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"What is Law?"

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ABOUT THE TYPEFACE

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CALL FOR PAPERS, VOLUME 2

JURISPRUDENCE AND ECONOMICS

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 challenge the scholarly and lay communities to inquire into intersection between jurisprudence and economics. Under what circumstances does economic theory shape legal philosophy? When should the quantitative rationalism of economics be included in jurisprudential rationales and when should it be excluded? What place does economic analysis have in the many moral questions judges and lawmakers engage with?

Scholars, lawyers, judges, philosophers and lay people are invited to tackle these great questions, directly or indirectly in articles of five to eight thousand words. Papers may engage with case studies, philosophical arguments or any other methods that answers the edition's main question. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

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> In recent years economists, and academic lawyers with a bent for economic analysis, have used the theoretical and empirical methods of economics to illuminate a variety of issues and problems in the law. Formerly law and economics intersected only in the fields of antitrust and public utility regulation; today the diligent reader of scholarly journals can also find economic analyses of crime control, accident law, contracts damages, race relations, judicial administration, corporations and securities regulation, environmental problems, and other areas of central concern in the contemporary legal system.

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EDITORIAL: WHAT IS LAW?

The study of jurisprudence in modern legal academia is a challenge. As law schools throughout the world became more vocationally orientated, particularly due to the pressures of government funding, the place of theory is now a distant second to practical pedagogy. This trend is disconcerting because theory is the foundation of practical application; it is the light illuminating the dark tunnel. I have always believed that theory unveils the patterns of everyday life.

The Journal Jurisprudence was constituted to enliven theoretical debates within the law. In setting the question, "What is Law?," as the theme for this inaugural edition, we challenged scholars and practitioners alike to be reflexive about the nature of law itself. "What is Law" is, of course, HLA Hart's primary question; but it is also the primary question of the whole discipline of law. Unlike the sciences, law, in my opinion, does not exist *sui iuris*, that is, in its own right. Human beings or, more precisely, human societies create law within purposeful history. Law has utility, but to discover that utility request a delimitation of its boundaries. I hope this inaugural edition spurs debate and contributes to the discourse.

Our first article is by Associate Professor Adam J. MacLeod of the Jones School of Law at Faulkner University. He conceives of law like the bards of history; law has narrative, like a story, but it also imparts values, instructions and cultures norms upon the audience/citizenry. Professor MacLeod imparts great scholarship upon his argument, but with a form of writing that makes his article accessible to a wide audience. Like the bards of yore, Professor MacLeod posses the skill to elucidate a narrative but also integrate a moral to his story. One of the primary missions of the Journal is to make legal writing accessible to non-lawyers/scholars, and *The Law as Bard: Extolling a Culture's Virtues, Exposing its Vices, and Telling its Story* does this admirably.

Dr.Jur. Eric Engle of the Universität Bremen offers a breathtakingly original engagement with the definition of law. He balances the notion of *lex* (law) and *ius* (justice) with a functionalist framework to deliver "general principles of law."

Furthermore, he foregrounds the juncture between the civil and common law to illuminate his discussions on freedom and justice. He concludes by challenging the death of universal morality through historical and theoretical examination. Dr Engle's conclusions are of immense importance to the discourse and, I am certain, would challenge the preconceptions of scholars and students alike. To suggests that some principles transcend all cultural boundaries has become increasingly untenable in a post-modern age, but *Law: Lex vs. Ius* begs to differ due to materialism.

Our third article engages directly with the work of HLA Hart, particularly in regards to public international law (PIL). Written by Dr Jason A. Beckett of the University of Leicester, who challenges us to reconceive of British positivism as a bifurcated debate. He suggests that the two major traditions, Hart and Austin, are both, in fact, inappropriate to the analysis of public international law. Dr Beckett is a bold and unforgiving writer; he openly states, quite simply, "Hart was wrong" and demands a re-conception of judicial discretion. Building upon Foucault and Kierkegaard, he concludes that paradigm of legal theory is identified by its own banality. He find more truth in public international law as a legal system, as opposed to Hart's rather "municipal" definition of law.

Journal editors often suggest that accepting articles, like a professor awarding a first class degree, is with great difficulty given the vast choice we are presented with. Since calling for articles in early 2008 and closing mid-year, we received nearly forty submissions. But it was without significant difficulty to present only three because they engaged with the theme in a manner intelligible to those outside the academy. This issue's diverse trio of authors cleared a path that I hope many will follow.

Aron Ping D'Souza
Editor
19 July 2008

THE LAW AS BARD: EXTOLLING A CULTURE'S VIRTUES, EXPOSING ITS VICES, AND TELLING ITS STORY

Adam J. MacLeod*

I. INTRODUCTION

Before literacy rates in the English-speaking world reached their apex (and long before they dropped into the trough they are now thought to occupy), before we commoners read newspapers (and long before we wrote 'blogs), before autobiographies crowded book shelves (and long before reality television created celebrities out of rather mean raw material), our cultural forebears appointed a rather singular individual to preserve for their children a record of their values, rituals, institutions, and assumptions: the bard. The bard told stories. But the bard didn't tell just any stories. The bard told stories drawn from the fabric of which his culture consisted.

The bard's stories, while entertaining, also served a much more lasting purpose, that of teaching, and in teaching, affirming, what choices his society valued. In particular, by reading the bard's stories one can identify which virtues (always courage and love, sometimes charity and chastity) the bard's society honoured and which vices (always cowardice and cruelty, sometimes intemperance) it condemned. The bard extracted from his culture's fabric samples representative of the whole. In short, the bard reinforced for his contemporaries and identified for his successors what choices and cultural commitments his society considered right and good.

Today the bard lives on as a movie screenplay writer. The historian Paul Johnson has observed that from early in the life of Hollywood,

> movies stressed patriotism, loyalty, truth-telling, family life, the importance and sanctity of religion, courage, fidelity, crime-does-not-pay, and the rewards of virtue. They also underpinned democracy, Republicanism, the rule of law, and social justice. Their presentation of American life was in all essentials the same as [the American illustrator] Norman Rockwell's *Post* covers. And the homogenizing effect, the encouragement to accept all-American norms, was far more successful than the crude social engineering of

> the Red Scare and Prohibition.[1]

A society's laws function in much the same ways. The law contains a narrative, which has two aspects, (1) preservation of an account of human choices and cultural commitments, which reflects the culture's values and (2) instruction that informs and shapes future choices. In other words, the law's narrative preserves samples of a cultural fabric for the benefit of contemporary and future generations, and in turn teaches which individual and cultural choices are just.

The preservation function of the legal narrative is most easily discerned in judicial decisions, in which courts tell stories about particular human choices, which are meant to be representative of the choices participants in a culture make generally. A judicial decision literally renders judgment on the rightness of a particular human choice. That judgment rests upon, among other things, cultural assumptions about what is good and virtuous, as well as conclusions about what is efficacious and useful. When read later, the decision reveals a tale of an individual who came to a crossroads and chose one course and not another. The decision also preserves the culture's expression of approbation or disapprobation of that choice.

