Nietzsche’s Theory of Law: A Critique of Natural Law Theory’, *Legal Studies Forum*, Vol. 18, Issue 4 (1994), 393

⁵¹ As Nietzsche himself reminds us ‘...there is a world of difference between the reason for something coming into existence in the first place and the ultimate use to which it is put’: Nietzsche, *On the Genealogy of Morals*, 57

regarding that distributive justice is so important. Similarly, it might be possible for us to identify through the notion of a tyrannical will, something of *aesthetic* value in the act of excluding the other, whilst still believing the best *moral* interpretation of property to be rooted in social inclusion. This is not the place to develop such a theory of property in a more general sense but our discussion so far serves to illustrate that by recognising the prevalence of taking in the logical structure of ownership we can begin to search for new philosophical perspectives on the Law of Property.

7. Conclusion:

My purpose in writing this article has not been so much to break new legal ground as it has been to show that even well trodden ground can have hidden depths. By examining instances in which ownership is transferred I have attempted to illustrate that it is the act of taking rather than the acts of giving or sharing that drive the process. In doing so, I hope to have created space for different philosophical perspectives on the phenomenon. In providing the barest bones of one deliberately controversial interpretation, I have attempted to illustrate the possible light that can be shed on our established institutions through more experimental conceptualisation.

**INTERNATIONAL RULE OF LAW AND HUMAN RIGHTS:
THE ASPIRATION OF A WORK IN PROGRESS**

Joaquín González Ibáñez

Abstract

For the last 20 years, since the fall of the Berlin Wall, the international community has worked together to enhance a process that aspires to uphold the International Rule of Law, the dignity of victims and the need to prosecute serious violations of human rights within a framework of domestic and international law. A practical approach to the current concept of international rule of law and the current situation of rampant impunity and grave violations of human rights from the domestic and international perspectives, leading us to rethink and question the process of justice created by international law machinery for the protection of human rights. The current situation in Syria is presented here as an example.

*“Poi mi domandava perché il popolo italiano, prima della Guerra, non avesse fatto la rivoluzione per cacciar Mussolini. Io rispondevo: «Per non dare un dispiacere a Roosevelt e a Churchill, che prima della Guerra, erano grandi amici di Mussolini.» Tutti mi guardavano meravigliati, esclamando: «Funny!». Poi mi domandava che cosa fosse uno Stato totalitario. Io rispondevo: «È uno Stato dove tutto ciò che non è proibito, è obbligatorio». – Curzio Malaparte, *La pelle**

Later he asked me why the Italian people, before the war, had not started the revolution against Mussolini. I asked: «They did not started one in order not to annoy Roosevelt and Churchill, who before the war were both great friends of Mussolini». Every one looked at me in wonder, saying: «Funny».

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Later he asked what was a totalitarian State. I answered him back: « It is an State where everything that is not labelled as forbidden, is compulsory »

“Our Constitution and our philosophy of law have been characterized by a regard for the broadest possible liberty of the individual. But the dullest mind must now see that our national society cannot be so self-sufficient and so isolated that freedom, security, and opportunity of our own citizens can be assured by good domestic laws alone. Forces originating outside of our borders and not subject to our laws have twice in my lifetime disrupted our way of living, demoralized our economy, menaced the security of life, liberty, and property within our country. The assurance of our fundamental law that the citizen's life may not be taken without due process of law is of little avail against a foreign aggressor or against the necessities of war. Either submission or resistance will take life, liberty, and property without a semblance of due process of law...

But we are at this moment at one of those infrequent occasions in history when convulsions have uprooted habit and tradition in a large part of the world and there exists not only opportunity, but necessity as well, to reshape some institutions and practices which sheer inertia would otherwise make invulnerable...But we can have nothing in common with the cynics who would have us avoid disillusionment by having no ideals, who think that because they do not believe in anything, they cannot be fooled. We must keep the faith roughly stated by Lord Chief Justice Coke that even the King is "under God and the law..."

Any United Nations court that would try, say, Hitler or Goebbels would face the same choice. That is one of the risks that are taken whenever trials are commenced. The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty.”

Robert H. Jackson, *The Rule of Law Among Nations*, Conference at the American Society of International Law, Washington, D.C. April 13, 1945

1. Introduction

The history of the 20th Century, and to a large degree the century that we are currently forging, could well be explained by looking at the role played by the rule of law and the aspirations of freedom, development and democracy.

Along these same lines, a thorough understanding of human rights in diverse countries is also illustrative; the totalitarianisms on one side – fascism and communism and the diverse pseudo-democratic regimes which dismantled the rule of law and the democratic system and systematically violated basic freedoms of people–. And, on the other side, the democracies that, with varying degrees of success, tried to strengthen democratic institutions, offering a framework of options and opportunities for their citizens as well as a basis for genuine public liberties.

Once again, in real time, we are witnessing the slow-motion killing of human beings, not only without a proper and immediate response to stop the massacres, but also without the realistic possibility of responding efficiently to the impunity and responsibility of those behind these international crimes.

On February 4 2012, at an anti-regime demonstration in the city of al-Qsair, south-west of Homs, where the UN confirmed that Syrian forces had killed more than 200 people- among them children and the elderly- a 12-year-old child held a placard with hand written letters in attempt to draw the media’s attention to their fate. It read, “*If you do not help us, we will be killed*”. Hours later, dozens of civilians were killed. It was as if we hadn’t believed that cry for help, and that our disbelief was a natural response. It was almost exactly as Ellie Wiesel had revealed to us in his book *Night* when he told the story of a Jewish citizen of his small village in Romania who managed to escape from a *verningstunglager* (extermination camp) and to whose story no one gave credit, until it was too late for those at Auschwitz.¹

¹ See WIESEL, : “I told him that I did not believe that they could burn people in our age, that humanity would never tolerate it (. . .)” Later on, after his release, and for many years Ellie Wiesel as an Auschwitz survivor has always recalled on the responsibility of the survivors as witness and keepers of the collective memory: “For the survivor who chooses to testify, it is clear: his duty is to bear witness for the dead and for the living. He has no right to deprive future generations of a past that belongs to our collective memory. To forget would be not only dangerous but offensive; to forget the dead would be akin to killing them a second time.” Wiesel, E., *Night*, Hill and Wang, New York, 1985, p.23. In the edition by Hill and Wang here quoted, see also at the end of book, a copy of his speech as Nobel Peace Laureate in Oslo, 10th December 1986. Also available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html

“This is what I say to the young Jewish boy wondering what I have done with his years. It is in his name that I speak to you and that I express to you my deepest gratitude. No one is as capable of gratitude as one who has emerged from the kingdom of night. We know that every moment is a moment of grace, every hour an offering; not to share them would mean to betray them. Our lives no longer belong to us alone; they belong to all those who need

There was no room for the UN Charter Chapter VII *Action with respect to threats to the peace, breaches of the peace, and acts of aggression*. Russia and China vetoed the UN Security Council Resolution². We feel, or perhaps we shiver at the idea, that again in 2012 we are observing glimmers of the Cold War.

International Law scholars, researchers, and observers of the violations of the Rules of War in the last 40 years are often poisoned by the Greek myth of Cassandra. Once the observer believes that he or she knows the future occurrence of a catastrophic event, having already seen it repeated in prior conflicts in the last 40 years (or even having experienced it first hand), the observer believes that there is nothing that can be done to stop the event from happening again and, particularly, that they will not be believed when they try to tell others.³ The evolution of International law since the dilemma of the doctrine of Humanitarian Intervention after Kosovo⁴, and the most recent principle of Responsibility to Protect⁵, has not only failed to demonstrate a capacity to act against grave violations of human rights, but instead has shown again that international law relies on the political decision of the Security Council members.

us desperately. (...) Without memory, our existence would be barren and opaque, like a prison cell into which no light penetrates; like a tomb which rejects the living. Memory saved the Besht, and if anything can, it is memory that will save humanity. For me, hope without memory is like memory without hope. (...)

What all these victims need above all is to know that they are not alone; that we are not forgetting them, that when their voices are stifled we shall lend them ours, that while their freedom depends on ours, the quality of our freedom depends on theirs.”

² Syria resolution vetoed by Russia and China at United Nations Saturday 4 February 2012 Paul Harris in New York, Martin Chulov, David Batty and Damien Pearse guardian.co.uk, 2012 22.28 GMT . The appalling photo of the children holding the poster from Alessio Romenzi/AFP/Getty

<http://www.guardian.co.uk/world/2012/feb/04/assad-obama-resign-un-resolution>

³ See HOMER, *The Iliad*, Penguin Classics, London, 1991. Cassandra was the daughter of King Priam in *The Iliad* and warned her father about the dreams about the future and she was doomed not to be believed. She was a cursed prophetess and her father King Priam did not want to believe her when she told him about the consequences of accepting the present of the Trojan horse, that finally meant the fall of Troy.

⁴ BAJORIA, JAYSHREE, "The Dilemma of Humanitarian Intervention", Council of Foreign Relations, March 24, 2011, <http://www.cfr.org/human-rights/dilemma-humanitarian-intervention/p16524>

⁵SG/SM/11701- 15 July 2008, Secretary General Ban Ki-moon Defends, Clarifies ‘Responsibility To Protect’ At Berlin Event On ‘Responsible Sovereignty: International Cooperation For A Changed World’

<http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm>

2. Rule of Law in democratic societies

In all probability, in the weeks following the violent death of hundreds of innocent people in Syria, professors of International Law around the world will have had to strive to elaborate convincing arguments about the purpose of international law after these killings, and how democracies have implemented a system –the legal system- to avoid and provide answers to these outrageous crimes.

Beyond the factual elements and the attenuated degree of coercion of international law – by means and competences assigned by States, I could think of two main assets – real accomplishments- that might provide some relief to a student willing to be part of a system that is willing to embrace those most noble and human of aspirations: dignity, peace, liberty and solidarity.

Professor Fallon summarized the core structure of the idea and aspirations behinds the rule of law “All understanding of the rule of law share three purposes, or values: the rule of law serves to protect people against anarchy: to allow people to plan their affairs with confidence because they know the legal consequences of their actions; and to protect people from the arbitrary exercise of power by public officials”⁶

Of course, I have tried to avoid cynicism- still believing that most of the work is yet to be done- but we should not stop ourselves from posing the right questions about our incapacity to create the spheres of justice, human dignity and security that appear as the main goals of current international human rights law. We have not yet crafted another system beyond the rule of law, although we must acknowledge that “In truth the rule of law is a complex, fragile, and to some extent inherently unrealizable goal.”⁷

2.1 The meaning of democracy

The whole aspiration to achieve international justice for democratic states comes through the completion and implementation of the International

⁶ FALLON, R. H., *The Rule of Law, as a concept in International discourse*, 97 *Columbia Law Review*, I, 7 (1997)

⁷ STROMSETH, J. WIPPMAN, D., BROOKS, R., *Can might make rights?*, Cambridge UP, 2006, p.57.

Rule of Law. From a national perspective an international one is constructed; individuals, public and private institutions make a difference because of the values, the principles, and the goals that democratic systems supposedly try to achieve. The combination of this construction –Rule of Law and democracy- provide the philosophical and ethical aspiration of international law’s machinery. In a way, democracy acts as a gateway to the Rule of Law.

The pursuit of justice for democratic societies is framed in the construction, and reinforcement of the Rule of Law. A system based on ethical aspirations and common moral values. This system that we name Law happens to be an intellectual system -an *entelecheia*- that tries to protect spheres of liberty, dignity and security for people. The instrument in the international domain is international human rights law.

Nowadays, states remain the main actors in international relations, an international community that has developed from the creation of a political concept in Europe in the 15th century: the nation-state.

Although recognizing the different ways in which political and legal entities act, the focus here is on democratic states; identifying the main characteristics that result from an evolution of Western philosophical-political principles and systems, derived from the Roman Republic’s democracy created 2,500 years ago.⁸

⁸ See, MACHIAVELLI, N., *Discorsi sopra la prima deca di Tito Livio, Dell’arte della guerra e altre opere*, Rinaldi, UTET, Milano, 2006 . It is also very interesting to see that the current democratic pattern was thought of in the 6th century BC, during the Roman Republic. M. Sellers offers a clear and precise analysis of the characteristics of the Roman republican democracy:

“The Origins of Republican Legal Theory

The first self-consciously “republican” ideology originated in the senatorial opposition to Gaius Julius Caesar, and implies a procedural commitment to certain “republican” political and legal institutions, usually attributed to Rome’s republican constitution of 509-49 BC. The basic desiderata of republican government, as articulated in the republican legal tradition derived from Rome, secure government for the common good through the checks and balances of a mixed constitution, comprising a sovereign people, an elected executive, a deliberate senate, and a regulated popular assembly, constrained by an independent judiciary, and subject to the rule of law. Some republicans would add representation, the separation of powers, or equality of material possessions, to protect the public liberty (*libertas*) and avoid Rome’s eventual descent into popular tyranny and military despotism. Republican liberty signifies subjection to the law and to magistrates, acting for the common good, and never to the private will or domination “*dominatio*” of any private

Real democracies⁹ require the following elements:

- a) Separation of powers- ensuring checks and balances;
- b) Respect for human rights- respecting individual, collective and minority rights.
- c) Elections- free, plural and periodical.
- d) A sovereign power, represented by the people, composed of a citizens consisting of free men and women with equal rights. Those who form part of that process denote the quality of a given democracy (governance) and the cohesion and inclusiveness of the system.

Contemporarily it is important to bear in mind that the efficiency with which that community - with all actors participating- responds to the demands and needs of citizens (governability). The reduction of institutional and individual corruption remains a basic principal for democracies, as these are a major threat to national sovereignty. The transparency in the functioning and accountability of the acts performed by institutions and individuals is a fundamental aspect of the democratic system.¹⁰

- e) The existence of the Rule of Law and accountability, implying the pursuit of justice and the avoidance of impunity. The rule of law is part of system of values, attitudes and legal spectrum that create a specific culture: “The culture which institutes the rule of law to limit both private and public power consists of a combination of beliefs that law should limit the exercise of power backed up by sufficient behaviour to make it reasonable to think that law in fact does exercise such a restraining function.”¹¹

master.” See M. N. S. Sellers, *Republican Legal Theory. The History, Constitution And Purposes Of Law In A Free State*. 6 **Pallgrave Mc Millan, New York, 2003**. For information on the Republic and the Roman democratic model, see Cicero, *De Republica And De Legibus*, (On The Republic And The Laws) (1986).

⁹ See, GONZÁLEZ IBÁÑEZ, J., RAMADAN, H., and RASKIN, J., B., Universidad Alfonso X El Sabio S A B E R E S Social Studies Review, “The Arab Garden And Ground Zero”, Revista De Estudios Jurídicos, Económicos Y Sociales, VOLUMEN 6 ~ AÑO 2008 , Vol. 6, 2006, ISSN: 1695-631 <http://www.uax.es/publicaciones/saberes.htm>

¹⁰ See, for example the case of corruption and its impact on public policies of education by Transparency International, and the impact it creates from an individual perspective, but also from the institutional. See http://www.transparency.org/whatwedo/activity/our_work_on_education, July 2012.

¹¹ REITZ, J.C, *Transnational Law and Contemporary Problems* “Export of the Rule of Law” Vo. 13:429 Fall 2003 p.436.

Out of the almost two hundred states in the international community, around sixty can be classified as democratic, not counting states such as the Russian Federation, Morocco, Egypt, Cuba, China, etc.¹² The Rule of Law is the genuine product conquered and crafted by democracies with different levels of accomplishment “(...) the reality is that the existence of the rule of law is matter of degree, with all legal systems being on a spectrum with no rule at all at one end and a complete actualization of the rule of law at the other”.¹³ This very idea is what has lead the World Justice Project to create a system that might provide an approach of the diverse degree of compliance of 67 countries and different legal systems with the aspirations and goals of the rule of law.¹⁴ It also provides a ranking in alphabetic order and it takes into account 8 factors that help to define the description of the different work in progress of the rule of law. There are eight factors taking into consideration and they are analysed depending on the income group and geographic region: limited government powers, absence of corruption, order and security, human rights, open government, effective regulatory enforcement, access to civil justice, effective criminal justice, and informal justice.

The interpretation of this factors is done in a holistic approach where the possibility of effective and real democracy can be understood, provided the existence and display of the a rule of law culture.

2.2 The Rule of Law

The term Rule of Law refers to a system that empowers individuals and other actors in the process of putting limits on power.

¹² See C.I.A, *CIA World Fact Report* . US, Virginia, 2005. at <https://www.cia.gov/library/publications/the-world-factbook/print/us.html> This account has not vary dramatically in the last 7 years and we look with attention what kind of political system will come out of the Arab Revolution process, and if these changes will spur the activity of individuals that will become citizens as active actors in their political systems.

¹³ MCCORQUALE, R. “Business, Rule of Law and Human Rights” published in *The Rule of Law in International and Comparative Context*, British Institute of International and comparative Law, London, 2010.

¹⁴ See the Rule of Law Index produced by World Justice Project available at <http://worldjusticeproject.org/rule-of-law-index>

Law is perceived as imperative and “It seems natural to think of Laws as commands. In doing so, however, we have already begun to theorize about the nature of law(...).”¹⁵ We have set in Law the community’s aspirations in terms of what we perceive as the principles and values necessary to provide dignity, justice, respect and security to the members of a given community. Thus, we can affirm that the Rule of Law is “a cultural achievement of universal significance” and probably “The Rule of Law is the most important political ideal today”¹⁶

The Rule of Law is a system whose objective is to put limits and restraints on governments, which limited by the Law, are understood as a formal legality containing the sovereign’s will and the aspiration of Justice. The Rule of law is the rule of law and not the rule of man, meaning that legal and political institutions provide a framework for policies throughout time, and not just personal and individual figures embodying the State.

As such, democracy is a system of rule by laws and not by individuals. In a democracy, the rule of law protects the rights of citizens, maintains order, and limits the power of government. As a consequence, all citizens are equal under the law and no one should be discriminated against on the basis of their race, religion, ethnic group, or gender.¹⁷

Highlighting the importance of the way in which we adopt Law, the method by which law enters into force is also relevant—through the representative of the sovereign, in a public, open and contested way, in other words a democratic legislative process-, there is also a qualitative “threshold” of the Law. As Anne Ramberg put it

The law must properly incorporate social values including the demand of human rights and international humanitarian law. But not even this is enough. The Rule of Law also requires a proper administration of justice. This in turn mandates a reliable and qualitative court system with well educated and honest judges, prosecutors and advocates.”¹⁸

¹⁵ LYONS, D., *Ethics and the Rule of Law*, Cambridge University Press, Cambridge, 1993, p. 37.

¹⁶ See TAMANAHA, B.Z., *On the Rule of Law*, Cambridge University Press, 2004, p.1.

¹⁷ TAMANAHA, B.Z., *On the Rule of Law*, Cambridge University Press, 2004, p.141.

¹⁸ Anne Ramberg quoted at BINGHAM, T, *The Rule of Law*, Allen Lane Penguin Books, London, 2010, p. 171.

This idea embraces the concept of the legitimacy of democratic system and the role played by the Rule of Law in that process.

The international organization created to effectively respond to situations such as the Syrian crisis, sanction perpetrators and provide relief to victims was conceived during World War II – and its treaty signed before the war's end in June 1945. The United Nations, in its Preamble, proclaims as its goal

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small

and more specifically article 3 UN Charter states as a main purpose of the organization

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

In 2004, 15 years alter the fall of the Berlin Wall, Kofi Annan, UN Secretary General placed the rule of law at the very heart of the organization's mission:

It refers to a principles of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicates, and which are consistent with international human rights norms and standards. It requires, as well, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁹

Judge Tom Bingham in a conference at *Centre for Public Law*²⁰ at Oxford University listed eight principles that define the very existence of the concept of the rule of law

¹⁹ Secretary General Kofi Annan's Report, 23 August 2004 to the Security Council S/2004/16, 23 August 2004, para. 6.

²⁰See the The Rt. Hon Lord Bingham of Cornhill KG, House of Lords, conference of 16th November 2006, full text transcript available at (2012) J. JURIS 524

- a) The law must be accessible and, so far as possible, be intelligible, clear and predictable.
- b) Question of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion.
- c) The law should apply equally to all, except to the extent that objective differences justify different treatment.
- d) The law must provide the necessary human rights protection.
- e) Means must be provided for resolving, without prohibitive cost or unjustified delay, *bona fide* civil disputes, which the parties themselves are unable to resolve.
- f) Public officers and magistrates at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were granted, and without exceeding the limits of such powers.
- g) Judicial and other complementary procedures must be fair and independent
- h) States must comply with its international law obligations.

The existence of an international society assumes the existence of an international Rule of Law. The Rule of Law among nations means the regulation of the mutual intercourse of nations, and international contacts and relations of individuals, by legal concepts, standards, institutions and procedures.²¹

2.3 On legitimacy and the Rule of Law

After World War I, Italian political scientist Guglielmo Ferrero defined political legitimacy as the “invisible genius of the city.”²² According to

http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php, also published at BINGHAM, “The rule of Law”, Cambridge Law Journal 67,69, Cambridge 2007.

²¹ Charles Rhyner, Opening Statement before Boston conference on World Peace through Law, 27, March 1959, quoted in BINGHAM, T., *The Rule of Law*, Allen Lane Penguin Books, London, 2010, p. 111.

²² Guglielmo Ferrero was a disciple of Cesare Lombroso, the inventor of "criminal Anthropology," though Ferrero focused afterwards on historical studies and political theory, becoming one of the most prestigious intellectuals in Europe after World War I. President Theodore Roosevelt nominated Ferrero for a Nobel Prize in Literature for his study of the Roman Republic, a work that presents a radical change from Theodore Mommsen. After 1920, Ferrero became an ardent opponent of Mussolini and had to escape to exile in Switzerland. "The government will be far less frightened of its subjects

Ferrero, the main purpose of legitimacy is to provide explanations for the actions of government and to assure that these explanations will be accepted and recognized peacefully. Legitimacy permits governments to avoid dependence on coercion and violence in order to impose its will and command. The government relationship is founded on the citizen's recognition that certain individuals have a moral right to their obedience, while they, in return, feel a duty to give that obedience. Where ruler and ruled agree on a principle, a government will not fear its subjects. Conversely, as illegitimate governments lack credibility, trust and consent, they are always forced to rely on violence and warfare. This unique relationship of public authority and citizens in democracy is characterized by a relative absence of fear and coercion.

An appropriate illustration can be found in well-known Latin American example referring to how democratic states legitimise themselves when they pay tribute to the principles and ethical values enshrined in their legal system. It refers to the prologue written by Ernesto Sábato in 1984 in the Foreword to the *Argentine National Commission on the Disappearance of Persons Report* (C.O.N.A.D.E.P *Informe Comisión Nacional de Desaparecidos*) during the *dirty war* of the Argentinean dictatorship. Dalla Chiesa was cited as an example of the principles and values that democracies must stand for.²³

Sábato tells the story of General Carlo Alberto Dalla Chiesa, general of the Italian *carabinieri*, who was an esteemed public official well-known for campaigning against the Red Brigades terrorist group (*Brigate Rosse*) during the 1970s in Italy, and also as *prefect* for Palermo for stopping the violence of

and of their revolting, knowing that it can count on their voluntary and sincere consent. Being less frightened of its subjects, it will not have to terrorize them nearly as much; less terrorized, the subjects will obey willingly and cheerfully. The principles of legitimacy humanize and alleviate authority, because it is in accordance with their nature to be accepted sincerely, as just and reasonable, by everyone who rules and by the majority, at least, of those who obey. The acceptance of the principles is not always active, willed, and conscious of their deeper meanings. It can be - and frequently is in the masses - a habit more than a conviction, a slothful legacy from the past, a kind of resignation to the inevitable." See FERRERO, G.; *The Principles of Power. The Great Political Crises of History*. translated by Theodore R. Jaekel. New York: G.P. Putnam's Sons, 1941, p. 40. See, the "Introduction" to the Spanish version by Eloy García López, Guillermo Ferrero, *Los genios invisibles de la ciudad*, Tecnos, Madrid, 1998.