To be sure, law is not *merely* a record of those choices that a particular society deems worthy of approbation, but it is at least that. While law promotes social utility it also identifies what conduct lawmakers deem useful. While law vindicates those who have been unjustly treated it also teaches what justice requires. While law protects valuable institutions it lends approbation to those relational arrangements that are good and valuable. When law punishes citizens for making particular choices it both expresses disapproval of those choices and affirms that human choices are meaningful.

After preserving a sample of cultural fabric, the legal narrative directs the future evolution of that fabric by teaching which choices are just and which ones are not. For better or

* Associate Professor, Faulkner University, Jones School of Law. I thank Justin Aday and Ned Swanner for their very capable research assistance. The errors are all mine.

[1] Paul Johnson, *A History of the American People* (1997) 696. Walt Disney was particularly adept at the cultural mediation function of the bard. 'By weaving animal characters into a moral tale, which was itself underpinned by the Judeo-Christian message of the Decalogue and the Sermon on the Mount, Disney invented a new form of miracle play, a quasi-religious subculture which translated morally based fantasy into screen reality': at 697.

worse, the common law tradition always looks backward before looking forward. Lawmakers and interpreters of the law begin their deliberations by reading the law's narrative about the past. Informed by this narrative, they proceed to pass new judgments on choices currently at issue.

More directly to the point, non-lawyers look to the law to teach them what choices they ought to make, and for what reasons they ought to make them. Choices informed by the law's narrative then combine to create or reinforce components of a culture – relationships, institutions, practices. Thus culture shapes the law and the law reciprocates.

For these and other reasons, one commentator has observed,

> The many components of our culture largely are united by law, not by blood, not by race, not by religion, not even by language, but by law. It's the one principal cultural component we all have in common. … In [the United States, at least] law is more important in teaching or instructing us than it is in directing us.[2]

This essay examines three provisions of positive law that demonstrate the narrative functions of law. The first example is the punishment that the old English common law meted out to those who committed suicide. The second is necrophilia prohibitions, which criminalise the performance of sexual acts with dead bodies. The third example is the decisions of state high courts in Massachusetts and California to reject legislation that provided to same-sex couples all the same rights and privileges that heterosexual married couples enjoy.[3]

These laws cannot be explained as means to promote social utility, to direct conduct away from infringement of individual rights, or to prevent harm to persons other than the actor. In fact, these laws are not designed to serve what we commonly refer to as practical purposes, though they may promote some ancillary practical ends. Instead, they are intended to preserve and to teach some principle that the lawmaker has deemed indispensable to his or her culture's self-understanding. That these particular laws demonstrate only the narrative functions of law does not

[2] Francis George 'Law and Culture in the United States' (2003) 48 *American Journal of Jurisprudence* 131, 135.

[3] *Opinions of the Justices to the Senate*, 440 Mass 1201 (2004), *Re Marriage Cases* (Reporter citation not yet available, Supreme Court of California, George CJ, Kennard, Werdegar, Moreno, JJ, 15 May 2008).

mean that the narrative functions of law cannot co-exist with other functions. Indeed, no matter to what ends any particular positive law is directed, it almost always exhibits this attribute of the bard: it articulates the story and values of the culture from which the law emanates.

II. FORFEITURE AND DISHONOUR OF THE SUICIDE

It is now commonly agreed that confiscating the personal property of one who has committed suicide and burying him at a crossroads with a stake through his body neither deters others from committing suicide nor punishes the person who performed the self-destruction. Forfeiture and dishonour served no social utility and prevented no harm to anyone, including the actor himself. Indeed, recognition that the forfeiture and dishonour provisions of the common law affected not the suicide himself but rather his family, further victimising people whom the suicide had victimised by his choice, led to abolition of those provisions in the 19th century in the United Kingdom, and earlier in the United States.[4] However, criminal punishment for an act of suicide, in the form of forfeiture and dishonour, enjoyed a long life in positive, common law.[5]

Was criminalisation of suicide an unjustifiable practice? After all, the state has no power to punish the dead. And to suggest that punishment might deter one who has resolved to end her own life seems contrary to human experience. Indeed, deterrence, rehabilitation, retribution, incapacitation – the common justifications for criminal punishment – all fail to justify forfeiture and dishonour. Thus, the law could not have been justified on retributive or consequentialist grounds; forfeiture and dishonour neither repaired some imbalance caused by the suicide's usurpation of legal norms nor accomplished any practically-useful end.

To find a justification for forfeiture and dishonour it is useful to examine the narrative that the common law contains concerning suicide and those who commit it. Almost invariably, the authorities justified criminalisation on the ground that the law disfavors, even abhors, suicide.[6] The legal narrative has invariably portrayed suicide as a vicious act and, obversely, has characterised perseverance in the

[4] See Thomas J. Marzen *et al*, 'Suicide: A Constitutional Right?' (1985) 24 *Duquesne Law Review* 1, 56-100.

[5] *Ibid.* 59-63, 67-70.

[6] *Ibid.* 60-3, 68-9.

face of affliction as a virtue to be lauded. Blackstone famously offered his view that suicide constituted the 'pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure.'[7] Moreover, he attributed to the law the view

> that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest, crimes, making it a peculiar species of felony, a felony committed on oneself.[8]

The common law concerning suicide told a tale of one who, finding this world wearisome or arduous, fled the vexations of this life and rushed into the next unbidden. Though the law was unable to inflict upon this person any meaningful penalty, it nevertheless condemned him. Blackstone himself acknowledged that the law was powerless to punish one who had withdrawn himself from the law's reach.[9] Nevertheless, for centuries the law continued to declaim the villainy of those who ended their own lives while in their right minds.

That the law should express a preference in this matter, let alone that it should do so in such blunt terms of opprobrium, strikes many contemporary readers of the narrative as archaic. Nevertheless, though the penalties of forfeiture and dishonour gave way, the opprobrium persisted, and persists in American law. The Field Code, acknowledging that criminal punishment could not reach the perpetrator of suicide, called the act 'a grave public wrong.'[10] This choice of words was significant because the distinction between acts giving rise to criminal liability and those giving rise merely to civil liability turned on the question whether the wrong was public or private.[11] Other lawmakers and courts declare suicide to be 'a dreadful deed,'[12] 'ethically

[7] William Blackstone, *Commentaries on the Laws of England* (first published 1765-1769, 12th ed 1978) vol 4, 189.
[8] *Ibid.*
[9] *Ibid.* 190.
[10] Marzen *et al*, above n 4, 76.
[11] William Blackstone, *Commentaries on the Laws of England* (first published 1765-1769, 12th ed. 1978) vol 4, 5.
[12] *Commonwealth v Bowen*, 13 Mass 356, 360 (1816). Massachusetts at the time of Bowen's trial for abetting another's suicide had abolished forfeiture but retained

reprehensible and inconsistent with the public welfare,'[13] and 'unlawful and criminal as *malum in se*.'[14]

After abolition of forfeiture and dishonour, many American states continued to treat suicide as a crime, albeit one for which punishment is impossible.[15] Thus the New Jersey Superior Court prior to that State's repeal of the criminal prohibition against attempted suicide reasoned, 'Suicide is none the less criminal because no punishment can be inflicted. It may not be indictable because the dead cannot be indicted.'[16] Indeed, throughout the Twentieth Century courts affirmed the inherent criminality of the act. In 1933, the Florida Supreme Court stated, 'No sophistry is tolerated in consideration of legal problems which seek to justify self-destruction as commendable or even a matter of personal right.'[17] And in 1973, the United States Supreme Court acknowledged the existence of constitutionally unchallenged laws against suicide.[18]

So the law retains a narrative about suicide, a tale of cowardly Stoic philosophers and creatures carrying heavy burdens who, despite their afflictions, are equally to be condemned as pitied. And while this narrative has in some respects adapted to the times, it remains largely intact. Thus formed, the narrative teaches us that the life of one who would destroy himself is valuable in itself. Even when life ceases to be of any use to the one living it for the extrinsic purposes of enjoying play, beauty, or friendship, human life remains valuable *qua* human life. Thus, the loss of all extrinsic values is an insufficient justification for suicide, according to the narrative of the common law. In short, the lesson of the narrative is that the decision to commit suicide is contrary to a basic good, the intrinsic value of human life.

The law's narrative concerning suicide has important consequences, for it informs other important cultural commitments. For example, though we no longer mete out punishment for acts of suicide, the

ignominious burial. Massachusetts abolished the latter practice in 1823, but the Massachusetts Supreme Judicial Court continued thereafter to label suicide 'a crime of awful turpitude.' Marzen *et al*, above n 3, 74-5.

[13] *May v Pennell*, 64 A 885, 886 (1906).

[14] *Commonwealth v Mink*, 123 Mass 422, 429 (1877).

[15] Marzen *et al*, above n 4, 79-82.

[16] *State v Carney*, 55 A 44 (NJ Super 1903). See also *McMahan v State*, 53 So 89, 90 (1910); *State v Willis*, 121 SE 2d 854, 856 (NC 1961).

[17] *Blackwood v Jones*, 149 So 600, 601 (Fla 1933).

[18] *Paris Adult Theater I v Slaton*, 413 US 49, 68 n 15 (1973).

law's narrative influences contemporary debate over the related issues of physician-assisted suicide and euthanasia.

In their landmark *Glucksberg* decision,[19] in which they upheld Washington State's ban on assisted suicide, the Justices of the United States Supreme Court debated the significance of forfeiture and dishonour and the abolition of those provisions. Writing for the majority, Chief Justice Rehnquist framed the issue before the Court as 'whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so' and inquired 'whether this asserted right has any place in our Nation's traditions.'[20]

After reviewing the common law's history of criminalising suicide,[21] Rehnquist noted the 'consistent and almost universal tradition that has long rejected the asserted right' to commit suicide 'and continues explicitly to reject it today.'[22] He observed that 'for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.'[23] And though the American States had abolished the harsh penalties for suicide, abolition 'did not represent an acceptance of suicide; rather, as [Connecticut] Chief Justice [Zephaniah] Swift observed, this change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing.'[24] To strike Washington's law, Rehnquist concluded, the Court 'would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.'[25]

Justice Souter concurred, but wrote separately to advocate for a liberty interest in having the assistance of a physician in suicide. (He ultimately concluded that the State's interests were sufficiently serious to justify prohibiting the practice.) Though Souter favored recognising a constitutional right to assisted suicide, he was constrained by the common law's narrative about the immorality and felonious nature of suicide. Significantly, Souter acknowledged that the States abolished forfeiture and dishonour 'largely because the common-law punishment of forfeiture was

[19] Washington v Glucksberg, 521 US 702 (1997).
[20] *Ibid.* 723.
[21] *Ibid.* 710-15.
[22] *Ibid.* 723.
[23] *Ibid.* 711.
[24] *Ibid.* 713.
[25] *Ibid.* 723.

rejected as improperly penalising an innocent family.'[26] And Souter concluded that decriminalisation does not 'imply the existence of a constitutional liberty interest in suicide as such.'[27]

Thus the long Anglo-American narrative concerning suicide informed and, to some extent, directed the legal analysis in *Glucksberg*. Justices Rehnquist, Souter, and the other members of the Court operated within the context of a 700-year old story about suicide, preserved in the common law for the most recent generation by all those preceding. Two observations about this process seem valuable.

First, the narrative constrained the Justices' reasoning and prevented them from discerning a constitutional right of self-destruction. They did not write on a clean slate. They could not express approbation for suicide without doing violence to the plot of the common law tradition. Nor would it have been sufficient for the Justices to decide the constitutionality of Washington State's ban on assisted suicide in a vacuum, without reference to the common law tradition. If a right to *assist* suicide is consistent with the common law narrative disapproving of suicide then the Justices would have been compelled to justify the right on that basis. They were not free to reason that assistance of suicide is a fundamental right because suicide is legally permissible; the common law has never denoted suicide an acceptable practice.

Second, the *Glucksberg* decision is now part of the narrative. *Glucksberg* adds a chapter to the Anglo-American account of suicide. The decision teaches the reader the law's history of reviling self-destruction. It communicates the law's respect for the intrinsic value of human life, even the life of one who wishes to destroy herself. It preserves for future lawyers and jurists an account of the stigma attendant to suicide. It tells a story of one who, suffering from some physical affliction, finds the suffering too much to bear and seeks a way out. It records the judgment of the people of the State of Washington that the decision to live in spite of the suffering is courageous, virtuous, and right. And it affirms that judgment as consistent with America's tradition.

Another generation of jurists might someday revisit the issue whether the United States Constitution

[26] *Ibid.* 774.
[27] *Ibid.* 777.

guarantees a right to assistance in the commission of suicide. That generation might overturn *Glucksberg*. However, if future lawyers reject the *Glucksberg* ruling they must do so in spite of and contrary to the 700-year (and running) Anglo-American tradition that disfavors the choice to destroy oneself, and they must reject the teachings of those generations that came before.

The bard tells a compelling narrative about the despairing soul who loves life and its pleasures so little that he kills himself. The bard records a cultural judgment condemning this choice, declaring it cowardly. The narrative teaches us that previous generations have invariably commended the virtue of perseverance in the face of suffering and valued human life for its own sake. These teachings inform our cultural commitments to practices and institutions that alleviate pain through counseling, palliative care, and charity, rather than end pain through assisted suicide or euthanasia. These cultural commitments shape new laws, and the process is repeated.

III. NECROPHILIA PROHIBITIONS

Like prohibitions against suicide, prohibitions against necrophilia defy justification on grounds of social utility. They serve no practical ends. They do not protect the physical integrity of persons; dead bodies are not persons.[28] They do not prohibit violence because sexually molesting a dead body does not require force or violence, and the dead cannot withhold their consent. Unlike rape, necrophilia involves no usurpation of a victim's will because dead bodies have no wills to overcome.[29] The dead body does not suffer physically, emotionally, or psychologically from the act. It does not apprehend assault. It does not fear injury.