²³See SABATO, E. at the Report of CONADEP, National Commission on the Disappearance of Persons (*Comisión Nacional de Desaparecidos*) available at 1984<http://web.archive.org/web/20031013222809/http://nuncamas.org/english/librar_y/images/linea350.gif> and <http://www.desaparecidos.org>

the Second Mafia War in Italy. In 1982 Dalla Chiesa was killed along with his wife and their driver in Palermo just three months after taking command. When Aldo Moro, President of the Christian Democrat Party (*Democrazia Cristiana*) was kidnapped in 1978 by the Red Brigades, in a contested statement at the time, Dalla Chiesa declared in response to a suggestion that torture should be used in the investigation of a Red Brigade terrorist arrested a few days before: "Italy can survive the loss of Aldo Moro. It would not survive the introduction of torture."²⁴ His unswerving devotion to the Rule of Law was not in vain.

3. Epilogue. The work in progress

We assume that there are already clear international standards for addressing issues such as the above mentioned atrocities that have taken place in Syria and, as I write this article, they continue occurring in August of 2012. As Prof. Robert Goldman pointed out, in the worst case scenario of violations of human rights, we know that justice is a goal where the means to achieve the goals are as important as the goal itself.²⁵ This type of abuse of power as produced by states and other actors is also reshaping an atlas of discontented actors in the international arena, as Dominique Moisi has defined in *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope are Reshaping the World*.²⁶, where the International Rule of Law's presence is diminished because of an ubiquitous lack of legitimacy and justice in national and international conflicts.

No policy of democratic states would be sustainable without including the active respect for international human rights treaties and International Humanitarian Law. These principles are not to be considered "soft law" but as an integral part of law itself-. Rule of law, accountability, and human rights are the heart, the mind, and the soul of democratic systems. Because

²⁴ See *Il generale nel suo laberinto*, published in La Repubblica, Roma, Sept. 4, 1982, <http://www.repubblica.it/online/album/ottantadue/bocca/bocca.html>

²⁵ Prof. Robert Goldman at WCL-American University made a brilliant and balanced judgement referred to the breach of the rule of law by the United States because of the criminal system created ad hoc to give a response to the September 11 terrorist attacks: "Despite the fact that they call it terrorism, the law of war still applies. We didn't cease applying the law of war in World War II because the SS followed the German troops and committed terrorist acts... If we (Americans) can claim to justify this, our adversaries will say they can do this to us as well." See Sally Acharya, *Law professor defends human rights*, published at American Weekly, March 22, 2005

²⁶ Dominique Moisi, *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope are Reshaping the World*, Doubleday, New York, 2009.

the darkest episodes of humankind were produced by Europeans- the First World War, the Second World War and the Holocaust- we believe deeply that the strengthening of the democratic system depends on the recognition of International Law as a binding limit for the respect of individual dignity. This is especially true in a global period with violent threats and a worldwide contest for power and legitimacy. It is also particularly relevant when, on August 26 2012, the Syrian regime was accused of killing hundreds in Daraya and opposition groups claim to have found at least 200 bodies in a Sunni community on outskirts of Damascus, the only response to those allegations by President Bashar Al'Assad was "a promise to win at any cost".²⁷

I frequently ask myself as a citizen and a Law professor if our responsibility is always to improve human conditions and if law continues to be an effective and necessary means for that end. Progress means real enjoyment of rights, especially for the most vulnerable.

In Europe, and especially in a country such as my own (Spain) with its limited history of stable democratic periods over the last 100 years, the fight for liberties and dignity starts with the preservation of the culture, principles, rights, and duties that made progress possible in Western life. Since the Enlightenment period and the American and French Revolutions, that system has been based on the rule of law and the preservation of individual and public liberties. If we deepen our commitment to these values and principles, the democratic systems will be reassured and re-legitimized. Other courses of action put at risk the achievement of citizenship for all people and the very foundation of our political and legal systems.

Since the Enlightenment, Europeans have had an irrational feeling of optimism, and a faith in progress. Thanks to education, there has been a belief in the transformation and creation of a fairer society with fewer inequalities. That sensation of progress was acclaimed -some hundred years after the French Revolution- by some intellectuals of the Second Spanish

²⁷ See "Syrian regime accused of killing hundreds in Daraya massacre" by Julian Borger, August 26 2012 <http://www.guardian.co.uk/world/2012/aug/26/syrian-regime-accused-daraya-massacre> See also El pais "La oposición siria denuncia la peor matanza desde el inicio de la Guerra", August 26 2012 at http://internacional.elpais.com/internacional/2012/08/25/actualidad/1345931724_206892.html

Republic which existed before the Spanish Civil War of 1936. Among them, the poet Antonio Machado and his verse "Today is still the moment/Life is here and now (*Hoy es siempre todavía/ Toda la vida es ahora*)" contained the spirit of Enlightenment and self-determination.²⁸

The Rule of Law is central to the Enlightenment project. The Rule of Law is a system that provides certainty, legal enforcement, and feasibility for the application of international and domestic Law. But that system is "enlightened" by several elements that establish a radical difference between democratic and authoritarian regimes. The system is based on the pursuit of an ethical commitment surrounding the idea of Justice.

For the purpose of this article, I find adequate and dynamic the definition coined by Stromseth, Wippman and Brooks:

The rule of law describe a state of affairs in which the successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral and universally applicable rules, and in a manner that respects fundamental human rights norms (such as prohibition on racial, ethnic, religious and gender discrimination, torture, slavery, prolonged arbitrary detentions and extrajudicial killings). In the context of today's globally interconnected world, this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes.²⁹

Nevertheless I miss a powerful commitment with the aspiration of justice and the idea of non-impunity, specially after grave violations of human rights like the ones described in this work. The idea *Fiat justitia, el pereat mundos*, "Let justice be done, though the world perish" it is not, at least in a very first moment, a feasible nor realistic situation in countries and communities immersed in process of transition.

Accountability processes clearly are having a positive impact in a number of societies, but the effects of these efforts on domestic rule

²⁸ See Antonio Machado, *Proverbios y Cantares*, Dedicated to José Ortega y Gasset, Revista de Occidente, n.º III, Sept. 1923. See also "Human Rights and the Rule of Law after Abu Ghraib and the Election of Barack Obama: A European Vision of the Past and Future of the U.S. War on Terror" in *Protección Internacional de Derechos Humanos y Estado de Derecho*, II Volumen obra homenaje a Nelson Mandela, AAVV, director y editor de la obra. Gustavo Ibáñez ediciones jurídicas, Bogotá, 2009, p. 424.

²⁹ STROMSETH, J. WIPPMAN, D., BROOKS, R., *Can might make rights? Building the Rule of Law after Military Interventions*, Cambridge UP, 2006, p.78.

of law have been mixed, complex, and often unclear, and more (...) Whether accountability process have helped to strengthen the rule of law domestically, depends... on their demonstration effects and their capacity-building impact³⁰

The current International Rule of Law contains a set of moral standards that are chosen by our conscience and reason, balancing what is right and what is considered wrong (good and evil). Because of these values and principles one of the most important ideas is to remember that law schools in democratic countries hold an important responsibility, a duty to transmit and “embed” in students the belief that the Rule of Law is one of the most important achievements of humankind. Progress in democracy means more freedom and the empowerment of individuals, especially those who are weak and in vulnerable situations.

No political and historical commitment in society is more important than the pursuit of Justice. Now, after the fall of the Berlin Wall, “those wise restraints that make mankind free” prompt us to reaffirm the inherent value of Human rights, as it appears in the United Nation Preamble.

...to reaffirm faith in fundamental human rights, (...), and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,(...) to employ international machinery for the promotion of the economic and social advancement of all peoples.

The failure to live up to these standards has provoked part of the crisis and crimes in Syria.

History shows us that the absence of a system of Law that frames relations and provides security, accountability and a system of mutual rights and obligations instead means cycles of revenge, injustice, inequity and permanent unrest.

Governments that act in such a way so as to deny the intrinsic importance of any human life cannot do so without insulting their own dignity. As such,

³⁰ STROMSETH, J. WIPPMAN, D., BROOKS, R., *Can might make rights?*, Cambridge UP, 2006, p.307.

it is crucial that one is always aware when his or her actions show contempt for the value of other people's lives as well.

Some months before the 1945 London Conference –in which the Charter of Military Tribunals was adopted, thereby creating the legal basis for the Nuremberg Trials–, within the Truman Administration the international legalism thesis of Henry Stimson prevailed over Morgenthau's "victors' justice" vision. We agree with Henry Morgenthau's affirmation that "*The respect which the people of the world have to international law is in direct proportion to its ability to meet their needs*"³¹. That also means that those nations that do not respect International Law and consider themselves unaccountable for their deeds will obtain the rejection and disapproval of those who voluntarily submit to the limits and restraint of International Law, those who expect justice and security from its application; a system addressed to meet their needs: peace, security, human dignity, and justice.

International rule of law- specifically international human rights law- represents an attempt on the part of the international community to realise an ethical and moral aspiration reaffirming that the advancement and exercise of human rights symbolizes one of the most important forms of progress in the human condition. This is especially true because the *progress of the human condition* means access to the exercise of rights by vulnerable and excluded groups, normally women, children, indigenous peoples, poor and marginalised people, minorities, and above all, victims. Human rights are *the rights of the other* and a commitment to the cause of justice.³²

In February 1945, Primo Levi, a Jewish Italian citizen pain-stricken by hunger and illness, wrote about how he could see, from the windows of the sick bay in Auschwitz, the shadow of a rider entering the extermination camp (*verninstunlager*)³³. That rider wore a soldier's cap with the Soviet Army's red cross and was on his way to liberate the prisoners. In February 2005 heads of European governments from various nations that took part

³¹ Morgenthau to Truman, 29 May 1945, *Morgenthau Diary*, vol. 2 pp. 1544-45, cited in Gary J. Bass, *Stay the hand of vengeance*.

³² GONZALEZ-IBANEZ, Joaquín, "Legal Pedagogy, The Rule of Law and Human Rights: The Professor, The Magistrate's Robe and Miguel de Unamuno", *JOURNAL OF HUMAN RIGHTS LAW*, Volume 6 2011-2012 Number 1, November 2012, available at <http://www.americanstudents.us/journals/ijbr/>

³³ LEVI, P., *Se questo é un uomo-La tregua (If This Is a Man – The Truce)*. (Einaudi ed., 1950). (2012) *J. JURIS* 531

in World War II said *Never Again!*, and expressed the need to strengthen democracy, civil society and respect for human rights.³⁴

Indeed. Now in 2012 we proclaim once more in Syria, “*Never Again!*”. But is happening today? What is our international legal machinery for and what has it done for the victims in Syria? How do we hold all the actors; states, private individuals, international organizations etc. accountable?

Brian Z. Tamanaha in his work *On the Rule of Law* underlines the idea that these questions have been perennial dilemmas for human beings, and that behind injustice, there is a continuous positive process that is the refinement and efficiency in responding to the call against injustice: the answer has been to restore the Rule of Law and make it more relevant and efficient for the aspirations of human kind

Preventing government tyranny was a concern in ancient Athens, a concern throughout the Medieval Period, and continues to be a concern everywhere today. The nature of limitations will vary with the society, culture, political and economic arrangements, but the need for limitations on the government will never be obsolete. The great contribution to human existence of the rule of law in this sense is that it provides one answer to this need.³⁵

John Ruskin understood human action as an eventual generator of a legacy called civilization. This legacy is measurable in its words, its deeds and in its arts. And the law that we apply today, a law that contains the three elements mentioned by the above writer, will also be our legacy of civility or inequality. What is happening in our time, in our legal system in 2012, is definitive for our ability to interpret and assess our civilization.³⁶

But still, the Rule of Law represents a guideline for the pursuit of justice and maintains the focus on the need to address injustice and fight against

³⁴ See “Human Rights and the Rule of Law after Abu Ghraib and the Election of Barack Obama: A European Vision of the Past and Future of the U.S. War on Terror” in *Protección Internacional de Derechos Humanos y Estado de Derecho*, II Volumen obra homenaje a Nelson Mandela, AAVV, director y editor de la obra. Gustavo Ibáñez ediciones jurídicas, Bogotá, 2009, p. 405.

³⁵ TAMANAHA, B.Z., *On the Rule of Law*, Cambridge University Press, 2004, p. 139.

³⁶ GONZALEZ-IBANEZ, Joaquín, “Legal Pedagogy, The Rule of Law and Human Rights: The Professor, The Magistrate’s Robe and Miguel de Unamuno”, *JOURNAL OF HUMAN RIGHTS LAW*, Volume 6 2011-2012 Number 1, November 2012, available at <http://www.americanstudents.us/journals/ijbrl/>

impunity. Edmon Cahn in his work *The sense of injustice* interprets this as part of a human progression: “justice would not be a state, but a process, an action –the active process of remedying or preventing what would arouse the sense of injustice”.³⁷ When we face injustice, the response “is a biologic reaction combining both reason and empathy on the projection of one’s self onto others”.³⁸ The sense of injustice forms the basis of law. Heraclitus made this point by stating, “were there no justice, men would never have known the name of justice”. And this brings us back to the core issue. Justice and human rights are always “others peoples rights”, and empathy is the core element of this process, where the anthropocentric view of law is the inner garment of international law, at least when it comes to the most heinous crimes.

We should remind ourselves that maybe the only real reason in keeping the legitimacy of the international community alive is to strengthen our interest in the victims and the vulnerable. We shouldn’t forget that the current stage of international human rights law witnessed a dramatic change after the fall of the Berlin Wall and the UN Human Rights Vienna Declaration precisely because the victims, those who are most vulnerable and alienated, have become the epicentre of the legal universe.

The British judge Tom Bingham expressed this sentiment in a definitive manner when he wrote: “*So it seems to me that observance of the Rule of Law is the nearest we can get to a universal secular religion.*”³⁹ Rule of law, justice and commitment go hand in hand with our legal and moral obligations. The international Rule of Law has become a spiritual element of those democratic societies that aspire to be more just and inclusive; an essential element to reaching goals of development, or in other words, a space where there exists the options of rights and opportunities. It makes one think that the Rule of Law is an aspiration to dignity, not exempt from tensions, and which constitutes one of the clearest elements of the democratic system.

I still often wonder whether the rule of law is a cultural achievement of universal significance, and following judge Bingham’s metaphor regarding the rule of law as a universal secular religion, we probably have not

³⁷ CAHN, E., *The sense of injustice*, NYU Press, 1964 quoted by CLARKE, K., M., GOODALE, M., *Mirrors of Justice*, Cambridge University Press, 2010, p.322.

³⁸ CLARKE, K., M., GOODALE, M., *Mirrors of Justice*, Cambridge University Press, 2010, p. 322.

³⁹ BINGHAM, T. , *The Rule of Law*, Allen-Lane Penguin Books, London, 2010, p.174.

surpassed the “liturgical moment” that represents a simple paragraph pronounced during the second day of the Judgements at Nuremberg in 1945 by Robert H. Jackson, the American Chief prosecutor.

“The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility (...)” and spoke of the Allied “practical effort...to utilize International Law to meet the greatest menace of our times(...)”.⁴⁰ “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the **judgment of the law is one of the most significant tributes that Power has ever paid to Reason.**”⁴¹

Will it be the case that our tribute to Law is to avoid indifference in the face of injustice, to prevent the weakening of our collective memory, and to pay respect to the victims in conflicts such as that which is taking place in Syria through international legal protection? Will our tribute be the creation of the necessary policies to avoid impunity? Will that be the legal and ethical threshold of dignity?

We name as classical works those products crafted by human beings that, regardless of time, place, or cultural background, seem to be alive as part of the human experience. When it comes to victims the literature of Primo Levi and Ellie Wiesel are perennial reflexions for yesterday and tomorrow and our commitment to victims of any conflict.

Our defeat will be real if, when faced with the crimes in Syria, indifference and oblivion prevail in the coming months and years. The term *Kaputt* is frequently used to refer something that is broken, shattered and ruined. We have been unconsciously thinking about the killed, the refugees as if we were voluntarily forgetting that *Kaputt* is a word that comes etymologically from the Hebrew term *Kopparoth*, that means VICTIM.⁴²

I hope none of us will ever forget that our concept of justice and dignity relies not only on ourselves, but especially on those victims, vulnerable and alienated from any chance of hope, and opportunity. Their plight is our

⁴⁰ Gary J. Bass, *Stay the hand of vengeance*, Princeton University Press, 2000, p. 174.

⁴¹ *Opening Statement Before the International Military Tribunal*, Nuremberg, Germany, November 21, 1945

Available at <http://www.roberthjackson.org/>

⁴² MALAPARTE, K, *Kaputt*, Adhelpi edizioni Milano, 2009, p. 280: “Lei conosce l’origine della parola *Kaputt*? È una parola che proviene dall’ebraico *kopparoth*, che vuol dire vittima.”

plight. Ellie Wiesel's words are our own:

"Our lives no longer belong to us alone; they belong to all those who need us desperately. (...) Without memory, our existence would be barren and opaque, like a prison cell into which no light penetrates; like a tomb which rejects the living. Memory saved the Besht, and if anything can, it is memory that will save humanity. For me, hope without memory is like memory without hope. (...) What all these victims need above all is to know that they are not alone; that we are not forgetting them, that when their voices are stifled we shall lend them ours, that while their freedom depends on ours, the quality of our freedom depends on theirs."⁴³

A legacy of civic commitment is built and strengthens in every corner of the world through civic acts of empathy and encounter toward "the otherness" as Ryszard Kapuscinski described it.⁴⁴ I personally have tried to adopt as my own that which the professor Abdullahi Ahmed An-Na'Im has stated, and which Alberto Moravia in his work *The Indifferent*⁴⁵ (*Gli indifferenti*) had affirmed before; that in facing injustice the only option is to say 'No', as doing otherwise is to become an accomplice to injustice itself. I think that writer Javier Cercas was right in the closing chapters of *Soldiers of Salamis*⁴⁶ when he suggests that maybe being decent "means learning to say no".

Joaquín González Ibáñez, Madrid, August 2012

⁴³ Ellie Wiesel, Speech acceptance at Nobel Peace Laureate ceremony in Oslo, 10th December 1986, available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.htm

⁴⁴ KAPUSCINKI, R., *The other*, Verso, London, 2008. For Kapuscinski an essential part of the human experience has been the encounter with the other: "(Levinas's) philosophy (outlined in *Le temps et l'autre* – Time and the Other) is a framework that you have to fill in with your own experience and observations. Levinas never stops seeking ways to reach the Other, he wants to free us from the restraints of selfishness, from indifference, keep us from the temptation to be separate, to isolate ourselves and be withdrawn. He shows us a new dimension of the Self, namely that it is not just a solitary individual, but that the composition of that Self also includes the Other, and like this a new kind of person or being is created."

⁴⁵ MORAVIA, A., *Gli indifferenti*, Bompiani, Milano, 2000.

⁴⁶ CERCAS, J., *Soldiers of Salamis*, Bloomsbury, London, 2003.

THE POSITIVE CRITERIA OF LEGAL NORMS:
LAW BETWEEN FACTS AND NORMS

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Abstract

With the publication of *Faktizität und Geltung* Jürgen Habermas sought to extend his normative critical arguments to jurisprudence. In this work he argues that the law can mediate and coordinate valid social integration in complex modern societies because it is capable of receiving normative inputs from the public sphere, which are then translated into the administrative system. Throughout his extensive writings, Habermas has referred to a principle of the universalisation of the valid norm. Its role in pluralist societies is therefore not to offer a substantial value, but to guide in the character of a regulative idea. This idea would be impartial with respect to the plurality of conflicting goods in that society. This paper will argue that Habermas has not been able to maintain the impartiality or neutrality of the principles of discourse. That they are at each turn and in each operation involved in positive assumptions about goods. The norm, then, is situated and historical. Therefore, Habermas requires a revised account of the normative quality of both law, and the democratic forms of governance that sustain it. These are forwarded in terms both of a reconceived version of the democratic principle as a deliberative majority rather than a universal consensus. This, in turn, is based on a reconceptualisation of the public sphere from which norms arrive for the law to implement or reshape, away from its idealist version, to a situated and historical one in which the mediation of particular audiences is considered an element of rationality. Finally, the discourse of rights is considered, in order to assess both the context-dependence rather than context-transcendence of those norms. The difficulties encountered in the revision of normativity away from idealist conceptions of right is seen in a discussion involving recent criticisms demanding a more situated norm. It is concluded that that reconceptualisation cannot simply be implemented by jettisoning idealism at

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least as a regulative, and critical force, detecting the aporias of historical subjectivity.

THE NORMATIVE BASIS OF SOCIETY

Jurgen Habermas's social theory has consistently attempted to develop and defend a critical theory of normative society in which a credible form of universalism is reconciled with a genuine acceptance of pluralism.¹ This project has been conducted against a background of developments in philosophies of society and value which have discovered the irreducibility of the contextuality and contingency of knowledge and normativity. Similarly, whilst the rightness of norms can no longer be assessed against a conceptual universal, neither can it rely on a background of normative agreement, except, perhaps, on the most localised scale.

Habermas's conception of morality has been commented upon by numerous critics. Communitarians, for example, question the feasibility (and desirability) of the sharp distinction between the right and the good. They argue that the only defensible universal is a contextualist one arising from the well-being of a concrete identity, both individual and collective.² Feminists question the distinction's entrenchment of the public/private dichotomy on the basis of negative liberties.³

In response to communitarians, Habermas agrees that the right cannot be clarified without some reference to the good. Individual rights, for example, must relate to the broader social context of solidarity in which they are maintained, and which they in turn serve (the common good). However, Habermas insists that some distinction between the right and the good is required in a liberal society in which a diversity of conceptions of the good life is affirmed. A theory of public morality designed to address the legitimacy of the basic social norms that govern collective life should not rely upon a particular (and hence sectarian) conception of the good life.

¹ For examples only of an extensive secondary literature see: David Rasmussen (ed), *Universalism v Communitarianism: Contemporary Debates in Ethics* (Cambridge, Mass., 1995); Shlomo Avineri and Avner de-Shalit (eds), *Communitarianism and Individualism* (Oxford, 1992).

² See eg, Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York, 1983); Alisdair MacIntyre, *After Virtue* (Notre Dame, 1981).

³ See eg, Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: On the Politics of Gender* (Minneapolis, 1987); and Marie Fleming, *Emancipation and Illusion: Rationality and Gender in Habermas's Theory of Modernity* (University Park, 1997).

Neither should it necessarily have something to say on every ethical issue concerning individual or communal life.

Habermas defends the distinction between the right and the good by distinguishing between the general structures of communicative action and the plurality of concrete lifestyles that are compatible with them. He also draws a distinction between discourses of application and discourses of justification. These discourses occur in inseparable entwinement in most if not all discourses on practical problems – that is, in situations in which numerous persons or groups with an interest in the outcome engage in thematising the issues, clarifying their approaches, and constructing a consensual outcome.

Communitarians typically wish to minimise or bridge the gap between descriptive and evaluative expressions, between the right and the good, or between the grounding of norms, and their application. In their view, a proceduralist account such as that developed by Habermas, which attempts to develop norms which are ‘neutral’ with respect to goods, values and contexts, cannot generate norms, institutions or rules. Whether conducted along the lines of a revitalisation of tradition or participatory political cultures, the aim is to affirm the context-specific qualities of validity and justice.

The Foundation of Norms

Habermas’s overarching thesis is that it is possible to ground validity in a universalist but non-objectivist way by conceiving of truth and justice in procedural terms. This requires a rational consensus emerging from a free and open (that is, an ideal) discussion, among all those concerned with an issue or affected by a norm. Norms cannot be defended by reference to substantive values, but only by means of a properly conducted argument, and the validity of propositions and norms is fulfilled by the adherence to procedures rather than with reference to (unshared) content or (partial) particular perspectives.⁴

⁴ Two problems follow from this consensually grounded theory of truth. First, the assessment of the consensus itself must have reference to some external other than consensus. Second, it is not clear how consensus itself can be identified. Habermas responds in two, largely unsatisfactory, ways. The arguments involved are not of concern to this discussion; however they can be roughly stated. First, Habermas is forced to grant his theory the status of an exception. Second, he demonstrates in his engagement with his critics, that any attempt to deny the conditions of his theory of argumentation involves the denouncer in a ‘performative contradiction’.