Nevertheless, many common law jurisdictions expressly prohibit necrophilia, not in service to social utility or to prevent harm to some victim, but rather to preserve a

[28] This appears to be settled, at least in the United States. See, eg, *People v Kelly*, 1 Cal 4th 495, 524 (Cal 1992); *State v Perkins*, 248 Kan 760 (1991), 771; *State v Wagner*, 97 Wash App 344, 348 (1999).

[29] Necrophilia is distinguishable from rape-homicide, in which application of the force and consent elements of rape can be, and often is, complicated by the death of the victim during the crime. See, eg, *Lipham v State*, 364 SE 2d 840, 842-843 (Ga 1988); Transcript of Proceedings, *England v Director of Public Prosecutions* (High Court of Australia 26 May 2000). The typical rape-homicide consists of a series of wrongful acts by the perpetrator, which include both a rape and a killing. The series of acts begins while the victim is still alive, raising the issues of force and consent. The case is thus unlike pure necrophilia, where the series of wrongful acts commences after the body has ceased to contain a living person.

narrative concerning sex and the ends for which it ought not be used. California has adopted a necrophilia prohibition, which is illustrative and provides, 'Every person who willfully… commits an act of sexual penetration on, or has sexual contact with, any remains known to be human, without authority of law,[30] is guilty of a felony.'[31] This statute is the judgment that comes at the end of an ignoble and troubling tale.

In 2003, a California legislator told the 'horrifying story of Robyn Gillet,' a girl four years old at the time of her death.[32] The person responsible for transporting Robyn's body to the morgue sexually abused the body. The community was shocked. The bill's author continued:

> This is why California must take action. By failing to make this a heinous act a crime, we will only promote disrespect for the deceased. Families suffer enough when they lose a loved one and should feel secure in knowing that if their loved one's body is molested, there is a law in place that will ensure the crime will not go unpunished.[33]

The tale moved the California legislature to act. The State disclosed its cultural assumption that sexual acts have meaning, even when they harm no person other than, or perhaps even including,[34] the actor. California adjudged sex with a corpse to be beneath the dignity of the departed, the perpetrator, or both, and it crafted a narrative consistent with this judgment.

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[30] The 'without authority of law' clause is a curious exception. One wonders whether the California legislature, trying unsuccessfully to imagine a circumstance in which sexual contact with a corpse would not be morally reprehensible, added this exception in an excess of caution.

[31] CAL HEALTH & SAFETY CODE § 7052(a) (West 2007).

[32] *Hearing of the California Assembly Committee on Public Safety* (22 April 2003) 2 <http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1451-1500/ab_1493_cfa_20030421_111600_asm_comm.html> at 2 April 2008.

[33] *Ibid.*

[34] One prudential purpose that necrophilia statutes might hypothetically serve is the protection of the health and welfare of the perpetrator. It does not take a great flight of imagination to suppose that state legislatures intended to protect necrophiles from disease or physical harm. However, no evidence of this concern appears in the legislative histories.

New York has expressed its view that the necrophile 'is a sick individual who injures himself more than he does the public.' Commission Staff Notes to NY Penal Law § 130.20. For this reason, New York, unlike most states (see note 48, below) has made necrophilia a misdemeanor rather than a felony: at § 130.20. However, the presumed mental illness of the perpetrator is not a justification for punishing the perpetrator in the first instance. Nor does the legislative history support the inference that New York believes that concern for the necrophile's mental health justifies punishment.

California is not the only jurisdiction to preserve in law its cultural assumptions concerning necrophilia. It is among seventeen states that have express and particular prohibitions against the act. An additional eleven states, while not identifying necrophilia in particular as a criminal act, have adopted the approach of the Model Penal Code ('MPC'), which outlaws abuse of a corpse generally and includes within its purview 'sexual indecency.'[35] That twenty-eight of the fifty American states have adopted this criminal prohibition without a utilitarian justification is striking. This fact alone suggests that state legislatures around the United States consider the legal expression of disapprobation a sufficient justification for criminalising this conduct. Outside the United States, the Australian State of Victoria[36] and the United Kingdom[37] both expressly prohibit necrophilia.

The codification schemes of many statutes further support the inference that states are primarily concerned with expressing disapproval of necrophilia. Many jurisdictions, including the United Kingdom, codify necrophilia with sex offenses.[38] Utah codified its abuse of corpse and necrophilia prohibitions among offenses 'against public order and decency.'[39] Other states group necrophilia together with bestiality.[40]

Rhode Island classifies necrophilia not with sex offenses but rather with crimes pertaining to graves and corpses.[41] Yet it defines necrophilia as 'the act of first degree sexual assault upon a dead human body.'[42] This is a curious formulation. Rhode Island law defines first degree sexual assault as 'sexual penetration with another person' in enumerated circumstances.[43] Evidently, though necrophilia does not usurp the will of a person, as sexual assault does, the Rhode Island legislature nevertheless considers necrophilia equally as culpable as sexual assault.

The MPC, which eleven states imitate, helpfully identifies the purpose of the prohibition against abuse of a corpse as protection 'against outrage to the feelings of

[35] MODEL PENAL CODE § 250.10, comment 2 (1985).
[36] *Crimes Act 1958* (Vic) s 34B.
[37] Sexual Offenses Act 2003 (UK) c 42, s 70.
[38] Some place the offense with regulation of mortuaries. Curiously, New Jersey classifies necrophilia as an offense against property. NJ STAT ANN § 2C:22-1 (West 2005).
[39] UTAH CODE ANN § 76-9-704 (2007).
[40] These include Connecticut, CONN GEN STAT § 53a-73a (2007), and North Dakota, ND CENT CODE § 12.1-20-02 (2008).
[41] RI GEN LAWS § 11-20-1.2 (2008).
[42] *Ibid.*
[43] *Ibid.* § 11-37-2.

friends and family of the deceased.'[44] Yet even as it seeks to protect the feelings of one particular family, the MPC employs a deliberately objective standard; 'it does not vary either to exculpate on the basis of the actor's unusual callousness or to condemn for outraging an excessively delicate relative of the deceased.'[45] The MPC thus draws its judgment of the act from a sense of decency common to reasonable people within the community; it is the response that a hypothetical, ordinary family member would make to the act that counts.

The Alabama statute, which derives from the MPC, includes its justification in its definition of the act. 'A person commits the crime of abuse of a corpse if, except as otherwise authorised by law, he knowingly treats a human corpse in a way that would outrage ordinary family sensibilities.'[46] The annotated commentary to Alabama's statute explains the use of the word 'ordinary,' which denotes 'the contemporary local community standard.'[47] Several other states employ similar statutory language, referencing not the feelings of the particular family of the deceased but rather an objective standard derived from the cultural views of the community. In this way, states using the MPC approach preserve an account of a cultural response to an ignoble choice.

The definition of the act and the justification for the prohibition are clearly tied to cultural opprobrium. The act is outrageous because it is contrary to certain cultural norms, particularly the standards with which parents raise families. And it is criminalised because it is outrageous. Note the reasoning behind this formulation. The lawmaker starts with an observation about the culture: families are institutions built upon a salutary and discernable set of moral norms. The lawmaker then reasons that any act that, when compared to familial norms, appears outrageous is an act that the culture ought not tolerate.

That abuse of a corpse offended only against family sensibilities or decency, and not against some more concrete, prudential concern, was, in the view of the framers of the MPC, reason to make the offense a misdemeanor rather than a felony.[48] However, state legislatures, which

[44] MODEL PENAL CODE § 250.10, comment 2 (1985).
[45] *Ibid.*
[46] ALA CODE § 13A-11-13(a) (2008).
[47] *Ibid.* Cf Alaska Criminal Code Revision, Tentative Draft Part I, 89 (February 1997).
[48] MODEL PENAL CODE § 250.10 comment 3 (1985).

are accountable to the people and thus more in tune with cultural commitments, have not always agreed with this assessment. Alabama, Arizona, Arkansas, California, Georgia, Indiana, Iowa, Maine, Nevada, Oregon, Rhode Island, Tennessee, Utah, and Washington all denote abuse of a corpse and/or necrophilia as a felony.[49] Nevada punishes necrophilia with life imprisonment, with the possibility of parole after five years.[50] Florida has made necrophilia a second-degree felony[51] and places abuse of a corpse and necrophilia at level seven out of ten (ten being most severe) on its 'Offense Severity Ranking Chart,' used for sentencing purposes.[52] Among those other offenses also classified as level seven offenses are manslaughter, vehicular homicide, battery with a deadly weapon, sexual abuse of a child, and carjacking.[53] In Kentucky, abuse of a corpse is a misdemeanor, 'unless the act attempted or committed involved sexual intercourse or deviate sexual intercourse with the corpse,' in which case the act is a felony.[54] Thus necrophilia warrants more severe punishment than mutilation.

[49] ALA CODE § 13A-11-13 (2008); ARIZ REV STAT § 32-1364 (2008); ARK CODE ANN § 5-60-101 (Michie 2008); CAL HEALTH & SAFETY CODE § 7052 (West 2007); GA CODE ANN § 16-6-7 (2008); IND CODE § 35-45-11-2 (2004); IOWA CODE § 709.18 (2008); ME REV STAT ANN tit 17-A, § 508 (2006); NEV REV STAT § 201.450 (2008); OR REV STAT § 166.087 (2003); RI GEN LAWS § 11-20-1.2 (2008); TENN CODE ANN § 39-17-312 (2008); UTAH CODE ANN § 76-9-704 (2007); WASH REV CODE § 9A.44.105 (2000).
By contrast, Alaska, ALASKA STAT § 11.61.130 (Michie 2008); Colorado, COLO REV STAT § 18-13-101 (2008); Connecticut, CONN GEN STAT § 53a-73a(a)(3) & (b) (2007); Delaware, DEL CODE ANN tit 11, § 1332 (2008); Hawaii, HAW REV STAT § 711-1108 (2008); New Hampshire, NH REV STAT ANN § 644:7 (2008); New Jersey, NJ STAT ANN §§ 2C:1-4 & 2C:22-1 (2005); New York, NY PENAL LAW § 130.20 (2004); North Dakota, ND CENT CODE §§ 12.1-20-12 & 12.1-20-02 (2008); Pennsylvania, 18 PA CONS STAT § 5510 (2000); and Texas, TEX PENAL CODE ANN § 42.08 (2008); have made necrophilia a misdemeanor.

[50] NEV REV STAT § 201.450 (2008).

[51] FLA STAT § 872.06 (2007).

[52] 1996 Fla Laws c 96-393, § 1; FLA STAT § 921.0012 (2007).

[53] FLA STAT § 921.0012(3) (2007).

[54] KY REV STAT ANN § 525.120(2) (2008). Ohio distinguishes between those acts performed on a corpse that would 'outrage reasonable family sensibilities,' which are misdemeanors, and acts that would 'outrage reasonable community sensibilities,' which are felonies. OHIO REV CODE ANN § 2927.01 (West 2008). These terms are not self-defining, to say the least. In the one decision touching upon the matter, an Ohio court rejected the argument of a rape-homicide defendant that he could not be convicted of felony rape, where he performed the sexual penetration after the victim's death, because Section 2927.01 makes sexual abuse of a corpse a misdemeanor. *State v Collins*, 66 Ohio App 3d 438, 442-43 (1990).

All of these legislative expressions of revulsion and opprobrium demonstrate the seriousness with which states treat necrophilia. In California, the necrophilia narrative began with a morgue worker defiling the body of a dead four-year old girl. The tension in the plot inheres in the community's shock and outrage, the offense to the culture's family-oriented sensibilities. California and twenty-eight other states[55] choose to resolve the tension by attaching punitive consequences to the performance of the act, preserving in unequivocal terms an account of the culture's judgment. With minor variations, the end of the narrative is this: sexual contact with a dead body is so indecent that civilised society will not tolerate it.

IV. MARRIAGE IN MASSACHUSETTS AND CALIFORNIA

Recent decisions by the high courts of Massachusetts and California contain a narrative about marriage that cannot be read as neutral between competing societal values. In both cases, the high courts have told morality tales, selectively extracting certain cultural assumptions and values and teaching a lesson about the meaning of intimacy and marriage.

Conjugal marriage, the monogamous, committed, intimate union of one man and one woman, not close blood relatives, neither of whom is married to a third person, has until recently enjoyed a special place in positive law. In its controversial *Goodridge* decision,[56] the Massachusetts Supreme Judicial Court ('SJC') announced that the special status accorded to conjugal marriage violated the Massachusetts constitution. It reasoned that same-sex couples – not homosexual individuals *qua* homosexuals, but monogamous, same-sex pairs of persons – ought to enjoy the same rights as monogamous, opposite-sex couples. It noted various ways in which the law made it easier for conjugal, married couples to dispose of property and to care for one another.[57] It concluded that same-sex couples ought to have access to these legal means.

The Massachusetts legislature responded to the *Goodridge* decision by proposing the creation of a new

[55] Florida also enacted its necrophilia prohibition in response to particular incidents, sexual union with a dead body after a homicide and the removal of a sex organ from a dead human body lying in a funeral home. Florida Senate Staff Analysis and Economic Impact Statement for Bill CS/SB 108, 5 (9 January 1996).

[56] Goodridge v Dept Pub Health, 440 Mass 309 (2003).