The consensually based grounding of validity is derived from a pragmatic analysis of the presuppositions of argumentation.⁵ When we enter discourse, we must assume that the only legitimate criterion for agreement or disagreement is the cogency of the arguments adduced in support of the validity of the claim. Habermas argues that the discursive assessment of validity claims associated with statements and norms is only a special case of what takes place in ordinary communication. When speech acts are performed, three types of validity claim are implicitly raised. First, the concern for truth is raised in the presupposition of the propositional content of a speech act. Second, the illocutionary force grounds the presupposition of the validity of the social relation. Third, interlocutors generate and expect sincerity from each other. These claims may be accepted or rejected on the basis of reasons, or on the presupposition that reasons may be provided.

The values implied in speech acts, argues Habermas, are not the values of any historical community, but are drawn from the very idea of real-existing rational communicative forms of action. As a result, the good life is anticipated in every successful speech act.⁶ Habermas gives an account of intersubjective relations “inscribed in the linguistic telos of reaching an understanding”⁷ since mutual understanding is the basic type of social action⁸. Well-formed sentences presuppose the speaker’s access to a priori linguistic elements which enable the speaker to reproduce the structures of speech in general, or the elements which all forms of social life presuppose.⁹ The participants in the speech situation must take a performative attitude which involves a commitment to certain presuppositions. In particular, they must orient themselves to the presupposition that each and every dialogue raises claims to validity, which correspond fully to interpersonal obligations to offer grounds, disclose motives and exhibit norms in argument.¹⁰ Validity is at the heart of reaching an understanding. When, through an assertion, a speaker raises a criticisable claim to the validity of the asserted sentence,

⁵ Jurgen Habermas, ‘A Reply to My Critics’ in J B Thompson and D Held (eds), *Habermas: Critical Debates* (London, 1982), 219; ‘Counterquestions,’ *Praxis International* 4, 1984, 229.

⁶ Jurgen Habermas, *Knowledge and Human Interests*, trans J Shapiro (Boston, 1971), 54.

⁷ Jurgen Habermas, *Theory and Practice* (London, 1974), 18.

⁸ Jurgen Habermas, *Communication and the Evolution of Society* (London, 1979), 208-10, and 40-1.

⁹ See J B Thompson, *Studies in the Theory of Ideology* (Cambridge, 1984), 263.

¹⁰ Jurgen Habermas, ‘What is Universal Pragmatics?’ in *Communication and the Evolution of Society*, *ibid.*, 64-8.

because no-one has direct access to uninterrupted conditions of validity, “‘validity’ must be understood epistemically as ‘validity proven for us’.”¹¹

If the elements of speech act theory are part and parcel of everyday utterances, then illocutionary binding force can be “enlisted for the coordination of the actions plans of different actors.”¹² For Habermas, what is true for language is true for society. The relationship between facticity and validity is stabilised because,

with the concept of communicative action, which brings in mutual linguistic understanding as a mechanism of action coordination, the counterfactual suppositions of actors who orient their actions to validity claims also acquire immediate relevance for the construction and preservation of social order: for this order subsists through the recognition of normative validity claims.”¹³

The means by which the relationship between facticity and validity is stabilised in complex society is the law. Under law, mutual understanding replaces authority. However, with the decay of formerly strong institutions which were guarantees of social integration, social dissension grows. In discourse theoretical terms: strategic and communicative action have become separated. Habermas believes that the “only way out of this predicament is for the actors themselves to reach an understanding about the normative regulation of strategic interactions.”¹⁴

Where strategic action threatens to annihilate communicative action, Habermas has recourse to an original norm of interaction, the ‘ideal speech situation’, to which it would be unsustainably contradictory not to submit. This is because the ideal speech situation is pure intersubjectivity, a situation in which there are no barriers obstructing processes of communication. In that situation all participants have the same opportunity to: initiate and sustain discussion through question and answer; proffer interpretations and explanations so that preconceptions are laid open; express intentions and attitudes so that subjects remain transparent to themselves; order, prohibit, obey and refuse, thereby precluding the privileges that arise from one sided norms.¹⁵

¹¹ Ibid, 64.

¹² Ibid.

¹³ Ibid, 85.

¹⁴ Ibid, 77.

¹⁵ Thomas McCarthy, *The Critical Theory of Jurgen Habermas* (Cambridge, Mass., 1978), 308.

Habermas's methodology of advancing an evolutionary concept of society alongside a procedural concept of discourse enables him to separate social forms from essential social contents. This, in turn, is designed to preserve and reconcile pluralism (of content) and universalism (of form). Communitarian and other critics, of course, take exception to this distinction in the first instance. Most pointedly, they argue that this central presupposition simply negates the nature of morality itself, since the only substantial questions in ethics are those in which agents are confronted with choices between concretely distinct values, or those issues in which, conceptually, agents are asked to affirm or deny the available paradigms.¹⁶

For Habermas, the pragmatics and semantics of the good fall outside the range of the universalisable interests (the right) precisely because their separation has resulted from the rationalisation and increasing self-reflexivity of modern societies. Habermas's reasons for his sharp distinction is based on the fact, firstly, that identities are formed in particular collectives under historical circumstances. Therefore, when modern identities encounter each other and move beyond their range of operational felicity, they must find other bases for coordination, and other forms of accommodating their expectations. If one accepts that the rationally motivating force of the better argument contained in discourse ethics provides such a basis, reverting to older substantive values and forms will be impossible. This is because, being unable to convince others of the rational acceptability of the good or some part of it, the strength of one's conviction will be difficult to maintain (as a specifically moral force).

If Habermas is right in his social analysis, and sociological description of the irreducible plurality of modern complex societies, then it appears inconsistent to so completely exclude the values and goods contained therein from a central role in the achievement of rational consensus.¹⁷ Rather than the absolute distinction between what is good for me and what is good for all, rational consensus must pursue both the moral and the ethical dimension of agreement.

Problems of Social Interaction

¹⁶ See eg, MacIntyre, above n 2.

¹⁷ William Rehg, *Insight and Solidarity: The Discourse Ethics of Jurgen Habermas* (Berkeley, 1997), 97.

When it comes to social interaction - the problem law is specifically designed to address - the requirements of discourse ethics shape the solution *ab initio*:

If we want to decide the normative questions having to do with the elements of living together, not by the direct or masked resort to force, by pressure, influence or by the power of the stronger interest, but rather by a non-violent conviction based on a rationally motivated agreement, then we have to concentrate on the circle of questions accessible to an impartial evaluation. We should not expect a generally binding answer if we ask, what is good for me or good for us or good for her; for that we must rather ask, what is equally good for all. This 'moral point of view' projects a sharp but narrow circle of light which throws into relief, against the mass of all evaluative questions, those action conflicts that can be resolved in relation to a universalisable interest: the question of justice.¹⁸

Moral norms, therefore, are related to social order, and are the means for adjudicating conflict among competing interests.¹⁹ The analysis of adjudication or the institutions of adjudication formally so designated, or otherwise recognised, would distinguish modes of normative cooperation accessible to rational consent from those dependent on oppression.

However, the adjudication of competing interests does not depend on a sharp distinction between particular values and consensual morality. Discourse does not impose restriction on individuals bringing their particular self-understandings to discussions. In fact, Habermas insists on this point: "If the actors do not bring with them, and into their discourse, their individual life-histories, their identities, their needs and wants, their traditions, memberships and so forth, practical discourse would at once be robbed of all content."²⁰ Logically, an individual could not know if a good was equally acceptable to all unless they had some conception of the other's sense of values, which could only have come from an engagement with them.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Jurgen Habermas, 'A Reply to My Critics' in J B Thompson and J Held (eds), above n 5, 219, 255.

Habermas thus now engages with the possibility of a new-found role for the conceptions of the good life in the modern polity.²¹ Conflicts must be settled on the basis of moral considerations if they are to be settled across a range of conceptions of the good that cannot, in principle, be hierarchised. If the existence of the group depends on the cooperation of others, or on their not being interfered with by others, conditions of moral adjudication will have to be satisfied. However, that resolution will only be possible to the extent that the group's ethos will allow them to harmonise their conception of the good with the moral rules of cooperation. If regulation resulted in some unavoidable detriment to interests, participants would have to enter joint assessments of those detriments and interests.

SOCIAL INTEGRATION AND VALID LAW

For Weber, the secularisation and rationalisation processes of modernity deprived law of a foundation in sacred authority.²² Instead of a substantive ethos extensive through social roles and authorities, he claimed that the law embodied a value-free formal rationality which was general, abstract and well defined, and calculable.²³ Weber places emphasis on overt behaviours rather than on the values actually espoused by social agents. For Habermas, however, whilst the "metasocial guarantees of the legal order" were effectively undermined by the rationalisation process, secularisation did not, he claims, "vaporise ... the non-instrumentalisable quality of the law's claim to legitimacy."²⁴ Modern law cannot be exhaustively described by formal rationality.²⁵ What remains to be reconstructed counterfactually, are the

²¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, 1996), 200-01.

²² Even before *Between Facts and Norms*, Habermas begins his discussion of social modernity with Weber's theory of universal rationalisation in which the rationalisation of law played a prominent part. See, *Theory of Communicative Action*, Vol. I (Cambridge, 1995), 173-242.

²³ *Ibid*, 260.

²⁴ See David Rasmussen, 'How is Valid Law Possible? A Review of *Faktizität und Geltung* by Jürgen Habermas,' *Philosophy and Social Criticism*, Vol 20 no 4, 1994, 21-44.

²⁵ Indeed, Weber's description is ideological in that he ignores or underestimates the significance of two prominent currents in the modernisation of law. Firstly he underestimates the role played by the materialisation of law (Habermas, above n 21, 332), since, from the perspective of formal rationality it is particular, concrete and uncalculable. Secondly, his theory of law's formalisation does not allow for recent developments that proceduralise law: see Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Gunther Teubner (ed.), *Juridification of Social Spheres* (Berlin, 1987). Proceduralism dissolves formal rationality by replacing judicial imposition with informal bargaining procedures and hearings which accommodate compromise formations, destroying calculability. These forces are aberrant and deficient from Weber's perspective only because he develops a concept of law that is as value free as his theory of the scientific

communicative forms of rationality and legitimacy the law can claim (as opposed to any strategic rationality it has acquired historically).²⁶ For Weber the socially integrative force was political domination. However, Habermas brings together Parson's concept of the 'juridification of political power' and Durkheim's concept of the 'evolution of societal community' to explain the integrative force as the replacement of political domination with democratic will-formation.²⁷ This explains how the rationality of modern law can be upheld while the legal control of social life increases, and how spreading juridification can be controlled by those subject to it:

[M]odern law can stabilise behaviour expectations in a complex society with structurally differentiated lifeworlds and functionally independent subsystems only if law, as a regent for 'societal community' that has transformed itself into civil society, can maintain the inherited claim to solidarity in the abstract form of a believable claim to legitimacy.²⁸

Habermas's is a law legitimated under the conditions of deliberative democracy. The participant citizens are consociates of a form of life embedded in structures of communicative action, which are linguistically mediated forms of interaction based on the ability of the hearer and speaker to accept and reject the validity claims raised in reciprocally related speech acts. For Habermas, law represents a form of necessary coercion that can be discursively, or normatively, redeemed.

For Habermas, then, law is legitimate because it is the most abstract medium through which consociates can regulate one another's communicative freedom. Law occupies a relation between facticity and normativity analogous to communicative reason. Law brings "the language of lifeworld communications in a form in which these messages can be absorbed by the specific codes of self-steering systems in action – and vice

institutions. Habermas, on the other hand, insists that Weber's analysis shows that law cannot be theorised as value-free since it is permeated by moral viewpoints, and the amorality of law assumes a moral viewpoint. As the law is socially embedded, it cannot be disengaged from the normative viewpoint which allows its critique. Habermas therefore reverses Weber's form of inquiry: rather than asking how legitimacy can result from legality, he inquires after the legitimacy of legality.

²⁶ Habermas, above n 22, 11.

²⁷ See Emile Durkheim, *The Division of Labour in Society* (New York, 1933).

²⁸ Rasmussen, above n 24, 28.

versa.”²⁹ Indeed, the function of law is to compensate for the motivational weakness of practical reason alone in a form of mutual completion. The mechanism for forcing those involved to accept the procedural rules is reason – or, more specifically, a discursive ethics based on the idealistic reconstruction of the rationality inherent in the intersubjective engagement itself. For Weber, in the absence of other forms of social integration, law in modern society performs the sociological role of legitimation through domination. However, a central part of legitimacy – convincing others of the legitimacy of legal decisions – cannot be based on power. The coercive power of law is a necessary fact of modern democracies that rests in the validity of democratic institutions, and the freedoms exercised through practices of participation, contestation, deliberation and legislation. These civic practices precede the law but can only be exercised through the medium of the law. Inverting Weber, Habermas explains this to be the “paradoxical emergence of legitimacy from legality.”³⁰

ANALYSING MODERNITY: LAW BETWEEN SYSTEM AND LIFEWORLD

For Habermas, modern complex societies must be conceived in terms of the relatively independent domains of the ‘lifeworld’ and the ‘system’. The distinction is introduced in response to Habermas’s disappointment with the Frankfurt School’s analysis of modern societies in terms of ‘totality.’³¹ The category of totality failed to analyse the emerging norm of discursive rationality which arose in the specific historical conditions of modernity, but was applicable beyond the conditions of its emergence. Totality was replaced with the category of ‘complexity’ which did not assume a totally integrated version of advanced capitalist society, but discovered one open to ideological contestation and reason giving. Democratic practices were embedded in contexts which they, in and of themselves, could not regulate.³² Therefore, a normative conception of politics was only available from within a sociological description of complexity.

²⁹ Rasmussen, above n 24, 28.

³⁰ Ibid, 130-1.

³¹ Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923-50* (London, 1973), 113-42.

³² Habermas, above n 21, 370.

Habermas developed a methodology with a double perspective to differentiate spheres of social reproduction (symbolic and material), which in turn designate functions of societal integration (social and systemic), embedded in different contexts of action (communicative and strategic). The lifeworld is what participants in communicative action presuppose as their shared background.³³ It contributes to the maintenance of individual and social identity by organising action around shared values by means of mutual criticism, or collective agreement on what is communicated. The system, on the other hand, is that aggregate of social subsystems whose functions are internally mediated and externally coordinated by the steering mechanisms of power and money. It integrates diverse activities in accordance with adaptive goals of economic and political survival by regulating the unintended consequences of strategic action through market and administrative mechanisms that constrain voluntary decisions.³⁴

Therefore, for Habermas, democratic theory must avoid the extremes of the purely normative and purely functionalist accounts of complex societies. The consequences of this would be, in the first place, to develop ideal theories of democratic deliberation, specifying conditions for justification and procedures for decision making purged of the reality of institutional constraint. Normative theories lack a “sociological translation”.³⁵ Systems theories, on the other hand, provide an understanding of the mechanism by which complex societies are organised. However, systems theories replace all normative categories with functionalist ones.³⁶ To achieve the aim of giving institutional arrangements legitimacy, Habermas must combine an account of social complexity with normative principles.

Habermas, does however agree with Luhmann’s functionalist accounts of law to the extent that law must have functional characteristics related to the maintenance of the social environment.³⁷ As part of the social system based on money and power, law is a medium for the reproduction of the modern state and economy. However, the functional analysis of law’s role in the bureaucratic control of state and private organisations, and the reproduction of the legal system as such, must be combined with a reconstruction of the rationality structures guaranteeing its legitimacy. Law and the legal system,

³³ Thompson and Held (eds), above n 5, 268.

³⁴ David Ingram, *Habermas and the Dialectic of Reason* (New Haven, 1987), 115.

³⁵ Habermas, above n 21, 388.

³⁶ *Ibid*, 369.

³⁷ *Ibid*, 303.

as the ‘regent for societal community,’ functions as the interface between the system and the lifeworld.³⁸

Habermas develops his bi-level analysis of social integration from Parsons conception of society as consisting of a cultural sphere of action on one side, and a functional system comprising personality and social systems on the other.³⁹ Ideal values logically interrelate the two spheres. However, conflict and inconsistency resulted in pattern stabilisation through repression, which could be reconciled with personality on the basis of Freud’s theory of internalisation,⁴⁰ the relegation of dysfunctional ideas to the spheres of personality or culture, or their ideological repression.⁴¹ Unlike Parsons, however, Habermas’s concept relates the spheres through channels of mutually conditioning communication. Both lifeworld and systems have claims over each other. Where Parson’s was a theory of social integration as conflict control, Habermas’s can be used to describe social change.

Habermas’s “two-track model”⁴² of democracy accounts for the normative assessment and guidance of the law (rule of law). In complex democracies, representative institutions exist alongside and contend with a vibrant and free public sphere and civil society of associations, social movements and citizens initiatives. Law can act as the interface between system and lifeworld by virtue of its bi-functionality. Habermas’s first account of the law under the paradigm of communicative action described it in terms, firstly as a medium⁴³ in that it normatively orders the social world, and in the second place, it is an institution⁴⁴ and a medium of distribution for money and power. Being both, it can provide the mechanisms of money and power with a normative context. Critics, however, argued that this paradigm neglected the possibility of law itself being restructured by systems. However, he now maintains that law can be encroached by systems imperatives (political and economic) transforming its normative bases in intersubjective reason, and guiding it in terms of efficiency.⁴⁵ At the same

³⁸ Jurgen Habermas *Theory of Communicative Action*, Vol. II: 524, 534; For Habermas, law presupposes the lifeworld in order to function, but restricts its regulative function to systems – it does not ‘colonise the lifeworld’ (TCA II: 489 n).

³⁹ Ingram, above n 34, 142.

⁴⁰ Habermas, above n 38, 310-11, 314-18; Talcott Parsons, *The Structure of Social Action* (New York, 1937), 93-101.

⁴¹ Talcott Parsons, *Toward a General Theory of Action* (Cambridge, Mass, 1953), 173-78.

⁴² Habermas, above n 21, 306.

⁴³ Habermas, above n 38, 536.

⁴⁴ Ibid.

⁴⁵ Habermas, above n 21, 135-6.

time, it could still be legitimated by moral-practical discourses in its reliance on procedural democracy which operates in legislation, jurisprudence and administration.⁴⁶

The categories of system and lifeworld, then, are methodological tools suggesting that actions be view from two perspectives: the perspective of the social agent who participates in communicative networks (the public sphere), and the perspective of the observer who views social behaviour in terms of unintended consequences.⁴⁷ These perspectives are overlapping functions, since systems are never completely uncoupled from normative contexts, and because democratic legitimacy requires such system steering mechanisms as power and money to be anchored in law before they can function.⁴⁸ This results in the mutual conditioning of system and lifeworld.⁴⁹ For Habermas, ideological illusions can only be analysed when existing forms of social integration are understood as compromises between lifeworld and system.

Habermas conceives of law as a mechanism for social integration, as Parsons did. Parsons' model, however, made no distinction between the contribution of each subsystem. For Habermas there is a fundamental difference between the sites of integration. Law remains related to the normative perspective that is only available from the lifeworld⁵⁰ – in other words, that it requires moral justification, especially when legal norms are affected by political and economic values and imperatives. There are, therefore, three mechanisms guiding changes in the legal form: economic and political imperatives, so-called technocratic imperatives resulting from the 'colonisation' of law by systems, and responses to the moral claims of the lifeworld. Recently, Habermas has paid closer attention and accorded greater significance to the levels at which law operates, attending to the significance of the constitution and the judiciary. He argues that the law's legitimacy is ultimately a product of legislation, but that the judiciary ensures that this process obeys the conditions of judicial will-formation.⁵¹

Thus, Habermas's theory argues for a relative autonomy of law. Understandably, developing his theory in the context of European welfarist

⁴⁶ Ibid, 109.

⁴⁷ See Ingram, above n 34, 120.

⁴⁸ Habermas, above n 38, 273, 275-6.

⁴⁹ Ibid, 275-6.

⁵⁰ Habermas, above n 21, 70-8.

⁵¹ Ibid, 292-348.

states, Habermas accords a more interventionist role to the state⁵² than would a non-European. The government secures basic liberties and rights, and curtails capitalist encroachment on the lifeworld by supporting demands for equality and participation.⁵³ The normative claims of the lifeworld, then, are reflected in the norms guiding substantive law aimed at securing the viable coexistence of plural lifeworlds. Systems imperatives influence legal norms in terms of formal justifications, rather than specific *topoi*. Legal matters may arise anywhere, but the systems interest is in how they are dealt with, and how they are dealt with could transform the terms of justification demanded by the system.

THE JUDGE AND REASON

Before seeing how these consideration can be used to assess, more or less successfully, an actual historical situation, it is necessary to consider Habermas's application discourse on the relation of justice to rationality. Habermas comments on the normative influxes filtered through law to determine or control systemic functions. He does not however provides a detailed discussion of how law will handle normative inputs and channel them through to the system. For Habermas, the legitimacy of the legal norm is determined from the counterfactual reconstruction of the legislative process.

However, judicial application of a legal norm to a particular case involves more than a counterfactual reconstruction. It also requires judicial adaptation of the legal norm to the to the facts and circumstances of the actual case. For a judicial decision to be legitimate it must both contribute to legal stability and be right.⁵⁴ The judge faces the problem of how the application of a contingently emergent law can be carried with internal consistency, and grounded in an externally rational way so as to guarantee simultaneously the certainty of law and its rightness.⁵⁵ Habermas analyses Legal Hermeneutics, Legal Realism and Legal Positivism and finds them lacking,⁵⁶ since they fail to make the appropriate distinction between facticity and validity.

⁵² Habermas, above n 38, 267-72, 347-63

⁵³ See eg. Suzanne D Berger (ed), *Organising Interests in Western Europe* (Cambridge, 1981)

⁵⁴ Habermas, above n 21, 199-201.

⁵⁵ *Ibid*, 200.

⁵⁶ *Ibid*, 33.

For Habermas, ideological illusions can be diagnosed only when existing forms of social integration are understood as compromises between lifeworld and system.⁵⁷ Functionalist theories reduce social integration to adaptation and interpret cultural ideals as mechanisms for steering behaviour. Such ideals can be functionally legitimated but not ideologically compromised by the system, and so cannot serve as standards for criticising the injustice of adaptive hierarchies of power and wealth.⁵⁸ Legal realism shows an awareness of the contingencies of any particular ethics in a pluralistic society. Therefore it focuses on external factors such as the judge's politics, psychology and ideology to account for judicial decisions. However, in the process it wipes out the structural difference between law and politics and hence cannot explain how law stabilises expectations.⁵⁹ Legal positivism accounts for law's role in stabilising expectations by considering it impermeable to extra-legal principles, thus unduly sacrificing its rightness to its certainty.

Hermeneutic theories which reduce social integration to a consensus are incapable of grasping how the ideal of freedom and equality underwriting civil and democratic rights are vitiated by the constraints of political and economic domination that lie "hidden in the process of communicative action."⁶⁰ Legal hermeneutics admits the embeddedness of interpretation. It argues that standards for interpretation are relative because they are only referable to the pre-understanding of the judge and citizen. In turn this pre-understanding is shaped by the ethical complex of tradition. An essentially contextualist position it, because of its location in tradition, cannot reach beyond the available interpretations of tradition for standards of judgment. Habermas comments that the principle of adjudication can only be legitimated from "the effective history of those forms of law and life in which judges continually find themselves"⁶¹— thus it implements an already shared ethos.

However, there are numerous problems with this model. Firstly, context-dependent positions are bound by traditions which may be oppressive – and so should be regarded suspiciously.⁶² Secondly, in a pluralist society defined by competing conceptions of the good the hermeneutic model is flawed in

⁵⁷ Ibid.

⁵⁸ Habermas, above n 38, 276-7.

⁵⁹ Habermas, above n 21, 204-5.

⁶⁰ Habermas, above n 38, 276-9.

⁶¹ Ibid.

⁶² Ibid.

choosing to promote or advance one form of life over another. Therefore, Habermas concludes, overcoming context-dependent positions requires forms of idealisation which separate facticity from validity.