[57] *Ibid.* 323-6.

institution, the civil union. It proposed to endow the civil union with all of the legal characteristics of marriage. The legislature's proposal would have mended the injury that the SJC perceived in *Goodridge*, namely that the conjugal marriage statute denied same-sex couples 'access to civil marriage itself, with its appurtenant social and legal protections, benefits, and obligations.'[58]

The SJC rejected the civil union proposal in a subsequent decision, *Opinions of the Justices to the Senate*.[59] It was not enough, in the majority's view, to grant to same-sex couples all of the rights, benefits, and obligations of marriage. Instead, the SJC mandated that the law approve the moral teaching that homosexual intimacy is a reason for action equally as worthy as conjugal, marital union. After noting that 'civil marriage is an esteemed institution,'[60] the SJC appropriated that esteem for intimate, same-sex couples. It secured for those couples the law's 'stamp of approval.'[61]

In *Goodridge* and *Opinions of the Justices*, the SJC told a story of 'fourteen individuals from five Massachusetts counties'[62] who sought approbation for their intimate conduct. Each of the plaintiffs in *Goodridge* desired not merely 'to secure the legal protections and benefits afforded to married couples and their children' but also 'to marry his or her partner in order to affirm publicly their commitment to each other.'[63]

It is instructive to note that the seven couples who sued the Commonwealth in *Goodridge* sought approbation not for their friendship or love but more particularly for their intimate commitment to each other. That the law and the culture already affirmed non-sexual, same-sex commitments in many other contexts – business contracts, fraternity pledges, heroic acts on behalf of fellow soldiers in the field of battle – did not satisfy the *Goodridge* plaintiffs. They sought approbation of a different kind. They requested that the law of Massachusetts be re-written to draw moral equivalence between same-sex intimacy and opposite-sex, conjugal monogamy. The SJC granted this request.

Most scholars treat the *Goodridge* decision as if it were predicated upon

[58] *Ibid.* 315.
[59] 440 Mass 1201 (2004).
[60] *Goodridge v Dept Pub Health*, 440 Mass 309, 322 (2003).
[61] *Ibid.* 333.
[62] *Ibid.* 313.
[63] *Ibid.* 314.

some morally-neutral principle of equality or autonomy. If this interpretation of *Goodridge* were ever reasonable in the first instance, *Opinions of the Justices* renders it untenable. The civil union proposal that the SJC rejected in *Opinions of the Justices* would have treated same-sex couples and conjugal, monogamous couples the same in every regard except in terms of moral approbation. Thus, the only rational basis for the SJC's holding in *Opinions of the Justices* is the morally-partisan predicate that same-sex intimacy is valuable.

For this reason, *Opinions of the Justices* goes beyond securing rights for same-sex couples. It places the imprimatur of the Commonwealth of Massachusetts on the proposition that that homosexual conduct adds something of value to a friendship between two persons of the same sex. Committed, intimate same-sex relationships, as distinguished from business, fraternal, professional, or other relationships between members of the same sex, are in Massachusetts placed in a special class. They are accorded, if the members of the relationship so choose, the designation 'marriage.' That designation historically has been reserved for monogamous, conjugal couples. Prior to *Opinions of the Justices*, the term 'marriage' distinguished conjugal monogamy from all other relationships, whether same-sex or opposite-sex.

On May 15 of this year, the California Supreme Court told a much less subtle morality tale. In *Re Marriage Cases*[64] the court struck down a two-pronged statutory scheme for classifying intimate relationships. Prior to the decision, California recognised both conjugal marriages and domestic partnerships. Domestic partners enjoyed all of the rights and bore all of the obligations that California law assigned to marriages.[65]

The court held this scheme unconstitutional and found that a same-sex couple enjoys a fundamental right "in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple."[66] Because the term "marriage" is "unreservedly approved and favored by the community," the word has "considerable and undeniable symbolic importance."[67] The court appropriated this approbation and symbolism for same-sex intimacy.

[64] *Re Marriage Cases* (Reporter citation not yet available, Supreme Court of California, George CJ, Kennard, Werdegar, Moreno, JJ, 15 May 2008).
[65] *Ibid.* 40-2.
[66] *Ibid.* 10. See also at 102-03.
[67] *Ibid.* 103.

As the court implicitly recognised, California's marriage-domestic partnership scheme never withheld respect or dignity from any *individual* person, whether heterosexual or homosexual. The scheme did endorse the proposition that conjugal monogamy is distinguishable from non-conjugal relationships on relevant, discernable grounds. The court thought this distinction impermissible because the law did not endorse the additional proposition that same-sex intimacy has moral worth equal to conjugal monogamy and must be accorded dignity and respect for that reason.

Together, the marriage decisions in Massachusetts and California reflect moral assumptions underlying a particular set of cultural behaviors and commitments. They reflect the assumptions that (1) conjugal marriage does not possess unique moral value and (2) by choosing homosexual intimacy a person chooses something morally valuable. The decisions declaim that the same-sex couples who sought marriage licenses in those states added something of value to their lives when they moved beyond friendship and entered into intimate commitment. The tale is one of people who seek fulfillment in acts and commitments that are not conjugal but approximate conjugal monogamy in an ostensibly meaningful way. The story assures that same-sex intimacy is, in fact, meaningful and valuable in the same way and to the same degree as conjugal marriage.

As the decisions tell a story about same-sex couples they also teach certain controversial, moral propositions. These include the moral claim that conjugal marriage is neither unique nor special. Once embodied in positive law, these propositions become less controversial. Ten, twenty, or thirty years from now, the legal approbation of same-sex intimacy will no longer be an innovation. Instead, it will be an old story, grown familiar with the passage of time. In this way the California and Massachusetts decisions not only approve but also fortify and preserve particular cultural characteristics. The culture shapes the law's narrative and the law, in return, shapes the culture.

V. CONCLUSION

This essay has examined three provisions of law that serve no practical purpose in the sense that they vindicate no usurpations and promote no felicific calculi. None of these positive laws deters an

infringement of rights. None of them incentivises wealth-creating activities. None produces a tangible social benefit, such as efficiency, prosperity, or order. At the same time, each of the three provisions tells a story about its culture and each teaches a lesson about what choices the culture deems valuable. Indeed, because they serve no practical purposes, these laws demonstrate clearly the narrative function that positive laws often perform.

The forfeiture and dishonour provisions of the English common law identified a despondent soul who succumbed to the temptation to end the source of his despondency in an irreversible manner. The law taught that this person is not yet welcome in the next life and is unworthy of honour in this one. This tragic tale ended with the suicide's family in penury and his body staked to a place of unrest and commotion.

State legislatures in Alaska, California, New York, and elsewhere have responded to tales of ill persons seeking sexual satisfaction from the remains of the deceased, who cannot object to or reject sexual advances. These states have condemned these activities as beyond the boundaries of what a civilised society can and will permit. This story ends much like a horror show, with the audience members expressing their revulsion.

The high courts of Massachusetts and California told a story of same-sex couples who sought from the states approbation for their intimacy. The courts bestowed that approbation, decreeing that same-sex intimate relationships deserve the law's stamp of approval. This story ends with a promise that same-sex intimacy satisfies the deep longing that conjugal marriage has long been understood to fulfil.

Whether one agrees with the proposition that suicide is cowardly, that intimate, same-sex relationships are equally deserving of approbation as conjugal marriage, or that sex with dead bodies is uncivilised, it is difficult to avoid the conclusion that each of these propositions inheres in one of the positive laws discussed above. And one perceives from each law a glimpse of the culture from which the proposition emanates. One discerns the culture's assumptions about life, relationship, sex, and family. One detects the culture's values, the virtues that the culture lauds and the vices that the culture condemns.