Dworkin's legal philosophy is appealing to Habermas in both its deontological character and its appeal to history. Contrasted with legal hermeneutics this approach is not associated with the 'pre-understanding of normative transmissions.' Rather it represents the 'critical appropriation of the institutional history of law' (critical reasoning). This takes legal philosophy beyond context-dependent, historical references by incorporating a moment of idealisation, applying appropriate deontological principles. For Habermas, Dworkin's critical hermeneutics contributes two principles. In the first place, it states that legal decisions may have a reference to a certain moral content (normative inputs). In the second place it includes a moral content that goes beyond a particular historical context – thus vying for unanimity and universality. Dworkin's appeal to deontological principle gets beyond the assumption that law is a closed rule system.

Habermas interprets principle as “higher-level justification of norm applications”⁶³ The application of a deontological principle distinguishes Dworkin from hermeneutics:

Since these principles cannot be drawn like historically proven *topoi* from an ethical community's complex of received traditions, as legal hermeneutics assumes, the practice of interpretation requires a point of reference that takes one beyond settled legal traditions.⁶⁴

Critical hermeneutics is said to appeal to a certain form of ahistoricity which in turn will lead to the separation of the context dependent historical evidence from theory. However, as we have established in terms of a provisional critical theory emerging from the particulars of practical reason in the public sphere, something more is required for the convergence of principle and practice.⁶⁵

Dworkin explains it by postulating a legal theory that rationally reconstructs and articulates valid law at a given time.⁶⁶ Dworkin says: “Constructive interpretation is a matter of imposing purpose on an object or practice in

⁶³Habermas, above n 21, 342..

⁶⁴ Ibid, 343.

⁶⁵ See, Ingram, above n 34, 172-88.

⁶⁶ Habermas, above n 21, 34, 31.

order to make of it the best possible example of the form or genre to which it is taken to belong.”⁶⁷ Habermas interprets this to mean that Dworkin is advancing a legally grounded bridge between reason and history: “With the help of such a procedure of constructive interpretation each judge should be able to reach an ideally valid decision by supporting his justification on a theory, thereby compensating for the supposed indeterminacy of law.”⁶⁸ So, Dworkin’s judge (Hercules) is able to appeal to the ‘best theory possible’ and conduct ‘rational reconstruction’. By upholding the classical principle of integrity, Hercules is able to sustain the interpretation of the law on the basis of ideals derived from the political community:

The judge’s obligation to decide the individual case in the light of a theory justifying valid law as a whole on the basis of principles reflects a prior obligation of citizens, attested by the act of founding the constitution, to maintain the integrity of their life in common by following principles of justice and respecting each other as members of an association of free and equal persons.⁶⁹

The judge is another citizen in this respect. But Habermas contends that Dworkin’s judge/citizen is unable to carry the program out because the integrity of the judge is not enough. One would have to liberate Hercules from the “loneliness of a monologically conducted theory construction” and redeem the deontological promise of adjudication dialogically. So, Habermas brings his theory and critique of subjectivity to bear on the point. Dworkin has acknowledged that integrity is grounded in equal right. Should the equal right to subjective liberties be anchored in the ideal personality of a judge who distinguishes himself by his virtue and his privileged access to truth? It would be better, argues Habermas, to ground the ideal demands of legal theory (and citizenly practical reason) in another ideal: the ideal “of an open society of interpreters of the constitution.”⁷⁰ Interpretation would then refer beyond the immediacy of the judgment of an individual to the intersubjectivity of a community of interpreters conceived along the lines of a discourse theory of law.

The argument draws on the establishment of the co-originality of public and private autonomy to link subjective liberties with the common good. Individual judgment is therefore critiqued in the name of the community of

⁶⁷ Ibid, 222.

⁶⁸ Ibid, 333.

⁶⁹ Ibid, 354.

⁷⁰ Habermas, above n 22, 267

interpreters. The subject must be given a role without sacrificing the account of public rationality. Habermas furnishes a principle of dialogue among civic-minded individuals who do not share the same conception of the good.

THE HISTORICAL CASE

Deflem's historical analysis of the institutional, social, cultural and political changes in abortion law in America considers the political and cultural extra-legal conditions under which these decisions were reached.⁷¹ The two most notable cases in this debate were *Roe v Wade* (1973)⁷², and *Planned Parenthood v Casey* (1992)⁷³. In *Roe* the United States Supreme Court based its decision on a woman's privacy right. The right to privacy is not explicit in the US Constitution, but the Court concluded that

however based ... whether it is to be found in the Fourteenth Amendment's concept of personal liberty, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of the right to the people, it is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.⁷⁴

The court also ruled that this privacy right is not absolute and that it should be measured in relation to the state's interest to protect potential life. The decision was highly controversial and led to legislative changes in all American states. In effect *Roe* curbed the legislative powers of the US States by not allowing them to pass legislation that proscribed abortion. *Casey represents the most restrictive abortion ruling to date. Whilst not overruling Roe, it discarded Roe's trimester framework.* The State's interest can now be set by a determination of fetal viability no longer bound to a definite period in pregnancy.

Political responses to both cases assumed unprecedented proportion. This was characterised by an explosion of abortion related legislative initiatives after 1973, and an increased litigation over their constitutionality. The evolution of abortion law since *Roe* reflects the struggle between state and

⁷¹ Mathieu Deflem, 'The Boundaries of Abortion Law: Systems Theory From Parsons to Luhmann and Habermas,' *Social Forces* 76(3), 775.

⁷² *Ibid*, 784.

⁷³ *Ibid*.

⁷⁴ *Roe* at 728, in *Ibid*.

federal bodies of government. A number of controversial proposals were raised at state level. In 1976 the *Hyde Proposal* was put forward by Senator Henry J. Hyde to introduce an amendment to a federal health bill that stipulated that except where the mother's life was threatened, abortions could not be funded through Medicaid under Title XIX of the *Social Security Act* which provides federal funds to the states for medical care.⁷⁵ Senator Orrin Hatch proposed a constitutional amendment (the only one ever to reach the Senate floor) that abortion was not a right guaranteed under the Constitution and that the more restrictive law should govern in the case of federal and state law conflicting. Bitter controversies in Congress surrounded both amendments.

The political importance of the abortion issue was also evident in the consecutive presidential campaigns of Presidents Reagan, Bush and Clinton. Abortion was a key issue in the Reagan presidential campaign, whose administration advanced pro-life proposals. George Bush ran on a pro-life platform and continued the anti-abortion policies of the previous administration. Clinton, on the other hand, declared his more liberal position during his campaign, and pursued a number of them, if not legislatively, then through his appointment of key justices and Attorneys-General.⁷⁶

The cultural influence on the abortion cases is empirically difficult if not impossible to measure. They can be described, but not quantified. Furthermore, there are difficulties in accounting for the variables that constitute culture. Abortion is discussed in the light of multiple claims over the meaning of abortion from ethnic minorities, religious groups, women's rights movements, and the counter-reactions they invoke. Then, within any one of these groups analysis confronts the difficulty of attempting to relate the connection between the legality of abortion, the sentiments attached to its morality, to the political orientation, religious convictions, age, race, gender, and regional affiliations of individuals and collectives.

More broadly, analysis can point to the struggle between the American religious inheritance and the culture of individual rights – “a constant factor”⁷⁷ in all considerations of social life. Deflem argues that the Supreme Court expressed a reluctance to consider particularistic rights for women in favour of the application of universal principles, and that this confirms

⁷⁵ Ibid, 785.

⁷⁶ Ibid, 786-87.

⁷⁷ Ibid, 788.

Parson's contention that the universals have a conflictual relation between the plurality of values and the integrative aspirations of legal norms in the abortion case. Habermas argues that lifeworld claims are reflected in normative demands that have to be mobilised by social movements actively oriented towards legal and political reform⁷⁸ – so it better accounts for the cultural-religious controversy between different, pro-life and pro-choice pressure groups that seek to promote their interests in the debate.

Habermas argues that the role of the Constitutional Court is to preserve the very system of rights that preserves an internal link between the public and private autonomy of citizens.⁷⁹ He therefore provides a systematic theory of democracy that brings the legitimate parameters of constitutional review into focus. For Habermas, constitutional adjudication must be susceptible to deontological justification to the community of communicatively engaged actors. Legitimate constitutional adjudication is not a matter of “[w]hat is best for us at a given point” but “what is equally good for us all.”⁸⁰ However, at the same time, constitutional norms cannot simplistically preside over all conceptions of the good.

Habermas limits legitimate constitutional adjudication to the application of constitutional norms that a judge must presuppose to be valid.⁸¹ However, this is too narrow a formulation when considering the counterfactual nature of deliberative democracies. In an ideal democracy, surely constitutional norms would be established by a discursively oriented legislative procedure, and judges would merely apply those norms to individual cases. However, the greater the deviation between actual democracy and its counterfactual counterpart, the more room there is for judicial elaboration and application of constitutional norms. As long as the work of the judge can be justified in terms of Habermas's understanding of constitutional adjudication, there is a sufficiently strong theoretical foundation for the distinction between the judiciary and the legislature.

Habermas identifies technocratic pressures determined by medical technology on the Supreme Court's decisions. *Roe* acknowledged the normativity of the medical profession's position.⁸² The abandoning of the trimester framework was dependent largely on medical expertise: the state's

⁷⁸ Habermas, above n 38, 391-96.

⁷⁹ Habermas, above n 21, 272.

⁸⁰ *Ibid*, 270.

⁸¹ *Ibid*, 269-70.

⁸² Deflem, above n 71, 790.

compelling interests were judged not to apply until the end of the first trimester of pregnancy, while, “up to that point, the abortion decision in all aspects is inherently, and primarily, a medical decision ...[and] must be left to the medical judgment of the pregnant woman’s attending physician.”⁸³ As Habermas has argued in relation to the technocratic redefinition of European welfare laws,⁸⁴ the court resolved the normative dilemma (“the vigorous opposing views”) on the basis of technological reasoning.

This applies formally only to the justifications that set limits to the constitutional right to abortion. The technocratic reframing of abortion law has given rise to numerous criticisms. It has been suggested that the Supreme Court’s abortion rulings are constitutionally vague because the Court failed to clearly define the boundaries of the trimester framework and the point in pregnancy.⁸⁵ Some commentators therefore propose alternative standards based on fetal development.⁸⁶ Others questions the reliance on medical technology altogether in constitutionally determining the boundaries of legal abortions. Because technocratically transformed abortion law subordinates abortion as a right (defended or denied) to the technical abilities of medical experts and reaffirms the role of women in terms of their reproductive abilities, it is argued to abandon technocratic standards in favour of constitutional principles or a recognition of specifically feminine qualities.⁸⁷ The conversion of symbolic into technocratic reasoning has been applied in constitutional abortion rulings that have been reached since *Roe*.⁸⁸

The theories applied are not strong in determining the weights of the interests influencing abortion laws. However, the bi-level model is more successful in accounting for the range and types of influence. The law is not closed to these influences, as Luhmann would have it, nor is it simply

⁸³ *Casey* at 733, in *ibid*.

⁸⁴ Habermas, above n 38, 361-73.

⁸⁵ Carole Clark, ‘Perspectives of Viability,’ *Arizona State Law Journal* 9 1980, 128, 129-37.

⁸⁶ Ronald Dworkin, ‘Unencumbered Rights: Whether and How *Roe* Should be Overruled,’ *University of Chicago Law Review* 59, 1992, 381, 381-42; Kelly Henry, ‘*Planned Parenthood of Southeastern Pennsylvania v Casey*: The Reaffirmation of *Roe* of the Beginning of the End?’ *Journal of Family Law* 32, 1994, 93, 113; John E Kennedy & Michael Nicolazzo, ‘Abortion: Toward a Standard Based upon Medical Signs of Life and Death,’ *Journal of Family Law* 23, 1985, 545-63.

⁸⁷ Susan Behuniak-Long, ‘*Roe v Wade*: the Impact of an Outdated Decision on Reproductive Technologies,’ *Policy Studies Review* 8, 1989, 368-79; R H Blank, ‘Judicial Decision Making and Biological Fact: *Roe v Wade* and the Unresolved Question of Fetal Viability,’ *Western Political Quarterly* 37, 1984, 584-602..

⁸⁸ *Casey* (1992) at 710-11, and *Webster* (1989) at 3054-58 cited Deflem, above, n 71, 790.

translating these inputs into its own hermetically sealed and specialised code for the purpose of its own maintenance. For Deflem, Parsons can assist in accounting for changes in society and in relations between the state and society. Parsons' theory is able to describe changes in social agent's beliefs and values. However, he maintains that law mediates by curing society of dissent through the procedural negotiation between different values.⁸⁹ When law does not function, orders will disintegrate. This denies that law can heighten social disintegration. This, he concludes from his historical analysis, was indeed the case with abortion law. Rather than provide cohesion, it has contributed to conflicts over the morality of abortion, both between the culture and the state, between state and federal levels of government, and within the pluralistic culture.

Habermas's relation of the law to the lifeworld, on the other hand, allows for a more sophisticated analysis of a complex social process. Divergent lifeworld claims confront the legal system, and vice versa. The legal situation is characterised less by integration than by enduring conflicts and tensions. In a pluralistic society harbouring multiple and divergent values, normative integration is becoming more difficult to achieve. As Habermas says, "the sphere of questions than can be answered rationally from the moral point of view shrinks in the course of development towards multiculturalism."⁹⁰ Deflem concludes that the legal system still serves integrative functions, and can still solve problems even in the most intractable situations (unwanted children, illegal abortions). He refers to the fact that the qualified legalisation of abortion has found general support. However, he also concedes that public opinion on abortion has become more polarised, so that a normative conflict reigns. Ultimately, the legal determination of abortion is a determinate outcome rather than one reflecting a normative consensus.

LEGAL SOLUTION

Despite the shrinking domain of normatively relevant questions, discourse theory does aim to relate law, politics and morality by providing an impartial procedure of adjudication. The strong claim it makes is that, if these procedures are followed by actors they will yield legitimate solutions for all effected. Despite the difference between the universal moral domain, and

⁸⁹ Deflem, above n 71, 803.

⁹⁰ Jurgen Habermas, *Justification and Application: Remarks on Discourse Ethics* (Cambridge, Mass., 1991), 91.

the local and particular domain of values, Habermas claims that ethics, morals and values can be brought into a complimentary relationship. Discursive validation of the law requires impartiality with respect to conceptions of the good actually represented in an historical society. Law is, in this respect, at best relatively impartial. Morality, on the other hand, would have to be impartial with respect to all conceptions of the good – including those not represented – and thus absolutely impartial.

However, there are issues, such as abortion, that cannot be approached independently of some conception of the good. Alisdair MacIntyre refers to abortion as a paradigmatic case of essentially contested and incommensurable moral disagreement in contemporary life.⁹¹ The issue, as extracted from the historical cases, policy initiatives and legislation, can be variously characterised as one of wilful murder (pro-life), or women's rights to autonomy, privacy and equality (freedom of choice). If the value of discourse is in its ability to assess the injustice of an action or course of action, it must do so by referring squarely to these different conceptions of the good, and the value preferences they enshrine. If moral consensus, as defined by Habermas, is impossible, legal consensus on the basis of adjusted preferences, compromise and bargaining may be available.

Compromises, suggests Habermas, are legitimate as long as they are acceptable to all communicative actors.⁹² Unlike discursive consensus, discursive compromise may be acceptable to different actors on the basis of different reasons.⁹³ Even if it is permissible in legal discourse to introduce pragmatic concerns, identity issues, and aspirations which aim at reaching an equilibrium between competing value preferences and interests,⁹⁴ it is unlikely that even the flexibility of discourse in legal reasoning would resolve the issue of abortion. This is quite clearly because the issue is structured by a sharp class of value preferences for which no dialogical compromise or balance seems possible. It is difficult to see how an even perfect reversal in subject positions could produce the gain in understanding required to produce persuasion for the purpose of transformation.

POLITICAL SOLUTION

⁹¹ Thomas Farrell, *Norms of Rhetorical Culture* (New Haven, 1993), 234.

⁹² Habermas, above n 21, 118.

⁹³ *Ibid.*, and 177.

⁹⁴ *Ibid.*, 118.

Discursive proceduralism in general, and the discourse theory of law subsumed under it, acknowledges the pluralist nature of modern complex societies, and attempts to provide a means for including perspectives which disagree on substantive issues. However, proceduralism ultimately depends on the compatibility with an underlying consensus on relevant substantive values. Discourse theory is adaptable to testing the limits of pluralism. On the one hand, Habermas insists that differences must be settled within the discursive process. So, feminists who reject standards of justice reflected in pro-life abortion rulings, for instance, must either agree to discursive proceduralism or renounce pluralism.⁹⁵ Habermas is amenable to a theoretical underpinning of the analyses of abortion cases in a liberal bourgeois democracy whose aim is to produce the greatest possible diversity compatible with the harmonious coexistence and cooperation, and with treating others with respect, fairly and equally, because discourse theory is grounded in pluralism's second-order value preferences. It is therefore appropriate for suggesting ways of accommodating as many first order value preferences as possible and to the greatest extent possible that is consistent with a cohesive and determinate political society. In fact, this ethic of pluralism takes the place of morality – although it would, as a definite conception of the good, fail the test of universalism.

Driven by its second order norm, pluralism is neutral to all first order values. It informs and limits the discursive procedure designed to select first order values for inclusion, subsuming that procedure under its own conception of the good. The pluralist perspective and the procedure it establishes are not entirely impartial. Rather, its role is to: test the authenticity of first order preferences; explore whether value preferences have commonalities or overlap; and suggest compromises pursuant to a balance of interests according to their relative weight in relation to the respective value preferences to which they are linked.⁹⁶ Law cannot reconcile legal and factual equality for the same reason pluralism cannot place all first order preferences on an equal footing. Therefore, discursive proceduralism can only suggest the best possible solution under current limitations.

Discursive proceduralism, therefore, restores the balance between the two profiles of Habermas's counterfactual constructs. First, it provides the means for constructing reflective equilibrium – the balance of first and second order preferences which orders them according to the situation and the concerns of morality. Second, it affords a critical vantage point from

⁹⁵ Ibid, 182.

⁹⁶ Ibid, 181.

which to demand inclusion or more favourable terms of inclusion. As the abortion case severely demonstrates through its deep value chasm, the morality of pluralism, and the legitimacy described by discursive legalism restricts the range of instances where legal consociates in a form of life can be genuinely considered both the authors and addressees of their own laws. Given that one's first order preference (pro-life/pro-choice) has been set aside or greatly restricted by a pluralist proceduralism, one cannot consider oneself an author of coercive laws to which one is subjected. The tension is acknowledge by Habermas as the tension between facts and norms which can never be ultimately resolved

The divisions of the abortion issue militate against the possibility of a dialogical agreement at the level of fundamental rights. Ethical and culturally specific interpretations (and conflicting self-understandings) enter the process which do not admit of a convergence towards consensus. Value conflicts cannot be impartially resolved – especially so if what is at stake is the concept of ethical interpretation itself. The task is made more difficult by Habermas's insistence that citizens agree “for the same reasons”⁹⁷ when deliberating, rather than agreeing for different reasons as in bargaining and compromise. The only solution may be a loosening of the requirements of the discourse principle that: “Only those laws may claim legitimacy that meet with the agreement of all citizens in a discursive law-making process that is itself legally constituted.”⁹⁸ Lowering the requirement of unanimity without surrendering the norm of popular sovereignty requires the introduction of a participatory component into the formulation of any principle. Thus, a law may be legitimate if it is agreed to in a participatory process that is fair, and open to all citizens.

Citizens who participate may still cooperate in processes the outcome of which does not accord with their values directly. Cooperation is defined as continued participation in the ongoing public discourse, despite disagreement with any particular decision. Furthermore, a law is thereby legitimate if it agreed to by all citizens in a fair and open participatory process in which they continue to cooperate freely. Habermas's principle of publicity prescribes cooperation among numerous collectives and counter public spheres. Once unanimity is abandoned, it is possible to incorporate the principle of majority rule into the two-track theory of democracy. Majority rule is acceptable as a basis for cooperation as long as minorities have reasonable expectations of being able to effect and revise political

⁹⁷ Ibid, 411.

⁹⁸ Ibid, 141.

decisions, including decisions about the conditions of participation. If all decisions are open to revision it is possible to compel the majority to take the minority into account, as long as all citizens are potentially capable of occupying the position of the minority. This condition is available from Habermas's discursive rules, but the outcome of unanimity is not unavoidable. Thus, the rule of the majority is what institutionalised popular sovereignty means – its weaknesses corrected by rational counter-majoritarian institutions such as judicial review.

RIGHTS

The ideal speech situation provides Habermas with the basis of the definitional interdependence of autonomy and solidarity. Habermas postulates that in any setting involving communicative action, the individual arguers or advocates are self-promoting, but are bound by good faith to recognise their mutual embeddedness in a community of discourse. This bond of belonging requires of interlocutors both the right to assert or deny, and the overcoming of egocentrism and resistance to self-criticism.⁹⁹ The same communicative setting requires equal rights of individuals within argumentation, and equal respect for the dignity of each participant in the process.¹⁰⁰ In other words, Habermas is raising, through the networks of communication, the prospect of identifying private and public persons engaging in practical historical questions.

What the ideal speech situation proposes, then, is nothing less than that democracy and the rule of law are mutually related. This synthetic claim is central to a system of rights in which public autonomy and private autonomy are mutually implied, or “equiprimordial.”¹⁰¹ Subjective liberties must be derived from democratic legislative procedures which confront its participants with the normative expectations of the orientation to the common good.¹⁰² Habermas wishes to avoid the liberal-republican dichotomy in the interpretation of rights. That is, the representation of

⁹⁹ Jurgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, Mass., 1990), 195-217.

¹⁰⁰ *Ibid.*, 202-3.

¹⁰¹ Habermas, above n 21, 162.

¹⁰² See Claus Offe, ‘Binding, Shackles Brakes: On Self-Limitation Strategies,’ in Axel Honneth et al (eds), *Cultural-Political Interventions in the Unfinished Project of Modernity* (Cambridge, Mass., 1992), 63.

rights as on the one hand the exclusively moral, universal property of atomistic individuals, and on the other hand the shared values of a particular community.

Law, in a manner analogous to communicative reason, mediates the dichotomy. As elements of a legal order, rights make sense by means of the mutual reinforcement of mutual recognition and self-legislation. It is the dual characterisation of rights which make them the means for citizens to collaborate in making positive law as free and equal citizens. Rights are collaborative in that they do not exist independently of the process of regulating the common life of citizens through the law. Laws, too, are legitimated when citizens grant each other equal rights and liberties. Habermas's theory of rights is based on his principle of discourse, derived from his postulates of communicative reason and states that "only those norms are valid which all those affected could agree to as participants in a rational discourse"¹⁰³ Thus, the regulation of common life will take the form of law when this principle is upheld, since the unanimity of citizens in its internal connection with the principle of legitimacy, preserves its "connection with the socially integrative force of communicative action."¹⁰⁴

The system of rights which Habermas derives from his formal postulates of successful communication supports a substantive democracy which emphasises the '[g]enuine participation of citizens in ... political will formation.'¹⁰⁵ Thus a strong notion of democratic will formation emerges which requires more than either formal or self-interested rationality. Habermas thereby rejects Weber's contention that legitimacy is a function of instrumental rationality. Rather, communicative rationality based on speech act theory founds modern law. Law expects its consociates to have a capacity for purposive-rational decision making. Habermas explains that the connection between public rights and subjective liberties,

lies in the normative content of a mode of exercising political autonomy, a mode that is not secured simply through the form of general laws but only through the communicative form of discursive processes of opinion and will formation.¹⁰⁶

¹⁰³ Habermas, above n 21, 411.

¹⁰⁴ Ibid, 111.

¹⁰⁵ See *Legitimation Crisis* (London, 1974), 36; and Habermas, above n 38, 8.

¹⁰⁶ Habermas, above n 21, 419.

Habermas's concept of the constitutional state in which rights are institutionalised is aligned to the model of the *Rechtsstaat*.¹⁰⁷ The *Rechtsstaat* institutionalises impartial procedures of decision making, and guarantees impartiality by procedural forms determining the rationality of law and the areas of life regulated by it. However, Habermas has characterised complex democracies as consisting of mixed modes of pragmatic, ethical and moral discourse, producing compromise and bargaining procedures.