This is true of law in general. This essay has focused upon three legal provisions that can be explained *only*

as forms of cultural expression. However, laws that serve more practical ends also express something about their cultures. Homicide prohibitions, for example, deter homicide, vindicate the state's interest in protecting innocent human life, and teach that human life has value. City expenditures for school departments both fund teacher salaries and leave a record of the city's judgment that education is important. The law teaches and records even while it meets more pedestrian needs. To abuse the analogy, like a singing waiter, the law continues to tell a story while it serves supper.

The law is a bard. It tells a narrative and preserves a record of the culture that forms and enacts it. We would do well to consider what story our law tells of us and what it will teach future generations.

LAW: LEX VS. IUS

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Abstract: Rather than seeing law as a vague "norm" or overly precise and possibly untenable "rights" this article argues for a simpler functionalist definition of law as a set of conditionals associated with imperatives. As such it hopes to bypass two fruitless parallel debates which however do not address each other: 1) the nature of "norms" 2) the nature of "rights".

I. WHAT IS LAW?

One of the fundamental questions of legal theory is what is meant by the term "law".[1] This essay proposes an answer to that question. That answer will not be exclusive: other definitions of law than the one that will be presented here exist. The answer may even be incomplete. However the answer proposed will be internally consistent. It will also explain and permit prediction of what goes on in the field of law. Law is best understood as a term with many meanings. By distinguishing between natural law, positive law, law as a prescription and law as a description we can coerce the otherwise ambiguous term into tractable forms. Further distinguishing between law (lex) and justice (ius) allows us to focus on different aspects of both command and right.[2] Unlike Kelsen,[3] I regard law as consisting of a conflicting set

[1] Definitions of law abound: E.g., the "bad man theory" ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, (1897) *Path of the Law* in David Kennedy & Fisher (2007) at 31.) but also Cicero (arguing law is inherently moral: "Est quidem vera lex, recta ratio, naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium jubendo, vetando a fraude deterreat, quae tamen neque probos frustra jubet aut vetat, nec improbos jubendo aut vetando movet."True law is right reason in accord with nature. Cicero, (51 b.c.) *De Republica*) and of course Kelsen who argues that the law is a "norm" Hans Kelsen, Théorie Générale du Droit et de l'Etat Paris: Bruylant (1997) p. 166.

[2] Hobbes clearly makes the distinction between binding law (lex) and justice (ius) (see generally Hobbes, Leviathan). Hobbes, Leviathan, Richard Tuck ed., (1996) at 91. Aristotle in contrast seems to believe that law and justice are congruent sets.

[3] Hans Kelsen, Théorie Générale du Droit et de l'Etat Paris: Bruylant (1997) p. 166.

of conditional statements and consequent imperatives rather than as a hierarchically harmonious set of norms.[4] Further, I argue that normative inference is not only possible, it is also necessary if law is to be something other than mere force -- and it is, or it would not be obeyed. The force behind law is not only physical violence it is also, and even more often, moral sanction.

II. METHODOLOGY

A. LEGAL SCIENCE

In order to determine what law is we must first understand what is meant by legal science.[5] This is because if law cannot be the object of scientific inquiry then the question "what is law" could not be answered at all. This paper proposes that law can in fact be the object of scientific inquiry. However, legal science, like any of the human sciences, is not as exact (but hopefully as exacting) as any of the natural sciences.

In the natural sciences, e.g. physics, chemistry etc., science is nomothetic:[6] that is, it poses

[4] "A plurality of norms forms a unity, a system, an order, if the validity of the norms can be traced back to a single norms as the ultimate basis of validity. This basic norm qua common source constitutes the unity in the plurality of all norms forming a system. That a norm belongs to a certain system follows simply from the fact that the validity of the norm can be traced back to the basic norm constituting this system. Systems of norms can be distinguished into two different typse according to type of basic norm constituting the system. Norms of the first type are 'valid' by virtue of their substance; that is, the human behavior specified by these norms is to be regarded as obligatory because the content of the norms has a directly evident quality that confers validity on it. And the content of these norms can be traced back to a basic norm under whose content the content of the norms forming the system is subsumed, as the particular under the general. Norms of this type are the norms of morality. For example, the norms 'you shall not lie', 'you shall not cheat', 'keep your promise', and so on are derived from a basic norm of truthfulness. From the basic norm 'love your neighbour', one can derive the norms 'you shall not harm others', 'you shall help those in need', and so on.
The basic norm of a given moral order is of no further concern here. What matters is knowing that the many norms of a moral order are already contained in its basic norm, just as the particular is contained in the general; thus, all particular moral norms can be derived from the general basic norm by way of an act of intellect, namely, by way of a deduction fom the general to the particular. The basic norm of morality has a substantive, static character."
Hans Kelsen, An Introduction to the Problems of Legal Theory (RR1) Oxford: Oxford University Press, 1992 Page 55-56.

[5] For an exposition and critique of competing ideas of legal science see Howard Schwber, The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education, 17 Law and History Review (1999) 17.3 (1999): 94 pars. 29 May 2008 <http://www.historycooperative.org/journals/lhr/17.3/schweber.html>.

[6] Christiane et Ota Weinberger Logik Semantik Hermeneutik München: Beck'sche Elementarbücher, (1979). Page 38.; Stanley

principles which themselves are laws strictu sensu.[7] Nomotheses cannot be derogated from. For example, every time that water is heated it expands; if water is sufficiently heated at 1 atmosphere of pressure it will eventually boil and evaporate.[8] The objects of natural sciences have no volition – they literally must react as they do.

This is not the case in the human sciences generally, including legal science. It is not possible to state that every time event X occurs outcome Y will follow when the object of event X is a human or a group of humans. The objects of human sciences, unlike the objects of natural sciences, are people and groups of people. People as individuals definitely have will (volition), the capacity to act upon and interact with their environment. Because of this capacity it is impossible to propose nomotheses about human behaviour. Even if most people will react in a given way to a certain stimulus some may not and all can at least claim to have been able to have reacted otherwise. Human science cannot discover "laws" but only general trends and tendancies – which nonetheless is knowledge.

This is not to say that there can be no human science. Many human activities are quantifiable. Some are verifiable. That is why it is possible to make statements regarding human tendencies and trends, albeit with less exactitude than in the natural sciences. It is even possible for the human sciences to make general predictions. By a comparison of the differing scientific opinions about a certain human activity it is possible to develop a well informed viewpoint and to make generalizations and predictions thereon. However, though the dialectical method can determine which opinions are roughly correct, that determination is still only approximate. One must both recognize the possibility and limitations of human sciences.

L Paulson (1990) Kelsen on legal interpretation
Legal Studies 10 (2) , 136–152

[7] For an argument that law is in fact nomothetic (or at least distinguished from social science in that it must appear nomothetic…) see Jeremy A. Blumenthal, Law and Social Science in the Twenty-First Century, 12 S. CAL. INTERDISC. L.J. 1, 47 (2002).