This, however, would involve democracy in perlocutionary acts as well as illocutionary ones. Perlocutionary acts are strategic, symbolic and non-propositional, whereas illocutionary acts are communicative and propositional. Perlocutionary acts are also parasitic on illocutionary acts in that comprehensibility is the condition of all communicative action. In the course of Habermas's theorising of the speech act types which constitute a communicative practice, he comes to identify validity with some and not others, producing a hierarchy of types with rational and ethical significance.¹⁰⁸ In this case, the perlocutionary are not rational. Moreover, neither are they any longer two ways of examining the same phenomenon as they were in the speech act theory from which they were derived.¹⁰⁹ Habermas, in revising speech act theory for his own ends, denies the co-existence of perlocutionary and illocutionary perceptions or performances of utterances, morality or rationality, and replaces that symbiosis with a dichotomy.

A perfectly perlocutionary act in Habermas's complex democracy, and strategies of modern law, is bargaining.¹¹⁰ Bargaining is perlocutionary because an incompleteness of initial intent – which violates rules of discourse – is built into the procedure. The attitude involved in the dialogue requires an acceptance of ambiguity and a withholding of consent. Furthermore, it is only by these means that bargaining proceeds so that it is redeemed by reciprocal strategies.¹¹¹ If comprehensibility, as Habermas claims, is the condition of all communication, then there are never prior conditions to understanding. Comprehension occurs in the pure mode of rational reconstruction. However, if we return to speech act theory's forgotten claim that all utterances have locutionary, illocutionary and

¹⁰⁷ Jürgen Habermas, *The Philosophical Discourse of Modernity* (Cambridge, 1987), 8.

¹⁰⁸ Farrell, above n 91, 192-3.

¹⁰⁹ Allen Wood, 'Habermas's Defence of Rationalism,' *New German Critique* 35 (1985), 158, 158-9.

¹¹⁰ Habermas, above n 21, 207.

¹¹¹ Farrell, above n 91, 196.

perlocutionary elements, then it is possible for perlocution to precede illocution. Some communicative acts may therefore be based on substantive values rather than ideal presuppositions. In those cases, understanding and proof may not be advanced by validity claims grounded in grammatical structures, but by feelings that arise in historical cultures under specific conditions. In law, concern for justice may motivate understanding and proof.¹¹²

Democratic pluralism therefore requires a revised discourse ethics constructed within the framework of Habermas's statement that "the substance of human rights ... resides in the formal conditions for the legal institutionalisation of those discursive processes of opinion- and will-formation in which the sovereignty of a people assumes a practical shape."¹¹³ Here, Habermas connects concrete and specific rights with their formal conditions of formation, as well as discursive processes and their social form. The defence of substantive democracy requires an expansion of Kantian practical reason towards a conceptualisation of practical reason in historical contexts. For democratic institutions to be rational and discursive in Habermas's sense (under illocutionary comprehensibility conditions alone) is too stringent. Free and equal citizens may deliberate and make decisions in ways other than those revealed by pure conditions of intersubjectivity.

Democratic legitimacy does not rely on metaphysical foundations, but centres on the creation of discursive conditions under which all can shape the decisions affecting them, not intersubjective universalisation. Indeed, Habermas encounters this set of conditions in his discussion of communicative power – the illocutionary acts that issue from the norm-defining public sphere. Significantly, he draws on Arendt's distinction between power (*Macht*) and violence (*Gewalt*) in his search for a basis of legitimacy.¹¹⁴ Power, says Arendt, emanates "from the ability not just to act but to act in concert."¹¹⁵ For Habermas, law is the medium through which communicative power is transformed into administrative power, thus establishing "a balance of forces between three forces of social integration:

¹¹² Ibid, 197.

¹¹³ Habermas, above n 21, 291.

¹¹⁴ See Dana Villa, *Politics, Philosophy, Terror: Essays on the Thought of Hannah Arendt* (Princeton, 1999), 128-54.

¹¹⁵ Ibid, 16-17.

money, administrative power and solidarity.”¹¹⁶ Habermas then explains how discursively achieved collective clarification (comprehension) is connected to opinion- and will-formation and communicative power: in the setting of a legal community, political opinion- and will-formation include pragmatic, ethical-political, moral and bargaining question-procedures which then pass into legal discourse.¹¹⁷

They are, then, theoretically internally connected from the start. Indeed, because the legal form occurs at the same time as the collapse of traditional ethical life, the validity of legal norms derives from both law’s being enforceable, and its appeal to the assent of the governed. Discursive law making and communicative power are linked by the fact that reasons in communicative actions produce no motives, and law makes up the positive deficit. The connection is effective because concrete communities arrange their common lives using common legal norms and do not “separate questions of regulation of behaviour by law from questions of collective goals.”¹¹⁸ Habermas appears forced to presuppose, not ideal discursive conditions, but a legal community. This is so despite the fact that communicative power was meant to explain the conditions “bringing into being new institutions and laws.”¹¹⁹ That is, through the intersubjective recognition of validity claims raised in speech-acts reinforcing a belief held in common which is held by a speaker and hearer involving tacit acceptance of obligations relevant for action.

Thus the endorsement of values mediates a consensus on norms. Solidarity must include references to both individual welfare and the common good. The two moments of the discourse principle – that each can convince others of the acceptability of norms, and that one can be convinced by all – represents the extent to which solidarity brings to light the “hidden link between justice and the common good.”¹²⁰ Described in pragmatic terms as an agreement on the common good, consensus does not necessarily prescribe goods for all participants. Solidarity indeed describes for

¹¹⁶ Habermas, above n 21, 187.

¹¹⁷ Ibid, 207.

¹¹⁸ Ibid, 188.

¹¹⁹ Ibid, 187.

¹²⁰ Habermas, above n 99, 202.

Habermas the notion of concern for others on the part of those who are not concretely pursuing the same goods.

This absence of commonality in the uncontextualised justice of right needs completion in something beyond the ideal speech situation. Habermas has referred to the centrality of the ego's concern for the other:¹²¹

The agreement made possible by discourse depends on two things: the individual's inalienable right to say yes or no and his overcoming of his egocentric viewpoint. Without the individual's unfringeable right to respond 'yes' or 'no' to criticisable validity claims, consent is merely factual rather than truly universal. Conversely, without the empathetic sensitivity by each person to everyone else, no solution deserving universal consent will result from the deliberation. These two aspects – the autonomy of the inalienable individual's and their embeddedness in an intersubjectively shared web of relations – are internally connected, and it is this link that the procedure of discursive decision making takes into account.¹²²

Empathy is essential to rationality, at least for the time needed to allow insight into the rationality of the other's consent. The connection between empathy and justice is substantial, for empathetically sensitive arguments are designed to solicit rationally motivated consent. Rights claims, therefore, are only possible to the extent that private autonomy is based on mutual prior recognition. These relations of "mutual recognition"¹²³ involve a co-original concern for the welfare of others, and for the unlocalisable bonds of social solidarity.

The anthropological nexus between solidarity and presuppositions of communicative reason "is rooted in the realisation that each person must take responsibility for the other because as consociates all must have an interest in the integrity of their shared life context in the same way."¹²⁴ This,

¹²¹ See Steven Hendley, *From Communicative Action to the Face of the Other: Levinas and Habermas on Language, Obligation and Community* (Lanham, 2000).

¹²² Habermas, above n 99, 202.

¹²³ Ibid, 200.

¹²⁴ William Rehg, *Insight and Solidarity: The Discourse Ethics of Jurgen Habermas* (Berkeley, 1997), 110.

however, does not explain how the common good shines through the conditions of rational agreement. It may be argued that the common good is the norm itself, and that the common good is teleologically embedded in dialogue.¹²⁵ The norm is, in this sense, self-preservative, and preserves those other values necessarily founded upon and negotiated through it.

The intersubjectivity of discourse locates the site of the negotiation of solidarity and legitimacy in a public place. Indeed, the reversibility of the insights necessary to the structuring of solidarity relies on their being perfectly shared, which is inconceivable if a priori subjectivity were being used as the basis of rights claim in the liberal manner. However, as long as the cognition attributed to agents is theirs first, and then linked with other's convictions for the purposes of universal rational assent, obstacles impede the realisation of consensus. The complexity of modern society itself, as Luhmann maintains, renders this face-to-face conception of social integration both factually and theoretically naïve.¹²⁶ However, Habermas proposes no expedient mechanism for overcoming this extension of self-related insights.

Social integration cannot be produced outside conditions of legitimation, and legitimation is the direct result of citizens producing discourses in communicative engagements. The conditions of successful communication – individual and collective – and therefore genuine praxis – for Habermas is directly dependent on comprehension. It is a stringent requirement because it is geared to universalisable interests achieved communicatively under the conditions of discourse. Comprehension is that form of consensual understanding¹²⁷ which represents for Habermas an attempt to overcome the distortions of opinion formation under conditions of limited information, ideological forms of address, and restricted opportunities for testing and stabilising insights into the constitution of understanding. The self-reflective science that Habermas promotes connects the meaning of propositions to their causal structures.¹²⁸ In this way interpretation is linked to explanation.¹²⁹ Emancipation then occurs through self-reflection – and repeats the solipsistic gesture.

¹²⁵ Ibid.

¹²⁶ See Thomas McCarthy, *Ideals and Illusions: On Reconstruction and Deconstruction in Contemporary Critical Theory* (Cambridge, Mass., 1991) on the 'naïve' attitude Luhmann is attempting to overcome with Systems Theory: 154-6.

¹²⁷ Habermas, above n 38, 276-9.

¹²⁸ J M Bernstein, *Recovering Ethical Life: Jurgen Habermas and the Future of Critical Theory* (New York, 1995), 59-60.

¹²⁹ Ibid, 60.

Habermas has never altered his position on the need for complete participation in discursive opinion- and will-formation. Rational accountability is absolute. His historical study of the public sphere envisaged a society in which subjective participation was an empirical norm as well as a moral one. More recently he has confronted the problem of complexity as a limit to solidaristic participation. In the process “subjectless forms of communication”¹³⁰ have replaced the collective subject of the historical public sphere. However, in stating that “an intersubjectively dispersed, anonymous popular sovereignty withdraws into democratic procedures and the demanding communicative presuppositions of their implementation” Habermas returns to the universal pragmatic structures of communicative reason, with their insight-dependent subjectivities. At the same time, he advances an image of decentred processes which fail to coordinate all members of the social sphere. These two competing tendencies of the continuing presence of the subject, and the escalating distance over which the communicative process is forced to expand creates a legitimation gap.

Rehg suggests that no amount of rational reconstruction can unite this archipelago of discourse.¹³¹ As a fact of advanced modernity, if rationality is to be secured, an ontological element must supplement the presuppositions of discourse. He suggests that “trust must inhabit the heart of rational conviction.”¹³² Experts must be consulted, and the formation of a rational opinion on behalf of each subject fast-tracked through the assessment of these condensations of discourse. Of course, this trust is not to amount to blind faith or naïve acceptance, but to be cognitively acceptable on some basis that is not itself, of course, rationalistic. He sees the development of regimes of trust as possible on the basis of the cooperative nature of will-formation itself. If will-formation requires trust, the presuppositions of discourse do not fully thematise rational consensus, and therefore compromise the strength of normativity.

Intelligibility and Comprehension

¹³⁰ For criticism of Habermas’s equivocal historicism see Craig Calhoun (ed), *Habermas and The Public Sphere* (Cambridge, Mass., 1993), especially sec. II: 181-358.

¹³¹ Rehg, above n 124, 236; see also Kenneth Baynes, *The Normative Grounds of Social Criticism: Kant, Rawls, Habermas* (Albany, 1992), 172-81, on the multiple spheres of the public.

¹³² Rehg, above n 124, 237-8.

Moral autonomy involves a complex set of competencies. The principle competence for moral autonomy, according to Habermas, is communicative. The autonomous person has acquired a decentred understanding of the world, is able to differentiate between the natural, social and subjective, and raise the three types of validity claims in relation to them.¹³³ The morally autonomous person is also able to abstract contested norms from their embeddedness in social life and adopt a reflective attitude towards them.¹³⁴ If the norm is contested a reflective person can enter debate, or practical discourse to determine its validity. These competences constitute normative cognitive behaviour, and are criteria for rational social interaction.

However, once it is accepted that trust is not incompatible with rationality, and is a component of (historical) rationality itself, then the shift entailed from Habermas's position may require extending communicative competences under conditions of decentredness. According to Rehg, with the addition of trust, rationality remains concordant with its origins in discourse. However, recently critics have suggested that Habermas must modify the requirements of discourse to accommodate these untranscendable characteristics. Anderson is critical of Habermas's attempts to avoid facing the tension between the real and the ideal by ignoring the subjective requirements of his dialogic interlocutors. In particular Anderson identifies "need-interpretive competence" as "an *essential* aspect of discourse".¹³⁵ This competence, or set of competences, is central to pragmatic discourse, demanded by participants of each other, and pressures Habermas to revise discourse ethics.¹³⁶ The revision is structural, since it addresses the substance of the presuppositions of the discourse to which Habermas' entrusts consensus formation for the purpose of social integration. Facticity is not simply in tension with normativity as a conflictual counterpart, rather the tension describes the unity of social complexity.

In other words, on Anderson's account, Habermas is in danger of unjustifiably relieving his justificatory discourse of a responsibility of

¹³³ Ibid, 237; on trust and ontological uncertainty in modernity see also Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge, 1991), 38-42.

¹³⁴ Habermas, above n 99, 138. See also Baynes, above n 131, 144.

¹³⁵ Habermas, *ibid*, 125.

¹³⁶ *Ibid*, 1.

understanding normativity “all the way down.”¹³⁷ Habermas characterises ‘interests’ and ‘needs’ as instantiations of the “partiality that determines our subjective attitudes in relation to the external world.”¹³⁸ As Habermas notes, need interpretation cannot be abstracted from the interpretive subject, for whose competence there is “no functional equivalent.”¹³⁹ Habermas also maintains that needs are inaccessible even to the participants who process them outside a form of life in which they are attributed value, position and priority by means of intersubjective engagement.¹⁴⁰ Dialogue about those needs and the contexts in which they have arisen decontextualises them, and recontextualises them as discursively understood. However, it is the second phase of this familiar Habermasian move that is difficult to conceptualise. Recontextualisation requires motivation, which is inconceivable outside a lifeworld of shared values. Without this, needs interpretations resemble arguments in which speech acts supply reasons for other speech acts, and constatives, representatives and regulatives offer grounds, disclose motives and exhibit norms.¹⁴¹ However, the only motive allowed in such justificatory discourses is the willingness “to arrive at an understanding”¹⁴² and this does not suffice for action.

Anderson argues that needs-interpretive competence is an unavoidable presupposition of practical discourse. Habermas, he argues, conceives of it as a “lifestyle choice” that “remains contingent on a prior *telos* of a consciously pursued way of life”.¹⁴³ For Anderson, this merely restates the tension of the real and ideal as one between anticipation and the currency and poignancy of the ‘here and now’: the “anticipation built into the claims

¹³⁷ Joel Anderson, ‘Competent Need Interpretation and Discourse Ethics’ in James Bohman and William Rehg (eds), *Pluralism and the Pragmatic Turn: the Transformation of Critical Theory, essays in Honour of Thomas McCarthy* (Cambridge, Mass., 2001) .

¹³⁸ Habermas, above n 22, 92.

¹³⁹ Habermas, above n 38, 96. See also, Seyla Benhabib, ‘The Generalised and the Concrete Other: the Kohlberg-Gilligan Controversy and Feminist Theory’ *Praxis International* 5 (1986), 402-24; Nancy Fraser, ‘Towards a Discourse Theory of Solidarity,’ *ibid*, 425-9, and Thomas McCarthy, ‘Practical Discourse: On the Relation of Morality to Politics,’ in McCarthy, above n 126, 181-99.

¹⁴⁰ See McCarthy, *ibid*; see Ingram, above n 34, 141-42: on needs as choices requiring interpretive contributions.

¹⁴¹ Jurgen Habermas, ‘What is Universal Pragmatics?’ in *Communication and the Evolution of Society* (London, 1978), 1, 64-8.

¹⁴² Jurgen Habermas, *Theory and Practice* (London, 1974), 18.

¹⁴³ Jurgen Habermas, *Justification and Application* (Cambridge, Mass., 1995), 12. See also, Anderson, above n 136, 2.

of rightness”¹⁴⁴ appears to eliminate the distinction between ideal values and empirical functions by treating discourse as a special action sphere in its own right. The realisation of rightness appears in discourse as a goal value controlling its functions, when discourse was ostensibly established as a formalist procedure without ethical pre-commitment. Habermas cannot claim, for instance, as Parsons did, that the power of cultural values devolves on them by virtue of their relationship to the telic system.¹⁴⁴ Rather, an awareness seems to emerge that the ‘here and now’ is simply overridden (not logically compelled) by the context-transcending requirements of discourse.

This is not strictly accurate. Habermas identifies both validity claims and conditions of intelligibility, but identifies rationally motivated binding force with the acknowledgment of the validity claim alone.¹⁴⁵ So, the only attitude to the world that speakers can adopt is with relation to the validity claims themselves. More forceful is Thomas McCarthy’s argument which notes that needs, desires, feelings and concerns are interpreted “in the light of cultural values.”¹⁴⁶ That is to say, needs are not available to abstraction because they embody values. In complex, pluralist societies, having lost its basis in the unassailable authority of tradition, no value-preference associated with a need could be prioritised over others to constitute a universal. Similarly, pluralism ensures that values will clash or even conflict. Because needs require interpretation through ‘thickly’ evaluative languages, neither can agreement be expected about the ways in which norms are to be assessed through them, given that establishing the validity of the norm will effect different needs in different ways.

Intelligibility might prove an adequate substitute for agreement, if understanding the other’s meaning could be achieved without sharing their language or conceptual schemas. Anderson regards it as unintelligible to assert the possibility of ‘making sense’ of a perspective one does not share. Thomas McCarthy equally forcefully states that reaching agreement about moral norms requires some, and perhaps comprehensive, agreement about substantive ethical values.¹⁴⁷ Methodologically, this is the pole *in extremis* to Habermas’s consensual understanding. However, for subjects to expect only

¹⁴⁴ Jurgen Habermas, ‘Reply to Symposium Participants, Benjamin N Cardozo School of Law’ in M Rosenfeld and A Arato (eds) *Habermas on Law and Democracy: Critical Exchanges* (Berkeley, 1998), 452.

¹⁴⁵ Habermas, above n 38, 372-3.

¹⁴⁶ Habermas, above n 22, 307; see also Baynes, *The Normative Grounds of Social Criticism*, 105.

¹⁴⁷ Robert Brandon, *Making it Explicit: Reasoning, Representing, and Discursive Commitment* (Cambridge, Mass., 1994), 230-1.

intelligibility from each other is not to avoid raising validity claims, or giving reasons of the type Habermas requires. Scanlon, for example, in his assessment of contractual negotiations, suggests that interpersonal comparisons involve an assessment of preferences, reasons, and any potential reasons a person might give.¹⁴⁸ From reasons alone, he argues, can a range of variation from normality emerge. This is necessary, because needs rarely appear in isolation or perfectly specified, but come in bundles to be assessed for their urgency. Because preferences vary between cultures and individuals, the notion of responding to a need involves a standard of justification¹⁴⁹ which McCarthy's reference to thick evaluations does not in itself embrace.

Anderson argues in broad terms that moral consensus is either unachievable in a pluralistic society with a diverse representation of values, or will be achieved on the basis of some modification of the overly stringent universalistic requirements proposed by Habermas. Anderson therefore confronts Habermas with three related choices: either

(a) loosen the requirements of agreement and mutual intelligibility, particularly of having to agree for the same reasons, or (b) lower the expectations of need interpretive competence as a presupposition of discourse, or (c) accept that agreement on norms will only be attainable if we limit the scope to those who share our evaluative language.¹⁵⁰

McCarthy is certainly right to point out that Habermas is committed to basing moral discourses on ethical ones. However, despite the comprehensive discussion of needs, the conditions of intelligibility producing Anderson's 'trilemma' is in need of further clarification.

Neither Anderson nor McCarthy considers the need to undertake a critical examination of intelligibility. It is presented without a sense of its own historical constructedness. They proceed as if the subject's access to and disclosure of their needs were given, and that the different domains of intelligibility ("space of values") existed unproblematically in a broader social context. This space includes distortions of communicative relations in the form of ideological dominance and material inequalities, for example, which reconstructions of the ideal presuppositions of discourse address in

¹⁴⁸ See Anderson, above n 136, 5.

¹⁴⁹ Baynes, above n 145, 148.

¹⁵⁰ Ibid.

order to distinguish consensus from conformity. It is therefore necessary to consider needs in the light of a prior, or at least concurrent, critical discourse which sensitises and informs subjects about the non-neutrality of value difference – reconstructive science which makes visible distortive, quasi-causal mechanisms, or a power-sensitive hermeneutics which arms subjects with a degree of self-understanding premised on simultaneous self-distancing and self-disclosure.¹⁵¹

Anderson and McCarthy require Habermas to weaken the notion of ideal standards of practical discourse. However, to accept something ‘less’ may be to accept something other. To accept the inarticulate may be to accept the distorted, although this is not to equate articulation with ideologically-free or pure transparency. However, to use compromise as a starting point, not for practical but for structural reasons may immunise the participant against critical self-relation.¹⁵² Does less than full comprehension, for example, include tolerance for the incomprehensible?

McCarthy identifies the basic requirement of discourse as being no more than the mutual attribution of need-interpretive competence as an ongoing achievement of engaged participants for all practical purposes.¹⁵³ Anderson believes that participants could ‘scale back’ their expectations of consensus or agreement in response to the context:

If we know, for example, that our interlocutors are ethically opposed to viewing sexuality in the language of ‘basic needs’, we have grounds to view their relative silence regarding the impact of a norm on their potential for sexual satisfaction as something other than a repressed relation to self.¹⁵⁴

The observer function takes over and assesses the ‘appropriateness’ of considering the other competent, rather than assuming the existence of an objective basis for assessment. Implicit in this suggestion is the criticism that Habermas shares with some of the theorists he criticises (in particular, Luhmann) a tendency to reduce the moral judgment to a determinant

¹⁵¹ Anderson, above n 136, 5.

¹⁵² Hans Herbert Kogler, *Critical Hermeneutics after Gadamer and Foucault* (Cambridge, Mass., 1996), 199-250.

¹⁵³ Ibid.

¹⁵⁴ See Thomas McCarthy, ‘On the Pragmatics of Communicative Reason’ in David Cozens Hoy, *Critical Theory* (Cambridge, Mass., 1994).

judgment, and consider reflective judgment irrelevant or, at best, a psychological component of cognition.

This lack of context sensitivity is the basis on which McCarthy urges a reconceptualisation of moral autonomy and solidarity. Using the intelligibility criterion, McCarthy implicitly advances Rawls over Habermas¹⁵⁵ – reflective equilibrium over rational consensus. In addressing the first branch of the trilemma with respect to agreement, McCarthy has argued against the necessity of participants in a practical discourse agreeing for the same reasons, and for “rationally motivated agreement” that may involve conciliation, compromise and accommodation.¹⁵⁶ McCarthy argues that participants in discourse are “reflective participants”. Given the presupposed *telos* of universal pragmatics which involves reaching an understanding, participants must base their engagement in discourse on the potential they see in possible agreement. However, they can, at the same time, access an observer perspective from which can be noted facts such as the cultural prevalence of reasonable pluralism “and anticipate that of the reasons acceptable to us will be unacceptable to others.”¹⁵⁷

Weakening ideal conditions is problematic because the function of such idealisations is the counterfactual influence it has in transforming and improving actual discourse. The solution is to alter the criteria for recognising the participant as a deserving discourse partner – but, this not need involve the attribution of full competence. Indeed, it would weaken the transformative power of counterfactual discourse if it did not offer groups identities on a basis of something other than complete competence, or the full articulation of its needs.

Context sensitivity, then, is the new norm. This new normative function is expressed in perlocutionary speech acts, which withhold aims and intentions, and await revelation. To accept ‘silence’ may be a way of opening the interlocutor up to ‘another language’. This process may trigger processes of reconstruction, learning and reflexive social knowledge by challenging the speaker to clarify and extend arguments and insights. On the other hand others may wish to define themselves to interlocutors only provisionally, for reasons that range from the political to the moral.

¹⁵⁵ Anderson, above n 136, 14.

¹⁵⁶ Thomas McCarthy, ‘Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue,’ *Ethics* 105 (1994), 58.

¹⁵⁷ See Anderson, above n 136, 8.

Appropriateness also raises the need for the interlocutor to exercise a prudential capacity, which is essentially judicial. Needs now call forth a requirement to apportion meaningful properties to real persons. In other words, needs competence is not just any competence: it is a competence that goes to identity, and is a guide to practical engagement. It is also a form of justification because, as Perelman says, “the manner in which he judges permits the judges to be judged.”¹⁵⁸

If appropriateness is the norm, does it limit intelligibility, allowing for ambiguity? If intelligibility accepts ambiguity, it presumably also accepts interpretation. Interpretation may simply not be context sensitive. Firstly, ambiguity is itself measured relative to a baseline and is inseparable from a form of prior interpretation. Anderson and McCarthy may allow for this in simply identifying such prior conditions with an ethos. Intelligibility might then be identifiable with a substantive value which motivates the subject’s willingness to remain appropriately open to the unknown other. On the other hand, intelligibility might motivate the desire to assign a role, or determine an outcome.

Neither Anderson nor McCarthy consider whether some other quality, or higher (Habermasian) standard (say impartiality) might make ambiguity tolerable when the initial encounter is not the final one. However, here we strike the bargaining position, where intelligibility appears as truly parasitic on the illocutionary. The less demanding the criteria – the evidence required to consider another participant in discourse competent – the greater the number of competent participants. The emphasis on context sensitivity (“appropriateness”) and the negotiation of expectations recall Lyotard’s *Differend*.¹⁵⁹ What emerges, then, is something closer to Lyotard’s ‘solidarity without criteria’, than Habermas’s normative consensus. For Lyotard, justice consists in recognising and respecting the heterogeneity of genres and phrase regimes and resisting any temptation to adopt genres (discourses) which ‘cover over the abyss’ of heterogeneity.¹⁶⁰

However, recognising the Lyotardian connection reintroduces a problem seemingly rejected along with other Habermasian criteria. Namely, given the respect for something approaching radical difference in the McCarthy-Anderson proposals, what will authorise the respect shown to

¹⁵⁸ McCarthy, above n 155, 58.

¹⁵⁹ Farrell, above n 91, 206.

¹⁶⁰ Jean-Francois Lyotard, *The Differend: Phases in Dispute* (Minneapolis, 1988), 130.

heterogeneous regimes?¹⁶¹ Will it be the observer perspective, grounded in empirical reality, tolerant of reasonable plurality? Or will the wheel turn full circle to construct a discourse which bridges genres without disguising their difference? Perhaps at this point the long sought-for form of rationality able to mediate between forms of rationality, and discourses, is required.¹⁶²

The second problem is related to the first. Given that the observer participant is willing and able to tolerate silence, what kind of intelligibility will this silence have? Will it be distinguishable from inarticulateness? From obstinance? Again, the wheel recircles towards an escalating demand for intelligibility, and the higher the degree of tolerance (given the lack of criteria for discourse), the greater the demand on intelligibility. The “relative silence”¹⁶³ of participants is surely no bar to their complete silence and, on discursive criteria, their exclusion from democratic and juridical processes. If intelligibility is not required for an ethics of this nature to be advanced, it must be explained. Pluralistic tolerance assumes facts rather than reveals relations.

No matter how minimal, how reticent, how undisclosed, the relation between the observer and silence is still one premised on action-guiding principles, if only potentially. How will these principles be articulated? What will the observer do in the face of silence? Classically, the problem of the subject-object relation returns. A descriptive discourse which accompanies every act of observation will be relied upon to furnish prescriptive norms for guidance without participation.¹⁶⁴ The silent other cannot simply retreat from the action context. They will inevitably be involved. The context for pure strategic rationality appears to have been prepared by a failure to acknowledge that the transformative quality of idealised discourse is pertinent not only to the silent participant, but to the observer, since transformation is a mutual process, but mimetic reconciliation is asymmetrical.

From the fact of silence and reasonable pluralism it does not follow that every language game or discourse is equally worthy. Habermas was right to

¹⁶¹ Dwight Furrow, *Against Theory: Continental and Analytical Challenges in Moral Philosophy* (New York, 1995), 175.

¹⁶² See Jean-Francois Lyotard, *Just Gaming* (Minneapolis, 1985).

¹⁶³ See Ingram, above n 34, 172-88; for a review see Jane Braaten, ‘The Succession of Theories and the Recession of Practice’ *Social Theory and Practice*, Vol 18, no 1, Spring (1982), 81.

¹⁶⁴ Anderson, above n 136, 10.

refer to McCarthy's argument for tolerance and self-restraint in the face even of "comprehensive doctrines"¹⁶⁵ as 'Schmittian' in its implications.¹⁶⁶ Some account of the kinds of discourses that should be fostered or constrained is required. Ethics will require forms of collective action.¹⁶⁷ The proposal of modified and reduced demand may threaten the demand for justice itself. Whilst it is clearly not intended to accept radical atomism, there is nothing theoretically predisposed against it in either Anderson's or McCarthy's tolerance for 'reasonable difference'. Indeed, reasonable here only refers to existing social data. This data has apparently not been subjected to counterfactual demands. But collective action will have to subject empirical reality to just that, because collectivities are not necessarily pre-given, nor the form of collective action predetermined. In that case, what is to be the source of the prescription? Here, we cannot do without the authorisations of deliberative democracy.

The final question to be put to the proposed revisions of Habermas's presuppositions of comprehensive reason giving is, what is to prevent the silent participant from having competencies attributed to them, in precise disregard of Anderson's edict that this was not to be done? It is psychologically reductive to introduce a sense of the paranoid encounter with uneventful otherness in the scenario presented. Conversely, how can we be obligated by something that cannot be adequately expressed? Lyotard suggests that genres can be preserved and traversed by analogically borrowing rules and strategies from each other.¹⁶⁸ In other words, the communicative solution once again addresses the problem of conflict and pattern stability, and will not allow the participants to remain in a context of difference amounting to discourse about silence on one side, and silence on the other.

THE HISTORICAL PUBLIC SPHERE

Habermas has admitted that his concept of communicative rationality is dogged by shadow of a "transcendental illusion."¹⁶⁹ It does not address the issue traced out previously, of the existence of unstable conditionals between ideal presuppositions and the presupposed discourses of which they are a function. As such it has a more likely role as a revisable and

¹⁶⁵ See Furrow, above n 160, 175-6.

¹⁶⁶ McCarthy, above n 155.

¹⁶⁷ Habermas, above n 143, 395.

¹⁶⁸ Furrow, above n 160, 176.

¹⁶⁹ Ibid.

fallibilistic regulative ideal than a detached a priori ground of validation. Reintroducing volatility, controversy, partisan and strategic participation and provisional judgment would link reason to the norm-forming public sphere in its historical specificity. This historical recontextualisation would revise the theoretical position wherein validity conditions were presupposed by communicative utterances, so that validity conditions and communicative utterances converged through the encounter with an interlocutor or audience.¹⁷⁰

The link between autonomy and solidarity evinces a desire in the theorist to do more than elaborate the conditions of legitimacy through discourse. Communicative practices must be motivational in order to be legitimated: “Unless discourse ethics is undergirded by a thrust of motives and by socially accepted institutions, the moral insights it offers remains ineffective in practice.”¹⁷¹ If it is the case that morality thrives only where certain moral intuitions have already taken hold and been institutionalised, it is simply not the case that his theory is without partiality. Western culture itself is presupposed, along with westernised forums, and capitalist economic societies through which law was formalised. That is to say, a predisposition to a developmental-evolutionary explanation of societal culture is part of the substance.

In the *Structural Transformation of the Public Sphere* Habermas overcomes the distinction between action (referring to everyday contexts of social interaction) and discourse (which is abstracted from them)¹⁷² by showing how a society with a history of class relations and partisan interests raised and sustained a generalised ‘humanity’ which transcended social distinctions and asymmetries. Thus, norms of critique arose from specific conditions. Moreover, the public sphere is sustained not by the reconstruction of a universal viewpoint on idealist premises, but a provisional critical theory embodied in institutional practices. Given Habermas’s pessimism regarding the possibility of reclaiming a public space for effective, general norm formation,¹⁷³ what will be able to act as the condition of possibility for the validity claims raised in public and on which institutional practices such as law and government depend? Institutional embodiment and specification is

¹⁷⁰ Jurgen Habermas, ‘The Unity of Reason in the Diversity of Its Voices,’ in *Postmetaphysical Thinking* (Cambridge, 1995), 144.

¹⁷¹ See Farrell, above n 91, 225.

¹⁷² Habermas, above n 99, 207.

¹⁷³ Jurgen Habermas, ‘A Postscript to Knowledge and the Human Interests’ in *Philosophy and the Social Sciences* 3 (1973), 157-89.

possible: legal reasoning is established, parliamentary rules of order and modes of inquiry exist. But these are ultimately, says Habermas, public concerns. Indeed, the duality of institution-public only begs the question of their origins.

Habermas addresses this issue in his system of rights wherein the constitutional state enforces the law to increase the freedom of each citizen. However, even that relation is subtended by an immediate abstraction without any intervening form between discursive conditions and lifeworld practices secured by law: “In the legal mode of validity, the facticity of the state’s enforcement of the law is intertwined with the justificatory force of a law-making process that claims to be rational to the extent that it guarantees freedom.”¹⁷⁴ However, the speech acts accompanying rights and their practice are not as invariant as propositions, but are embedded in complex situations, appear in ambiguous episodes and are otherwise marked by contingency. As Habermas himself maintains, rights have no existence outside their practice: they are not property, but performed validity claims. They are therefore redeemed in contexts involving conduct and choice, character and decision. However, as stated, Habermas does not confront the emergence of rights in an ethos but postulates them through foundational discourses of communicative power.

Perelman positions himself midway between Habermas, for whom rationality depends on a non-delusional lifeworld, and Luhmann, who emphasises the illusion of moral reasoning, since it never escapes the context of power and money which it serves to reproduce. Perelman structures his discussions of practical reason around the paradoxical (or doubly contingent) construction of justice.¹⁷⁵ Firstly, he claims that when universal conceptions of justice are raised they can only be seen after first obscuring the disagreements the claim engenders. Secondly, in defining concrete justice its advocates are obliged to package it in essentialist notions of universal justice. These are not, as they are for Habermas, deformations to be redeemed by practical reason in abstraction. Rather, Perelman’s solution is to locate the determinant of the normative content of justice in audiences involved in the process of justification. For Perelman, justice is a product of practical reasoning. And the rule he formulates as a principle of justice (consisting of the obligation to treat in a certain way all persons who

¹⁷⁴ See Jurgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, Mass., 1973) chapter IV.

¹⁷⁵ Habermas, above n 21, 46.

belong to that category¹⁷⁶) is an attempt to apportion “comparatively meaningful properties to real persons in existing settings” because and so that “those who reason through problems of justice also help to enact the virtue.”¹⁷⁷

For Perelman, the audience’s involvement allows the act of judgment to be cultivated. Judgment is a cultural modality rather than an ahistorical universal. Habermas, it could be said, posits historical creations inferred directly from the partial normative contents of real commitments in existing communication practices. In the *Theory of Communicative Action* Habermas considers the limits to money and power as steering mechanisms of the sociopolitical system.¹⁷⁸ He argues, in this context, that money and power are insufficiently grounded and therefore unreliable constructs. Lacking grounds in language, or discourse, money requires a level of constraint to be found in law. Power also requires a further level of reflective constraint because of the structural asymmetries between those obey and those who command. This constraint is the communicative norm of legitimation. Both are therefore oriented to mutual understanding, yet both are traditional, value laden and social. The level of reflective constraint applied to both suggest that ideality may emerge from practice, as well as being imposed on it.

Thus, contrary to his demands in discourse ethics for universal consensus without recourse to deductive or intuitive certainty, Habermas admits that additional mediations are necessary. Indeed he notes that the cogency of moral argumentation rests on the fact that an inference is possible, and thus requires only a “sufficient motivation for considering [a norm] plausible.”¹⁷⁹ As we have seen, essentially contested concepts such as abortion underlie intractable political, legal and ethical disputes. Moral concepts frequently turn on such concepts and so are, precisely as moral concepts, open to reasonable disagreement. The fact of pluralism, as Habermas accepts, precludes deductivist conclusions such as there being ‘one right answer’. The deductivist approach appeals to an ideal ‘universal audience’¹⁸⁰ of rational beings able to assent to relevant conclusions. Habermas, too,

¹⁷⁶ Chaim Perelman, *The Idea of Justice and the Problem of Argument* (London, 1963), 6.

¹⁷⁷ *Ibid*, 40.

¹⁷⁸ Farrell, above n 91, 206.

¹⁷⁹ Habermas, above n 38, 260-96.

¹⁸⁰ Rehg, above n 124, 239.

appeals implicitly to such an audience: the language of ‘convincing’ indicates this.¹⁸¹

However, Perelman’s concept of audience is mediated by acts of ‘persuasion’¹⁸² and this form of practical reason only claims validity for a particular audience. Given the decentered subjectivity to which Habermas’s principle of universalisation refers, under conditions of complexity, universality may be the result of a series of ongoing discourses before a series of particular audiences. A norm could therefore be successfully argued before particular audiences enjoying the rebuttable presumption of validity or rightness. Universal agreement is enjoyed by dispersement. Not every particular audience need assent to the discourse, but the achievable consensus is binding on all. The result, then, as we have seen, is majoritarianism securing cooperation, with the inbuilt principle of participation, and the ongoing process of revision (the persistence of universalisation). Indeed, precisely because the subject no longer occupies a privileged position dissent can be grounds for non-compliance. However, a particular audience will have a privileged position with respect to the discourse at the time of address.¹⁸³ In this way, value orientations that would otherwise be purged from the concerns of discourse would be incorporated. However, the ultimate aim is to bring all audiences into a stable cooperation.

¹⁸¹ Chaim Perelman and Olbrechts-Trycka, *New Rhetoric* (Notre Dame, 1982), 19.

¹⁸² *Ibid.*, 26-31.

¹⁸³ *Ibid.* 39.

The Failure of State Building in Afghanistan, Review of
The Rule of Law in Afghanistan: Missing in Action

Richard Hanania

Summary

For ten years, the United States and coalition forces have been struggling to build a functioning state in Afghanistan. The author reviews *The Rule of Law in Afghanistan*, a compilation of articles by scholars on the efforts to establish the rule of law in that war-torn country. The picture that the scholars paint is a bleak one, and undermines the claims of several of the contributors that the situation could have turned out differently with more of a commitment to legality on the part of the international community.

It has been just over eleven years since the United States and coalition forces invaded Afghanistan. As much as anything else, the new compilation *The Rule of Law in Afghanistan: Missing in Action*, serves as an inventory of how well the nation building effort is going. Among the authors are activists who have participated in the effort to build a well-functioning Afghan state under the auspices of the US, UN, and various NGOs. The picture they paint can only be described as depressing.

For example, a UN study shows that Afghans spent \$2.5 billion on bribes in 2009, which we are told is the equivalent to 23 percent of national GDP. Even this number is less incredible than several statistics on drug cultivation and trade. Throughout the last few years, Afghanistan is estimated to have produced more opium than necessary to meet the entire global demand.

One could be hopeful if the international community knew of serious reformers on the ground that it could rely on, but this appears not to be the case. The Afghan government looks bad even when we compare it to the main alternative: the Taliban. While the popular perception in the West is that the drug trade funds the insurgency, Hafvenstein reports that in the south of the country, government officials are widely perceived as making more money off the trade than the Taliban is. Almost all relevant actors, from the local police to the highest national government officials, are implicated. Not only that, but the courts of the Taliban are perceived by many Afghans to be fairer than those of the government. Peters even tells

us of Taliban attempts to punish corrupt officials working for them. Taliban judges and sub-commanders have been fired, while the government has not prosecuted a single major official for corruption. Kilcullen opines that the Afghan government is “losing because it’s being outgoverned rather than outfought.”

The contributors suggest ways that the international community could improve the situation, but their arguments are unconvincing. For example, in the conclusion, editor Whit Mason argues that the authors of the book converge on the point that the rule of law and security are essential for legitimizing the state in the eyes of the population. Part of establishing the rule of law is ensuring that no individual is above it; corrupt officials and warlords must be brought to account. Similarly, a few of the contributors complain of the law passed by the Afghan parliament that granted amnesty to past human rights abusers.

Yet it is far from self-evident that directly taking on the warlords would lead to peace and security. Of course, everyone would agree that as an abstract proposition no one should be above the law. But attempts to combat the drug trade have led to the drug dealers with ties to the state simply using their connections to go after their rivals. Why would a serious attempt to go after past human rights abusers not end up the same way, especially when we are told that every one of Afghanistan’s major political and ethnic groups has been implicated in atrocities over the last three decades? Selective enforcement in such a state of affairs is all but inevitable, and the Afghan government has not even been able to establish functioning courts to deal with much less complicated issues.

Further, even if it were possible to do so in a fair and just way, we are not even told the mechanism by which going after warlords and corrupt officials leads to the state being legitimized in the eyes of the population. Such a point only seems axiomatic when we look at the situation with the biases of our culture. Take the fact that the Afghan government has not prosecuted a single governor or minister for corruption despite international pressure to do so and put it next to the fact that they have prosecuted a handful of individuals for blasphemy despite pressure from donors to comply with internationally accepted human rights norms. The officials prosecuting individuals for converting to Christianity or criticizing the Prophet are likely responding to the demands of their constituents. Even if the government officials are simply acting out of conviction, one has no reason to believe that the Afghan people are any more liberal on these issues than the elites

who run the government are. Perhaps what makes a state legitimate in the eyes of Westerners is not what makes a state legitimate in the eyes of Afghans.

Astri Suhrke's article is the best contribution to the collection, mainly because it shows an awareness of the different tradeoffs that the international community faces in Afghanistan. On one hand, the US and UN would like to fight corruption. But fighting corruption means more intrusive measures on the part of the international community, which means that the state becomes much less of an Afghan enterprise and thus delegitimized in the eyes of the population. To take another example, several contributors call for the international community to make more resources available to the Afghan mission, but external aid already makes up about 70 percent of the state budget. The more that the state receives its funding from the international community, however, the less it needs to rely on its constituents for revenue and the fewer incentives it has to provide good government. This is similar to what happens in many poorer states with a great deal of natural resources, where a rentier class develops and maintains itself without providing services to the population.

Not a single contributor believes that things are going well in Afghanistan. Even those who do think that the situation could potentially improve do not believe that things can turn around without an increase in resources and commitment. As the United States is in the process of winding down what has already been the longest war in its history, this is highly unlikely. While the international community has failed in building a functioning democracy that respects human rights, the contributors to *The Rule of Law in Afghanistan* who argue that the mission, with better policy decisions, could have turned out differently have very little to support their case.

***Book Review: Sherlock Holmes and
the Case of the Bulgarian Codex***

By Tim Symonds

Xanthe Mallett*
University of New England
Armidale, Australia

A new ‘Sherlock Holmes’ novel has a lot to live up to. And frankly, I was not hopeful for this offering. As an avid Arthur Conan Doyle – and Holmes – fan, I was sceptical that anyone could match Conan Doyle’s intellect whilst matching his fast-paced and gripping style. I was wrong. Symonds story could be described as a gripping yarn, which captured the essence of both Holmes and Watson very well.

The story in short; Holmes and his faithful sidekick were contacted by the mysterious and duplicitous Prince Regnant of Bulgaria, following the theft of an ancient and sacred manuscript. Holmes is tasked with finding the manuscript, and by extension preventing war. The lives of millions are in his hands.

So, plot set, the trusty duo set off for Bulgaria, travelling through beautifully described landscapes. As one would expect, the story is not as simple as it at first appears, and what follows is a tale of murder, greed, and vampires. There are the requisite unexpected twists and turns: A tale worthy of Holmes any day.

So, although I expected to be disappointed, I was not. The language Symonds employs is reminiscent of Conan Doyle, and really transports the reader on the journey. If I were to offer some small criticism, it would be that it feels as if the author is trying too hard to link the story to the earlier texts. But that would be all. And by halfway through this feeling is forgotten, as is the fact that this is not one of Conan Doyle’s original offerings – so good is the dialogue and story telling.

A good test for me is, when you turn the last page, how do you feel? Glad or disappointed. I was definitely disappointed, as I was enjoying it so much I didn’t want it to end.

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I haven't read Symonds first novel *Sherlock Holmes and the Dead Boer at Scotney Castle*. I will now, and very much hope Symonds keeps writing in this tradition, as this book is a worthy addition to the Holmes repertoire of tales.

I recommend it whole-heartedly to any Holmes fans.

A Packet of Purported Legal Humor
Stephen Kruger*

Abstract

The packet consists of seven humorous pieces.

- I. "Appellate Insight": a look at goal-oriented adjudication.
- II. "One Dozen (Equivalent of a Duodecimal 10) Haikus."
- III. "A Tetrad (Equivalent of a Ternion Plus One) of Legal Limericks."
- IV. "A Baker's Dozen of Legal Rubaiyat."
- V. "The Road Not Taken": a look back at 25 years of practicing law.
- VI. "Final Exam: Contracts": a look at a law-school phenomenon.
- VII. "With Security and Efficiency For All": a look at telecommunications security.

I. Appellate Insight

Introduction

One of the faults of the case-law method is that only the best of the best appellate decisions are studied. Law-school students get the mistaken impression that appellate judges are founts of wisdom. Too many judges, appellate judges among them, are social engineers and policy-makers. They do not see precedents as mainstays to be respected, but as gates of a slalom course, to be negotiated or evaded.

The following illustration of judicial slaloming is attributed to the Appellate Division of the Belau Supreme Court. There is a Palau, the local name for which is Belau. The Republic of Palau is a micro-country in the north Pacific Ocean, southwest of Guam and east of the southern Philippines.

The Palau Supreme Court has a Trial Division and an Appellate Division. The Trial Division has general original jurisdiction. There are two courts of limited jurisdiction. All appeals are heard by the Appellate Division. There is no court above the Appellate Division.

The imaginary Belau Supreme Court has a Trial Division and an Appellate Division. The Trial Division has general original jurisdiction. There is no

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court of limited jurisdiction. All appeals are heard by the Appellate Division. There is no court above the Appellate Division.

Opinion

SUPREME COURT OF BELAU
APPELLATE DIVISION

NGARA-IRRAI TRADITIONAL
COUNCIL OF CHIEFS and
ROMAN TMETUCHL, as
Ngiraked of Airai,

Petitioners,

v.

SUPREME COURT OF BELAU,

Respondent.

SPECIAL PROCEEDING

NO. 2011-5

OPINION

Ngara-Irrai Traditional Council of Chiefs and Roman Tmetuchl by Stephen Kruger, Esq., Council Counsel, and John Gower, Esq., Heriot & Mortuary Supreme Court of Belau by Boris Badenov, Esq., Attorney-General, Natasha Fatale, Esq., Deputy Attorney-General, on the brief
Before Arthur Ngiraklsong C.J., Larry W. Miller Ass.J., and Alexandra R. Munson T.Ass.J.
Decided October 18, 2011

NGIRAKLSONG C.J.

A. Introduction

This special proceeding is brought by the Ngara-Irrai Traditional Council of Chiefs and Roman Tmetuchl. From “time out of mind,” which is to say, from a “time whereof the memory of man runneth not to the contrary,”¹ the Ngara-Irrai has been one of the traditional political authorities in Belau.

¹ 1 BL. COMM. *67 (in context of ancient nature of common-law maxims and customs).

The bailiwick of the Ngara-Irrai is the traditional region of Irrai; that region and the territory of the contemporary Airai County are coterminous. Irrai and Airai County are situated on the island of Babeldaob, north of the Ngermechiiuch Channel. To the south of the channel are the islands of Oreor, the traditional region which is coterminous with the territory of the contemporary Koror County. The court house is on Koror, one of the islands of Oreor and Koror County.

Roman Tmetuchl is the Ngiraked of Airai. As Ngiraked, Tmetuchl is the paramount chief among the ten traditional chiefs who constitute the Ngara-Irrai.

The Ngara-Irrai and Tmetuchl, appellants in the companion appeal,² petition the Court to vacate my nomination and appointment of Assistant Magistrate Alexandra R. Munson, of the United States District Court for the Northern Mariana Islands, as a temporary associate justice of this Court to hear the appeal. I acted because R. Barrie Michelsen Ass.J. is scheduled to check yet again into an off-island rehabilitation clinic, so he will be unable to attend the scheduled oral argument on the appeal.

B. The Merits

Pursuant, nominally, to the applicable sections of the Consolidated Laws of the Republic of Belau,³ I sent to the Clerk of Courts, on May 28, 2011, a one-page, conclusory Order appointing Assistant Magistrate Munson as a temporary associate justice.

And that was that. The President, the President of the Senate and the Speaker of the House of Delegates were not notified of my determination, they were not bothered with pettifogging details of why a temporary

² *Ngara-Irrai Traditional Council of Chiefs and Roman Tmetuchl, as Ngiraked of Airai v. Republic of Belau and Airai County*, Civ. Appeal No. 2010-110 (Civ. Action No. 2009-666). The Trial Division (Kathleen M. Salii Ass.J.) granted summary judgment to both defendants. As per usual, her decision was peppered with dubious legal reasoning.

³ “The Chief Justice may determine whether one or more associate justices are needed for temporary service on the Supreme Court, and, if so, he shall notify the President and the presiding officers of the Olbiil Era Kelulau of the need, with specific reasons therefor.” 4 CLRB § 201 (2010). “A temporary associate justice shall be appointed by the President.” 4 CLRB § 205 (2010). “The appointment of a temporary associate justice is valid only for the civil action or criminal case, whether for trial or for appeal, specified by the chief justice.” 4 CLRB § 206 (2010).

associate justice was needed, and the President was not distracted from his other duties to exercise his appointment power.

No objection to the appointment was made by the Ngara-Irrai and Tmetuchl in their opening brief on appeal. The rule is that an error not assigned on appeal is waived. *Sungino v. Belau Evang. Church*, 3 Belau 72, 75-76 (1992).

In their petition for this special proceeding, the Ngara-Irrai and Tmetuchl protest that the appointment was made “in secret,” and they learned of the facts only recently, so there was, allegedly, no opportunity to brief the issue. Petition, p. 8. This borders on whining. Anyhow, *stare decisis* and consistency in judicial opinions are important, so my gut reaction is that it’s probably not a good idea to make an exception to *Sungino*.

The Ngara-Irrai and Tmetuchl refer to the Disqualification Provision (Belau Const. art. X, § 2), the last sentence of which provides, “No justice may hear or decide an appeal of a matter heard by him in the trial division.” Petition, p. 17. They contend that, because I made the appointment, I am reviewing my own decision, so, under the Disqualification Provision, I may not sit on this panel.

Section 2 refers to “appeal” and “matter” and “trial division.” The challenge to the qualification of Temporary Associate Justice Munson is not an appeal or a matter, but is a special proceeding. My action was taken in Chambers, not in the Trial Division. Section 201 (see footnote 3) uses “determine” and “notify” and “specific reasons.” I did not determine; there was a ukase in the form of an Order. Consequently, no notification was required, and, so, no specific reasons were required. Dodging a bullet was never easier.

The Ngara-Irrai and Tmetuchl suggest that Temporary Associate Justice Munson may not sit on this panel, because she is in breach of the ABA Model Code of Judicial Conduct.⁴ According to the Ngara-Irrai and Tmetuchl, “it was typical impropriety, and it stank of partiality, for her to have said, at a recent meeting of the Belau Inn of Court, ‘I’m a Koror gal, and always will be.’” Petition, pp. 23-25 (citing Model Code Canon 2 and Canon 3E(1)). Based on our long-term professional relationship, I know

⁴ “Justices and judges shall adhere to the standards of the Code of Judicial Conduct of the American Bar Association except as otherwise provided by law or rule.” 4 CLRB § 303 (2010). No law or rule provides an exception to the Model Code.

that Temporary Associate Justice Munson is beyond reproach, so I won't stoop to the level of the Ngarra-Irrai and Tmetuchl.

Another position of the Ngarra-Irrai and Tmetuchl is that, contrary to the Due Process Provision (Belau Const. art. IV, § 6),⁵ they would be deprived of due process of law were Temporary Associate Justice Munson to sit. They make much of the Panel Provision (Belau Const. art. X, § 2): "All appeals shall be heard by at least three justices." Petition, p. 33. It is undisputed that the practice is to have three justices hear appeals. According to the Ngarra-Irrai and Tmetuchl, "Though, over the years, Assistant Magistrate Munson has sat, on prior appointments, for various appeals before the Court, she has never, ever issued any opinion of her own -- majority, minority, you name it." Petition, pp. 46-47. The Ngarra-Irrai and Tmetuchl conclude that, with Temporary Associate Justice Munson on this panel, its appeal would be heard "in effect" by only two justices. Petition, p. 61.

The Ngarra-Irrai and Tmetuchl fail to refer to any United States decisions supportive of this proposition, though Belau is a former U.S.-administered trust territory, and its tie to the United States through the Compact⁶ is of interpretive significance. I therefore treat United States case law as persuasive. *Tell v. Rengiil*, 4 Belau 224, 227-28 (1994) (uncritical citations of U.S. cases to establish sovereign immunity); *Fritz v. ROB*, 4 Belau 264, 271-76 (Trial Div. 1993) (mindless citations of U.S. cases to import political-question doctrine into Belau). Generally, U.S. constitutional concepts may be imported. *Senate v. Nakamura*, Civ. Action No. 1996-510, Order, slip op. at 4 (Trial Div. July 11, 1997), *rev'd on oth. gds.*, 7 Belau 8 (1998).

United States case law is to the contrary of the position taken in the petition. A justice absenting himself or herself or itself from the court room during trial does not necessarily deny due process to a litigant. *U.S. v. Grant*, 52 F.3d 448 (2nd Cir. 1995). Where, as here, the Ngarra-Irrai and Tmetuchl do not indicate that Temporary Associate Justice Munson will not be in fact

⁵ "The government shall take no action to deprive any person of life, liberty, or property without due process of law . . ."

⁶ Compact of Free Association Between the Republic of Palau and the United States of America, 48 U.S.C. § 1931 note. *See* Belau Const., amend. II (changed name of country from Palau, which is of Spanish derivation, to Belau, the Belauan name for the country, after Compact became law; no corresponding change in § 1931).

in the court house, in the court room, on the bench and awake during oral argument, this argument is kinda weak.

The Ngara-Irrai and Tmetuchl observe that, under the Prerequisites Provision (Belau Const. art. X, § 8), no one is “eligible to hold judicial office in the Supreme Court . . . unless he has been admitted to practice law before the highest court of a state or country in which he is admitted to practice for at least five years preceding his appointment.” Petition, p. 88. Clearly, serving as a temporary associate justice of this Court is the holding of a judicial office.

Thereon, the Ngara-Irrai and Tmetuchl put forward two issues. First, though Temporary Associate Justice Munson is admitted to practice in the Northern Mariana Islands, and has been for more than five years, the Northern Mariana Islands Supreme Court, which admitted her to practice, is not “the highest court of a state or country.” The Northern Mariana Islands is a commonwealth, not a state, of the United States, and is not a country. According to the Ngara-Irrai and Tmetuchl, “The plain meaning of § 8 requires the conclusion that Assistant Magistrate Munson lacks the prescribed experience.” Second, § 8 speaks of “he” being admitted to practice before the highest court of the foreign jurisdiction; “he” being admitted for more than five years; and “his” appointment. “The plain meaning of § 8,” again according to the Ngara-Irrai and Tmetuchl, “precludes appointment of a justice of the female persuasion.” Petition, p. 91.

Neither plain-meaning issue need be given much thought. I read the constitutional phrase, “highest court of a state or country,” as “highest court of a state, province, commonwealth, territory, possession, district or country.”⁷ The plain-meaning rule of constitutional interpretation (*Senate v. Remeliik*, 1 Belau 1, 5 (High Ct. Trial Div. 1981)) notwithstanding, this Court has authority to add to the Constitution words inadvertently omitted by the Framers. *ROB v. Gibbons*, 1 Belau 547A, 547P-547T (1988) (adding “unreasonable” to Search and Seizure Provision (Belau Const. art. IV, § 4)).⁸

⁷ The facts prevent me from deciding whether “state” is inclusive of a state of a federal country other than the United States. Belauans attended law schools in Australia, and it’s important to increase Belauan participation in the judiciary, so I read “state” inclusively. But don’t quote this dictum.

⁸ The companion authority to subtract from the Constitution words inadvertently included by the Framers (*Koror County v. Blanco*, 4 Belau 208 (1994) (subtracting “expressly” from Express Delegation Provision (Belau Const. art. XI, § 2)) is not at issue here.

I also employ this authority to read “he” in both places in § 8 as “he or she,” and to read “his” therein as “his or her.” Alternatively, I interpret § 8 according to the gender-connotation standard of 1 CLRB § 203 (2010).⁹ This makes “he” and “his” in § 8 inclusive of “she” and “her.” Section 203 does not apply by its terms to the Constitution, but equality of opportunity is a policy I’m not adverse to.

The Ngara-Irrai and Tmetuchl cite many United States decisions which support the proposition that a statute may not be used to interpret a constitutional provision, because “courts are bound to the intent of the framers and may not substitute the intent of legislators.” Petition, p. 108. Decisions of United States courts are not dispositive of this proposition, because Belau is a former, not a current, U.S.-administered trust territory, and its tie to the United States through the Compact is not of interpretative significance. I therefore treat United States case law as irrelevant. *Robert v. Ikesakes*, 6 Belau 234, 242 (1997) (slithering around and successfully avoiding inconvenient, on-point United States Supreme Court case central to appellant’s thesis); *ROB v. Sakuma*, 2 Belau 23, 37 (1990) (unconstitutionally-disproportionate sentence under U.S. Constitution is not unconstitutionally disproportionate under Belau Constitution). Generally, U.S. constitutional concepts may not be imported. *ROB v. Wolff*, 4 Belau 278, 280-81 (Trial Div. 1993).

The Ngara-Irrai and Tmetuchl maintain that “the lack of Belauan decisions by Assistant Magistrate Munson betokens mediocrity. A justice who writes nothing is hardly of the caliber expected of members of the Belauan judiciary.” Petition, p. 142. Though it is indisputably true that Temporary Associate Justice Munson has done nothing more than sign on to opinions authored by other members of the panels on which she sat, this argument, too, is kinda weak. There is no constitutional requirement that a justice of this Court author opinions, and I decline to amend the Constitution to create a requirement of that type. The function of the judiciary is to interpret the Constitution according to its plain meaning. *Senate v. Remeliik*, *supra*. I may neither add words to the Constitution nor subtract them.

⁹ “As used in any Act of the Olbiil Era Kelulau, unless it is otherwise provided or the context requires a different construction, application or meaning: * * * (c) words importing the masculine gender shall be applied to females[.]” 1 CLRB § 203 op. para., (c) (2010).

Irregardless, the argument flies in the face of history. When President Nixon nominated Judge G. Harrold Carswell to be an associate justice of the U.S. Supreme Court, Hizzoner's unimpressive caliber did not prevent very important persons from supporting the nomination. One VIP, Senator Roman¹⁰ Hruska, said: "Even if he [Carswell] is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?" L.A. TIMES, June 12, 1996, p. A19 (quoting remark made at time of nomination). My bosom-buddy Alexandra is entitled to a little chance.

The remaining arguments of the Ngara-Irrai and Tmetuchl are simply ridiculous, so no response is necessary.

Getting to the point: The petition is denied.

C. Sanctions

The Attorney-General moves to sanction counsel for the Ngara-Irrai and Tmetuchl, jointly and severally, for their "reliance on namby-pamby, time-wasting, due-process horse pucky." Opposition, p. 6. He also moves to sanction them for their "consistent, and therefore simplistic, invocation of the plain-meaning rule." *Id.*, pp. 7-8.

That denigration of due process is new here, but it fits in with our denigration of due process as a "ritualistic formula" (*Wolff v. Sugiyama*, 5 Belau 105, 115 (1995)). We have already condemned the plain-meaning rule, which "interferes with judicial creativity." *Children of Marina Udui v. Pinoy Fraternal & Sororal Ass'n*, Civ. Action No. 1998-361, Order Granting and Denying Summary Judgment, slip op. at 11 (Trial Div. Feb. 8, 1999). *Accord*, *Chodechosong Group v. Koror County Public Lands Authority*, 6 Belau 198, 203 (1997) (rejecting "exacting interpretation" of specific requirement of County Government Provision (Belau Const. art. XI, § 1)).

Considering that I have once again reached the desired goal of causing the Ngara-Irrai and Tmetuchl to go down in flames, I exercise uncharacteristic restraint, and deny the motions.

D. Conclusion

The petition is DENIED. The motions are DENIED.

¹⁰ All of us are unanimously opposed, together and without exception, to agreeing with a Roman, be he Tmetuchl or Hruska. The exception is contrived to support the conclusion.

MILLER Ass.J.

The artful reasoning of my revered brother the Chief Justice is magnificent, and the manipulated result of my celebrated colleague the Chief Justice is outstanding. Consequently, it was not necessary to resort to our private presumption of bankruptcy of most positions, whether put forward here or in the Trial Division, of a party from north of the Ngermechiuch Channel. Had the need arisen, I would have found that the Ngara-Irrai and Tmetuchl did not overcome the presumption, and I would have tanked the petition on that narrow ground.

On the other hand, I would have preferred to find *some* merit in the position of the Ngara-Irrai and Tmetuchl. All-or-nothing opinions create unavoidable precedent, but the judicial imperative is to leave ourselves some wiggle room. Precedent which forces us to reach results we don't care for isn't welcome. In the biblical adjudication, King Solomon threatened to divide the baby between the two women, and the mother made herself known. 1 *Kings* 3:16-28. He did not have to decide the case before him in the way he deemed undesirable. When we play our cards right, neither do we.

MUNSON T.Ass.J.

I concur.

II. One Dozen (Equivalent of a Duodecimal 10) Legal Haikus

Haiku is traditional Japanese poetry. A haiku consists of seventeen syllables, in three metrical phrases of five, seven and five *morae* (sound units) respectively, written in a single vertical line. English-language haikus are written in three lines. The first line has five syllables, the second line has seven syllables, and the third line has five syllables.

Contracts

Commerce needs credence.
Ponzi scheme or bankruptcy
snips the strand of trust.

Constitution

Framers' guidance for
the ages, entombed in a
NARA pyramid.

Environment

Tree-huggers endorse
real tyranny to impose
pagan fantasy.

Gummint

A government is,
at heart, a mafia with
a constitution.

International Courts

Kangaroo courts of
ex-nihilo laws. Judges
singing for suppers.

Jurors

People who render
consequential verdicts for
derisive wages.

Law Reviews

Notes about nothings.
Head-of-the-class nerds stirring
dusty citations.

Liberalism

Attorneys who serve
the welfare state are priests of
a failed religion.

Real Property

My house, my castle.
A law-protected refuge
in a lawless world.¹

SCOTUS Justices

Bunker-busters strike
article I, section 8.
Bombardiers in robes.

Torts

Death and injury
wreaked again and again by
reasonable men.

United Nations

One-worlders' talkshop
and resolutions workshop.
Jew-haters' HQ.

III. A Tetrad (Equivalent of a Ternion Plus One) of Legal Limericks

The form of a limerick is a stanza of five lines. Each of the first, second and fifth lines has eight or nine syllables, and each of the third and fourth lines has five or six syllables. The rhyme scheme is *aabba*.

Humor or mockery is often the point of a limerick.

Lines are written in the anapestic meter (two unstressed syllables followed by one stressed syllable) or in the amphibrachic meter (one stressed syllable

¹ Subject to exceptions for lawful acts by sheriffs or bailiffs, the common-law rule was "That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law so that, although a man kills another in his defence, or kills one *per infortunium* [by misfortune] without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels for the great regard which the law has to a man's life, but if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house it is not felony, and he shall lose nothing . . ." *Seyman's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603). *Accord*, 4 Bl.Comm. ch. 16 (1769); Castle Doctrine Laws, *e.g.*, Tex. Penal Code §§ 9.31, 9.32 (2010), Tex. Civil Practice and Remedies Code, § 83.001 (2010).

between unstressed syllables). Meter and stress may be modified. There is freedom to bend words.

Appellate Argument

Contract clauses, torts, property, too,
Feed the primates in the legal zoo,
Judges high, to be heard
Draw nigh, say not a word
Ere blowing on the dice to luck you.

Constitution

John Marshall rewrote the document,
To be a centralist referent,
A national polis,
The Court *über Alles*,
And politics played out to judgment.

Ninogram

There once was a judge named Scalia,
Who preachèd Originalismia,
Said he to pal Clarence,
“Our thoughts have no valence,
Because of Ruth, Kagan and Sonia.”

Policy-makers

Prez Barack of hopey and changey,
Sees liberal judges as peachy,
They love queers and quota,
Not law an iota,
Or weapons or markets or country.

IV. A Baker's Dozen of Legal Rubaiyat

Rubai is the Farsi word for quatrain (a four-line stanza of poetry). The plural of *rubai* is *rubaiyat*.

Omar Khayyam (1048-1123) wrote numerous *rubaiyat*. The word found its way into the English language through *The Rubaiyat of Omar Khayyam*, rendered (not translated) from Farsi into English by Edward FitzGerald (1809-1893), first in 1859, and thereafter in four editions.

To scan, in poetry, is to identify the rhythm. In English poetry, rhythm is variation of stressed and unstressed syllables.

One or more stressed syllables together with one or more unstressed syllables constitute a foot. An iamb is a foot with one unstressed syllable followed by one stressed syllable. A verse with five feet is a pentameter.

Rhyme is repetition or correspondence of sounds, often of final syllables.

There are four lines in each of the stanzas in this piece, so each stanza is a rubai. The rhythm of the rubaiyat is iambic pentameter. That is, each foot has one unstressed syllable followed by one stressed syllable, and there are five feet in each verse.

The rhyme scheme is *aaba*. That is, the first, second and fourth lines rhyme, and the third line does not rhyme with the others.

For each of three rubaiyat in this piece, a reference is noted. This intends a starting point from which my work proceeded. There is no parody. That term means imitation of a style for comic effect or in ridicule. No comic effect, and no ridicule of FitzGerald, was purposed; none may be inferred.

I

Three years in law school, day plus day plus day.
Professors taught, each prof in his own way,
And in my seat in back, I held my tongue.
“Keep wake!” “Keep wake!” “Keep wake!” oft I did pray.

II

A book of contracts and a book of torts,
Con law and property, books of all sorts
In law school, which a desert of life makes:
No time for thee, no time for thee, no sports.

III

Oh, come with Kruger old, and leave the Law
To talk. No law is certain, no law saw
Whole-hearted honor given it. Each needs
A punishment, the legal line to draw.¹

¹ The reference is Rubai XXVI (First Edition):
Oh, come with old Khayyam, and leave the Wise

III

A hair, perhaps, divides the Law and Crime;
Yes, there are thousands who are doing time.
Could you but find a way to go scot free,
Would you maintain a life which is sublime?²

V

On television, lawyers handsome are,
and lawyerettes all score way above par.
Procedure, law or evidence is not
What truly separates stars from the Bar.

VI

In life are laws and strife. Attorneys see
to it that parties have advocacy.
Each client gets good lawyering, and, oft,
some empathy's included in the fee.

VII

To me a client his case did entrust,
The fees and costs of suit left him nonplussed.
Complaint and answer fil'd, discov'ry done,
Both settlement and trial were discussed.

VIII

Before I go to court and try a case,
I'm heedful that 'tis jurors whom I'll face,
Twelve men and women, tried and true, but lay,
Who'd rather be at work than in that place.

IX

All rise! The judge to his high bench doth go,

To talk; one thing is certain, that Life flies;
One thing is certain, and the Rest is Lies;
The Flower that once has blown forever dies.

² The reference is Rubai L (Fifth Edition):
A Hair perhaps divides the False and True;
Yes; and a single Alif were the clue --

Could you but find it -- to the Treasure-house,
And peradventure to THE MASTER too[.]

The judge in garment black who walks so slow,
The majesty of law thus to portray,
Though whim's enthroned, and all is just for show.

X

No matter quarts and more of Law Day fizz,
Each court a workshop of distortion is.
E.g., a statute a judge will rewrite,
His self-regard makes him a drafting wiz.

XI

Appellate briefs are written thusly: Fight
To cloak a client with the law and right.
Align the facts or make them go away.
The panel has a goal, keep it in sight.

XII

The "morals of the market place"³ don't seize
A judge. 'Tis law, each swears, that he must please.
In conference, therefore, secret truth is kept,
That traded votes create majorities.

XIII

Then from the courts of law I did adjourn,
A better way to spend my life to learn,
So verse was written, baseball games were played,
Of course to court I never did return.⁴

V. The Road Not Taken

A. Perceptions

Law is notorious for having, among all the professions, the highest rate of dissatisfaction. Earning money assuages professional dissatisfaction among lawyers up to a point. Compare taking a drug to ease, up to a point, personal

³ "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

⁴ The reference is Rubai XXXIV (First Edition):

Then to this earthen Bowl I did adjourn
My Lip the secret Well of Life to learn:
And Lip to Lip it murmur'd -- "while you live,
Drink! -- for once dead you never shall return."

discontent. The effectiveness of money diminishes, as does the effectiveness of a drug. Consequently, greater earnings are needed, in the manner of greater drug dosages. Ultimately, money does not conquer professional dissatisfaction, just as a drug does not conquer personal discontent.

The reason for professional dissatisfaction is not the history of law and is not legal methods, but is the contemporary condition. It used to be that the common law brought about consistent adjudication; the Magna Carta curbed despotism; the Constitution, through its article I, section 8, was a protection against governmental officers and officials who would emulate King George III; the Bill of Rights guaranteed enumerated and unenumerated rights across the generations; and the United States was a government of laws and not of men.

The contemporary condition is the trampling of the common law and its principles; the tossing of the Magna Carta into a landfill; the exercising by the United States government of unlimited authority, well outside the delegated powers; the degrading of constitutional rights to licenses, which are created and obliterated, expanded and contracted, both legislatively and judicially; and the maintaining, by the United States and by states of governments of men and not of laws.

The incomparable work of the Founding Fathers and the companion incomparable work of the Framers were undone by legislators and executives, supported by justices and judges. Invocation of law is useless, when justices and judges are beguiled from the straight and narrow by a “living” Constitution, the content of which is personal, political, economic and social inclinations.

For legislators, executives, justices and judges, the straight and narrow is republican government, federalism, limited government and capitalism. The straight and narrow was abandoned on March 4, 1933. In place of republican government, there are hives of bureaucracies. In place of federalism, there is treatment of states as prefectures of Washington. In place of limited government, there are more and more United States laws, and there are yet more and yet more state laws. In place of capitalism, there are allocations of resources and distributions of wealth by the United States and by states.

The contemporary condition is beyond repair. There will be no reversion to the country intended by the Founding Fathers, and no return to the

Constitution of the Framers. The departure from the straight and narrow is permanent.

What if I had perceived earlier that lawyering is, in this generation, illegitimate, and, so, causative of dissatisfaction? I would have branched out to other illegitimate activity.

B. Alternate History

CURRICULUM VITAE - STEPHEN KRUGER

Education

Brooklyn Law School, 1981-1984, Juris Doctor, 1984

Koror Jail, 2003-2004

Stonecutters Island Penal Institute, 2007-2009

Certificates

New York Bar, admitted 1984, disbarred 2004

Palau Bar, admitted 1999, disbarred 2004

Koror Jail, certificate of discharge, 2004

Stonecutters Island Penal Institute, certificate of discharge, 2009

Specializations

Double, triple and quadruple bookkeeping; deniable investment vehicles; invisible off-shore bank accounts; international trade in extraordinary merchandise

Experience

July, 2009 - present: Namibia: Firepower Services

Managing partner of cash-and-carry military-surplus emporium.

May, 2007 - June, 2009: 3rd interlude

All-expenses-paid vacation in Stonecutters Island Penal Institute, a serious lockup; model prisoner -- many months; prisoner of the year -- 2008; tutor of fellow prisoners, native speakers of Cantonese, in English conversation, grammar, reading, and some writing -- a unique cross-cultural experience; maximum time off for good behaviour (HK is a former British hangout, so good behaviour, rather than good behavior, was called for).

Served with deportation order; retrieved hidden proceeds of scheme; vamoosed to Namibia.

September, 2004 - April, 2007: Hong Kong: investment counselor

Made HK\$17,450,000 gross, HK\$16,869,000 net, in dodgy investment scheme; arrested in sting operation; tried in Court of First Instance, convicted and sentenced, with no mucking about; leave to appeal to Court of Appeal denied.

July, 2003 - August, 2004: 2nd interlude

All-expenses-paid vacation in Koror Jail, a lax lockup; lolled around, went fishing with guards, etc.

Served with immigration-hearing order re deportation; served with complaint sounding in restitution by Special Trustee of Iyebukl and Ngetkib Bank; ignored immigration hearing, and ignored summons and complaint, and scrambled with the loot; arrived in Hong Kong.

February, 1999 - June, 2003: Palau: lawyer

Employed as general counsel of Iyebukl and Ngetkib Bank; installed triple-bookkeeping system, and helped myself to US\$170,000; caught with hand in cookie jar; sham trial in Palau Supreme Court, Trial Division; typical Palauan slap-on-wrist sentence; wasted time and effort in appeal to Palau Supreme Court, Appellate Division.

July, 1998 - January, 1999: 1st interlude

International travel hither and yon; arrived in Palau in January, 1999.

January, 1988 - June, 1998: New York: lawyer

Practiced law, including contracts, torts, property, commercial law and constitutional law. Legal services included negotiations and settlement conferences; research for, drafting of, and writing of memoranda and briefs for submission to New York courts (Supreme Court, Appellate Division, Court of Appeals) and United States courts (United States District Court for the Southern District of New York, Court of Appeals for the Second Circuit); appearances and trials in the New York Supreme Court, and arguments before the Appellate Division. I had hundreds of tedious, wearying cases over the years for a multitude of clients, all of whom were entitled to representation, though all but a handful of them were undeserving of sympathy.

January, 1985 - December, 1987: New York: lawyer

Law clerk to Associate Judge George Mason, New York Court of Appeals; research for, drafting of, and editing of decisions, memoranda, motions and orders.

Languages

English (native), German (superior), Palauan (exposure), Cantonese (triad conversational)

VI. Final Exam: Contracts

In the State of Confusion, contract law is identical to that in the Empire State, except that a contract for sexual services is not illegal,¹ and prostitution is not against public policy.² There are no common-law crimes in Confusion or in New York, and there are no ecclesiastical crimes. Confusion courts cite New York cases, and accept New York appellate decisions as persuasive. Civil procedures of the two jurisdictions are similar, not congruent.

One hot evening at the end of August, 2009, Themis (not a goddess) and Dweeb (an urban rustic) find one another in a tony Confusion saloon, located in sophisticated Meetmart, Argent County. Themis is from Confusion, and Dweeb is from Hunger, an adjacent state. A Confusion governmental agency employs Themis as a goferette, whereby she is productive despite her limited ability. Dweeb likewise lacks talent, so he became a lawyer. He is utilized as a gofer by a partner in a major Hunger law firm.

¹ Prostitution is not a common-law crime. The offense was within the jurisdiction of the ecclesiastical courts. *People v. Cummons*, 23 N.W. 215 (Mich. 1885); *Commonwealth v. Cook*, 53 Mass. 93, 97 (1846). Statute law remedies the jurisdictional limitation, and has done so for a long time. See *Commonwealth v. King*, 372 N.E.2d 196, 201 (Mass. 1971) (citing colonial law which prohibited lewd, wanton and lascivious speech or behavior).

A contract to perform an illegal act is illegal. *Armaluuk v. Mereb*, 7 T.T.R. 459, 464 (Trial Div. 1975) (Trust Territory of the Pacific Islands). An illegal contract is unenforceable. *Gibbs & Sterrett Mfg. Co. v. Bruckner*, 111 U.S. 597, 601 (1884); *Holman v. Johnson*, [1775] 98 Eng. Rep. 1120, 1121 (K.B.); *The Highwayman's Case (Everett v. Williams)*, (Ex. 1725) 9 LAW Q. REV. 197 (1893).

² "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy;--it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." *Richardson v. Mellish*, [1824] 130 Eng. Rep. 294, 303 (C.B.).

After desultory conversation about the decor of the saloon (Dweeb: “Nice place, huh?” Themis: “Quite so.”) and about how long each has been present (Themis: “Have you been in this licensed establishment for a while?” Dweeb: “Yeh. An’ you?” Themis: “No. I arrived relatively recently.”), Dweeb asks Themis if he could buy her a drink. Themis perks up, says, “I do not mind if you do”; after imbibing, she feels that there is chemistry between Dweeb and her. Dweeb quaffs a few himself, and figures that she is better-looking than he first thought. The two dance, drink some more, and dance close together.

Later in the evening, Themis says to Dweeb, “The acquaintance in whose motor vehicle I traveled to this licensed establishment appears to have retraced our route, and gone back to her abode. If you provide transportation so that I can effectuate a return to my tenancy for years, I shall share a bed with you, and engage in intercourse with you. I shall treat you lovingly, as would a damsel.”³

Dweeb replies, “Let’s go to a hotel, sweets, and you got yerself wheels.”⁴ Themis says nothing, but she leaves the saloon with Dweeb, and gets into his wheels.

Dweeb and Themis drive to a motel, rather than a hotel, with no more than “Where’s the hotel?” from Themis. The motel is situated on a hillock of tacky Madonna County, Confusion. On the way, Themis removes her shoes and pantyhose. When, after midnight, Dweeb and Themis arrive at the motel, Dweeb wants to go directly to a room. Themis walks a few paces with Dweeb, pulls away, and, as she runs to the nearby lake, flings off her blouse and Victoria’s Secret brassiere. Dweeb gives chase, catches up to her and embraces her.

Themis resists, and moves away from Dweeb. He stands where he is, his arms akimbo across his chest. After a bit of coy hesitation, Themis goes back to Dweeb, who opens his arms. The two embrace, and ardor is reciprocated. Themis takes off her skirt; Dweeb rips off his shirt, yanks off

³ Damsel, noun. “A young unmarried lady; originally one of noble or gentle birth, but gradually extended as a respectful appellation to those of lower rank.” IV OXFORD ENGLISH DICTIONARY 233-34 (2nd ed. 1989). The definition is provided for moderns who are not familiar with the word, let alone the concept.

⁴ Wheels, noun. “A motorcar; var. of wheel, n.” A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 1325 (8th ed. 1984) (Paul Beale ed.). The definition is provided for ancients who are not familiar with the mode of transportation, let alone the slang.

his shoes, peels his socks and rids himself of his encumbering pair of pants and underwear.

As Themis and Dweeb lie entwined on the lakeside grass, Themis's thoughts are remote from the lakeside, Dweeb and the goings-on. Themis is delighted by the celestial street lights aglow along the Milky Way. She sees the Swan (in flight, as it were) in the northwest quadrant of the starlit dome of the heavens, as well as the Great Square. Binary Algol is difficult for Themis to distinguish, but brilliant Altair is not.

Dweeb maneuvers to achieve his goal, and causes his companion to transfer her attention to the terrestrial sphere. Themis realizes that she is not quite ready to consummate passion, so she says, "No! Not in this locale!", and pushes once, feebly, against Dweeb's chest. Dweeb ignores Themis and _____ her and _____ to _____ and _____, without caring about her psychological and physiological needs.

The two lovers gather their respective garments and clothing, and dress. Neither speaks to the other. Dweeb drives Themis to her tenancy for years. She flounces out of Dweeb's wheels, slams the door and goes into her tenancy. Dweeb drives back to his bachelor digs. Each sulks, feels angry and hurt and used.

Themis seeks to assuage her feelings by recourse to law.

Once Law was sitting on the bench,
And Mercy knelt a-weeping.
"Clear out!" he cried, "disordered wench!
Nor come before me creeping.
Upon your knees if you appear,
'Tis plain you have no standing here."

Then Justice came. His Honor cried:
"Your status? -- devil seize you!"
"*Amica curiae*," she replied --
"Friend of the court, so please you."
"Begone!" he shouted -- "there's the door --
I never saw your face before!"⁵

⁵ AMBROSE BIERCE, THE ENLARGED DEVIL'S DICTIONARY 176 (Ernest Jerome Hopkins ed. 1967).

One cold afternoon at the beginning of December, 2009, Themis sues Dweeb for breach of contract (count 1) and for breach of the implied duty of good faith and fair dealing (count 2). Punitive damages are demanded in relation to count 2. She files the complaint in the Supreme Court of Judicature, Trial Division, County of Bozo, State of Confusion.

The Confusion Supreme Court of Judicature has both a Trial Division and an Appellate Division. Each justice may serve in either division, except that a justice may not hear an appeal from a judgment which he rendered, or, when an interlocutory appeal is allowed, from an order which he entered. There is no court of limited jurisdiction, and there is no appellate court above the Appellate Division.⁶

The court has both *in-personam* jurisdiction and subject-matter jurisdiction.⁷ Themis chooses venue on the basis of her residence in Lamb Town, Bozo County, Confusion. Dweeb answers the complaint. Thereby, he waives the defect of venue, and does so because an accident of geography placed the Bozo County court house in Bozoville, Bozo County, Confusion, within convenient driving distance of his bachelor digs in Predator City, Lair County, Hunger. Dweeb also declines to challenge the validity of the second count, although the implied duty is inconsistent with freedom of contract.⁸

Along with the answer, Dweeb countercomplains with two similar counts, as well as a third count, sounding in duplicitous inducement to contract. Each of the three counts includes a demand for punitive damages. Themis makes a motion for definite pleading as to count 3, and a motion to strike the punitive-damages assertion in count 1. She, too, declines to challenge the validity of a count based on the implied duty of good faith and fair dealing. The Motion Term grants the motions, with leave to file a substitute countercomplaint within fifteen days. Another pleading is filed timely by

⁶ Conf. Const. art. IV, §§ 1-4.

⁷ Evaluation of the parties may be more important than selection of the court. If so, the first reference in a text is to personal jurisdiction, and the second reference is to subject-matter jurisdiction. Alternatively, selection of the court is primary. If so, one refers first to subject-matter jurisdiction.

A Scot cleric of an earlier generation said, of an entirely different problem, “This is a matter of very considerable difficulty. We look it straight in the eye, and pass on.”

⁸ *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983). At the common law, the implied duty is limited to special relationships. *Central S. & L. Ass’n v. Stemmons N.W. Bank, N.A.*, 848 S.W.2d 232, 238-39 (Tex. Ct. App. 1992).

Dweeb, but, due to a law-office failure,⁹ only two counts are stated: breach of contract (count 1) and breach of the implied duty of good faith and fair dealing (count 2), and the latter demands punitive damages.

Themis, pleased to be rid of the inducement count, answers the substitute countercomplaint.

Dweeb feels that he was indeed induced by Themis, who, he feels, acted unreasonably, but he prefers his stress-free relationship with a post-Themis bimbo to litigation, because “Litigation is an activity that does not markedly contribute to the happiness of mankind, though it is sometimes unavoidable.”¹⁰ Rather than move for rectification of pleading, he lets the inducement count go. The tactic provides him a bonus: constraint of his attorney’s fees.

The New York rationale for discovery is that a litigant is a stranger to the facts, so he needs a fishing expedition to uncover them. Under Confusion procedure, discovery is restricted. A litigant may inquire only about fact allegations and legal theories which are material to the pleadings. Dweeb and Themis manage nonetheless to avoid surprise through discovery of information which is, in any event, well known to both of them.

Limited discovery facilitates setting the day of reckoning within a year after issue is joined. One gray morning in mid-October, 2010, at 8:30 o’clock, trial begins. The milieu of the liars’ contest is Trial Term 1, the Honorable Stephen Kruger C.J. presiding.

Dweeb also wants to assuage his feelings, so he elects trial by wager of battle.¹¹ He informs the Court that, though trial by wager of battle was abolished in England,¹² abolition was effected after the reception of English common law in Confusion, whatever the date of the reception was. Thus, trial by wager battle is part of the common law of Confusion.

⁹ Law-office failure, noun. A professional lapse, characterized by not meeting a work-related obligation, whether caused by an attorney or by an attorney’s employee or by a client. Lapses include misplaced files and overlooked time requirements. *Fox v. Hartmann*, 455 N.Y.S.2d 17, 18 (2nd Dep’t 1982). The definition is provided for attorneys although they are familiar with the term, all too often through personal experience.

¹⁰ *Gallie v. Lee*, [1969] 2 Ch. 17, 41 (C.A.), *aff’d sub nom. Saunders v. Anglia Bldg. Society*, [1971] A.C. 1004 (H.L.).

¹¹ 3 BL. COMM. *337-*341 (1768).

¹² 59 Geo. III c. 46 (1819).

Themis replies that, no matter what the date of reception, there is no reported Confusion case in which the parties adjudicated their differences through trial by wager of battle. A century and a half without even one trial by wager of battle proves that it is not part of the common law of Confusion.¹³

The Court pronounces the *ex-cathedra* conclusion of law that trial by wager of battle was not received as the common law of Confusion. The fallback position of the Court is the further *ex-cathedra* conclusion of law that, if trial by wager of battle were received, it was abolished by the constitutional right to trial by jury.¹⁴

Dweeb adds that the statute of abolition was repealed in England,¹⁵ and that restored the status of trial by wager of battle in England to the legal status quo ante its statutory abolition. At the time that the statute of abolition was repealed, Confusion relied freely on English legal authority. With trial by wager of battle in England, trial by wager of battle became the common law of Confusion.

A hand is held up by the Court to stop Themis from replying. Repeal of an act of repeal, the Court rules, does not revive the repealed act, unless revival is expressly provided.

¹³ There is no doubt that reception took place. The Master of the Rolls was overheard to mutter that he rues the event. THE TIMES (London), May 7, 1975, at 2.

Professors and lawyerlings, sheltered in the legal acres of *silvas scholai* from the stresses of life, debate the date of reception, because the relevant records are not preserved (or cannot be found) in Confusion court records. Among the dozens of law-review expositions on this burning issue are Paris Hilton, "Reception in Confusion: Catering to the Bozos," 65 ANTIUTOPIA L. REV. 557 (2008), and Antonin J. Scalia, "Toward a Comprehensive Comparative Gnoseological Resolution of Historical-Dating Ambiguities in Common-Law and Civil-Law Jurisdictions," 4 BROOKLYN J. IOTAS 1066 (1997).

¹⁴ See *Childress v. Emory*, 21 U.S. 642, 674 (1823) (conclusory dictum that trial by wager of law, even if brought by colonists to New World, was abolished by constitutional right to jury trial).

Slackers are assisted here. A wager of law is a giving of sureties, in an action on a debt, that, on a day certain, the debtor would make his law. That is, he would take an oath that he is not indebted, and he would bring into court eleven compurgators. These men would swear that, to their knowledge, the debtor is telling the truth. Thereon, the debtor is discharged absolutely. 3 BL. COMM. *341-*342 (1768).

¹⁵ Statute Law Revision 1873, listed in 1 CHRONOLOGICAL TABLE OF THE STATUTES 239 (1992).

The Court goes on to say that there is no provision concerning revival of trial by wager of battle, or any provision of any sort concerning trial by wager of battle, in the TLC (Totality of the Laws of Confusion).

Without a statute, reliance has to be placed on the common law. Thereunder, Themis, a woman, may not be challenged, because the common law does not recognize women as battle-worthy.¹⁶ The common law, the Court adds in a dictum, does not recognize women as reasonable, either.¹⁷

Dweeb, a male supremacist, maintains hypocritically that men and women should be equal under law. Aren't female lawyers nowadays esquires, as male lawyers are, though the term "esquire" used to mean "knight's gentleman"? The analogy, and the guarantee in the Confusion Constitution of equal protection under law, he thunders, compel the conclusion that, whatever the common law was, the contemporary common law recognizes women as battle-worthy.

(Despite this litigation position, Dweeb still feels that Themis acted unreasonably, so he just cannot bring himself to apply the contemporary-common-law point to the dictum of the Court.)

Themis responds demurely that only males need register at age eighteen for military service. The U.S. Supreme Court upheld that sex-based distinction.¹⁸ The Confusion constitutional guarantee intends legal equality, not insupportable symmetry and not fatuous obliteration of natural differences.

¹⁶ Slackers are assisted here as well. "The cases which have been cited in this argument, and the others, to which we ourselves have referred, shew very distinctly that the general mode of trial by law in a case of appeal is by battel, at the election of the appellee, unless the case be brought within certain exceptions. As, for instance, where the appellant is an infant, or a woman, or above sixty years of age, or where the appellee is taken with the mainour, or has broken prison. Now, in addition to all these, there is the case where great and violent presumptions of guilt exist against the appellee, which admit of no denial or proof to the contrary." *Ashford v. Thornton*, [1818] 106 Eng. Rep. 149, 167-68 (K.B.) (Lord Ellenborough C.J.).

¹⁷ *Fardell v. Potts (The Reasonable Man Case)*, reported in A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW (1927). See *McFarlane v. Tayside Health Board*, (1999) 3 W.L.R. 1301, 1318 (H.L.) (reasonable man is commuter on Underground); *Hall v. Brooklands Auto Racing Club*, (1933) 1 K.B. 205, 224 (C.A.) (reasonable man is passenger on Clapham omnibus).

¹⁸ *Rostker v. Goldberg*, 453 U.S. 57 (1981).

The common law reflects life as it is, she says, never life as theoreticians and do-gooders would have life be. Nature made women the fair sex. On this, of necessity, the contemporary common law is as the common law always has been. Women are not battle-worthy.

More's the pity the continuation of inequality, Dweeb retorts, considering that trial by wager of battle is an honorable mode of alternative dispute resolution.¹⁹

Losing interest in the barrister-babble, the Court denies the election. To meet the requirement of a statement of decision,²⁰ the Court intones, "*Quod erat demonstrandum*."

A jury trial,²¹ which is the giving over of a private dispute for public resolution by nine ignorant strangers, is eschewed by Themis and brushed off by Dweeb. The litigants agree to trial by judge ("And a good Judge too!"²²).

Only the two former lovers testify; no demonstrative evidence is offered. The Court grants judgment in favor of Themis as plaintiff, and further grants judgment in favor of Themis as counterdefendant. General damages in the amount of \$2,500 are awarded, as are punitive damages of \$69 for count 2. There is no evidence as to special damages, so none is granted. Dweeb's motions to vacate the awards; to reduce the awards; and for a new trial, are denied.

You are a member of the Appellate Division panel which hears the case. Dweeb is the appellant, and Themis is the respondent. Write a pellucid opinion on the following issues:

1. Dweeb asked Themis if he could buy a drink for her, and Themis replied, "I do not mind if you do." Did this constitute offer and acceptance of a contract?

¹⁹ Revivalists should read HENRY C. LEA, *SUPERSTITION AND FORCE* (2nd ed. rev. 1968); M.J. Russell, "Accoutrements of Battle," 99 *LAW Q. REV.* 432 (1983); and Richard W. Ireland, "First Catch Your Toad: Medieval Attitudes To Ordeal and Battle," 11 *CAMBRIAN L. REV.* 50 (1980).

²⁰ Conf. Civ. Prac. Act, §§ 36, 44 (2010).

²¹ W.S. GILBERT AND ARTHUR SULLIVAN, *TRIAL BY JURY*, in *ASIMOV'S ANNOTATED GILBERT & SULLIVAN* 61 (Isaac Asimov ed. 1988) [hereinafter "A Delightful G&S Operetta"].

²² A Delightful G&S Operetta, *supra*, n. 21, at 71, 83-84.

2. Dweeb said to Themis, "Let's go to a hotel, sweets, and you got yerself wheels." Did Dweeb accept Themis's offer concerning transportation from the saloon to her tenancy?
3. At the motel, Themis pulled away from Dweeb and ran to the lake. Was this a breach of contract by Themis?
4. At the lake, Themis and Dweeb embraced ardently. (a) Was the embrace performance of a contract by Themis? If yes, which contract? If no, why not? (b) Was the embrace performance of a contract by Dweeb? If yes, which contract? If no, why not?
5. Themis realized that she was not quite ready to consummate passion. Instead of telling Dweeb this, she said to him, "No! Not in this locale!" (a) Did Themis have a contractual obligation to tell Dweeb what she wanted? (b) If Themis had accepted money, not only a ride, from Dweeb, would she have had an obligation, under the law merchant, to make a full disclosure to Dweeb of her needs?
6. Themis pushed once, feebly, against Dweeb's chest. (a) Was this a breach of contract by Themis? (b) Was this an anticipatory breach of contract by Themis?
7. At the critical moment, Dweeb did not meet Themis's psychological and physiological needs. Was this a breach by Dweeb of the implied duty of good faith and fair dealing?
8. Although Dweeb wanted to assuage his feelings, the Trial Division denied his election of trial by wager of battle. Was the ruling correct?
9. Was the amount of general damages excessive?
10. Were punitive damages for count 2 of Themis's complaint properly awarded?

which supports terrorism or attempted terrorism in the United States or which is likely to affect the United States.”

The term “telecommunication identifier” is defined in Section 2339E(f)(7) as “a telephone number or an email address, whether numeric, alphabetical, or alphanumeric.”

Section 2339E(c) permits the Telecommunications Protector to issue a Shutdown Order or Temporary Shutdown Order without judicial authorization.

Section 2339E(d) permits a person who is aggrieved by a Shutdown Order or Temporary Shutdown Order to contest the order before the United States Foreign Intelligence Surveillance Court. An aggrieved person may be represented by an attorney of his or her choice, if the attorney has a current security clearance of secret or higher. An aggrieved person may represent himself or herself, if he or she has a security clearance of secret or higher.

For information about obtaining a security clearance, contact the Defense Intelligence Agency, Security Clearance Office, Building 6000, Washington, DC 20340-5100; 202-231-8476; securityclearance@dia.mil.

Section 2339E(b)(1) prohibits a United States person from contacting a telecommunication identifier which is the object of a Shutdown Order or Temporary Shutdown Order.

Section 2339E(b)(2) requires a United States person who is contacted from a telecommunications identifier which is the object of a Shutdown Order or Temporary Shutdown Order to report the contact to the Telecommunications Protector, by email, within 24 hours, and to provide a copy of the written telecommunication or the substance of the oral telecommunication. The email address for this purpose is report@usdhs.gov.

Under 18 U.S.C. sec. 2339E(e), the first violation of a provision of section 2339E is punishable by a fine of \$5,000, imprisonment for not more than six months, or both. The second violation is punishable by a fine of \$25,000, imprisonment for at least six months and not more than one year, or both. A third or subsequent violation is punishable by a fine of \$100,000, imprisonment for at least three years and not more than five years, or both.

Further under sec. 2339E(e), a first violation of sec. 2339E is punishable by imprisonment in a United States prison operated in the United States by the United States Bureau of Prisons. A second or subsequent violation of sec. 2339E is punishable, at the discretion of a United States judge, by imprisonment in a United States prison operated in the United States by the United States Bureau of Prisons, in a “detention facility” on “United States military property in the United States or abroad”, or in a “security facility” in a “country with which the United States maintains diplomatic relations and which cooperates with the United States in the fight against terrorism.”

The Department of Homeland Security urges all Americans to be vigilant. Questions about this notice may be addressed to the Telecommunications Protector.

BY MAIL:

U.S. Department of Homeland Security
Office of the Telecommunications Protector
Washington, DC 20528-1539

BY E-MAIL:

telecommsprotector@usdhs.gov

Please include your mailing address, so that, if necessary, you can be contacted via the United States Postal Service.

BY PHONE:

Department of Homeland Security switchboard: 202-282-8000
Office of the Telecommunication Protector: 202-282-0666

OTHER OFFICIALS:

To contact other Department of Homeland Security officials, see the Directory of Department Officials on the USDHS web site.

To comment on the USDHS web site, please send an email to webmaster@usdhs.gov.

ESPAÑOL:

Para obtener este anuncio en español, llama por favor al 202-938-2225 o envía un correo electrónico a reconquista@whitehouse.gov. Con respecto al uso general del español en Estados Unidos, incluyendo interacciones con gobiernos, contacta con español@northamericanunion.int o multilingua@newworldorder.org.