[8] For a good recapitulation of Popper's views on facticity in science see: Eric Dodson Greenberg, *FALSIFICATION AS FUNCTIONALISM: CREATING A NEW MODEL OF SEPARATION OF POWERS*, 4 Seton Hall Const. L.J. 467, 479-480. (1994).

B. THE EMPIRICAL METHOD[9]

This paper has already hinted that one test to determine whether a position is scientifically known is to determine whether a prediction can be made based upon it. If a fact is known then we may be able to make a prediction based upon it. Further, though a fact be unknown it may nonetheless be knowable, though at present unknown. An unknown fact may of course also be unknowable. But an unknown fact cannot be the basis of science – although it can be the basis of speculation and hypotheses. Ideas may be true, false, unknown and possibly also unknowable.

Facts are knowable if they can be verified. Facts are verified through empirical testing. By empirical verification it is possible to know that in every observed instance of X, Y occurs, and from which we may infer that in future instances of X, Y will recur. Thus the material basis of science explains why and to what extent knowledge is possible – and also where knowledge is not possible.

Although empirical verification in human sciences is less exact than in natural science it is still possible. A theory can be said to be verified if there is a correspondence between material reality and the predicted outcome.[10] What are the predicted outcomes in law?

When we look at the law we see law books, courts, police, lawyers, legislators and citizens. We see the predictions of a legislator or judge as to what will happen if a person does a certain act (conditionals) or what will happen to person X (commands). However, sometimes what is written in the law books, i.e. what is predicted, is not at all an accurate prediction of what actually happens. And many times events occur which are not addressed in the law books. What are we to make of the absence of correlation between law in the books and life?

[9] See, generally, Bacon, Francis, Novum Organon (1620). Bacon correctly emphasizes the experimental method but wrongly rejects the dialectic and is for that reason the source of the limitations in Anglo-Saxon thinking to empiricism.

[10] Popper, (1957) *Science: Conjectures and Refutations* http://cla.calpoly.edu/~fotoole/321.1/popper.html Also see: Popper, (1963) "Science as Falsification" in *Conjectures and Refutations* (1963); Karl Popper, Objective Knowledge: An Evolutionary Approach (1972).

C. SCHOLARLY LAW VERSUS PRACTICAL LAW

There are two methods by which we could attempt to answer the question "how are we to explain and define the absence of correlation between law in the books and life". The idealist approach (i.e. scholasticism or neo-platonism) would divorce itself completely from the imperfect material reality.[11] It would argue that material reality is but an imperfect reflection of ideas and that failure of persons to conform to the law and of the law to punish them would imply that either the law and justice or the person and justice were not in a correct relation to each other.[12] This might in theory be accurate. However it is empirically incapable of verification. Because the idealist method does not lead to the development of empirically verifiable positions it is not in fact be scientific. It could be mythology. It could be pure formal representation. But it could not be science and certainly not applied science. This paper specifically rejects the idealist perspective and acknowledges it in order to be properly distinguished from it.

The other response to the question "what should be the reaction of a legal scientist to the fact that statements of legislators and even judges and the actions of persons do not always strongly correlated (and sometimes do not correlate at all)?" is to regard "law" as commonly understood, critically. "Scholarly Law" – law in the books, i.e. the statements of legislators and judges, is a description of what a ruling class thinks should happen. However, the daily material reality is what in fact happens. The first can be called "scholarly law" -- law in the books. This paper will call the second "practical law" - law in the streets. When the two are closely correlated that is evidence either of a very just regime or of a highly efficient tyranny. When the representation of what a ruling class believes should happen ("scholarly law") and of what

[11] See, Plato Phaedo, available at: http://classics.mit.edu/Plato/phaedo.1b.txt

[12] Plato, Republic especially book VI (e.g., "And do you not know also that although they make use of the visible forms and reason about them, they are thinking not of these, but of the ideals which they resemble; not of the figures which they draw, but of the absolute square and the absolute diameter, and so on –the forms which they draw or make, and which have shadows and reflections in water of their own, are converted by them into images, but they are really seeking to behold the things themselves, which can only be seen with the eye of the mind?"). Available at: http://classics.mit.edu/Plato/republic.mb.txt

does in fact happen ("practical law") is too far out of balance a revolution occurs and a new ruling class takes control. The differing possible relations between law in the books and law in the streets are discussed further below.

III. LAWS ARE CONDITIONALS AND IMPERATIVES

When we look at law in the books we see that all laws are stated as conditionals which if actuated will trigger imperatives. That is, all laws are of the form "if... then". If the conditional is fulfilled then the imperative, reward or punishment, should be imputed to the subject of the conditional statement. The degree of correspondence between these conditionals and their outcomes is the measure of the efficacity of the regime promulgating law.

The fact that a direct correspondence between the conditional and imperative commands of law is in fact impossible due to free will explains why legal science cannot be considered nomothetical. A nomothetical science, e.g., natural sciences, makes statements which are laws in the sense that on every occurrence of X, outcome Y will follow. The laws of any legal system are almost always imperfectly enforced. Thus, legal science is not nomothetical. To speak of legal science as a nomothetical science like the natural sciences would require that every law be enforced at all times and in all places and that humans behave invariably. That is clearly not the case.[13]

However, while it is clearly true that law is but imperfectly enforced it is also clear that law is generally enforced[14] and perhaps even more often than not just. So we can speak of a legal science which makes generalized predictions as to the probability of event Y following event X. Although legal science is not nomothetical, it *is* dialectical and

[13] H. Kelsen,: "L'efficacité n'est pas une <<condition per quam>> de la validité" in Le Positivisme Juridique, M. Troper, C. Grzegorczyk, (editeurs) Paris: LGDJ (1992) page 326.

[14] "L'efficacité de l'ordre juridique tout entier est la condition nécessaire de la validité de chacune des normes particulières de cet ordre. C'est une condition sine qua non mais non une condition per quam. L'efficacité de l'ordre juridique global est la condition, mais non la raison de la validité des normes qui le consituent." H. Kelsen,: "L'efficacité n'est pas une <<condition per quam>> de la validité" en La Positivisme Juridique, M. Troper, C. Grzegorczyk, (editeurs) Paris: LGDJ (1992). Page 326.

is in that sense scientific.[15] Legal science is dialectical, first, in the Aristotelian sense of dialogos, that is as the object of discourse.[16] Through comparison of differing legal opinions we arrive at a better sense of the best approximation of the laws which govern human behavior.[17] But legal science is also dialectical in the Marxist sense:[18] law is one element of the superstructure of a particular mode of production which justifies and defends a particular mode of production, i.e. a given productive base[19] (also known as infrastructure) at a particular point in history. However, historical development is dialectical:[20] it is the outcome of competition between differing modes of production. Thus, legal science, as one element of the superstructure of a mode of production, is subject to the historical dialectic which determines whether that mode of production will replace a less developed mode of

15 "The law is dialectic in a deeper sense than its adversary process. It mediates most significantly between right and right.' ... The only questions that matter for the law are those in which there is something 'right,' or good, on both or all sides of the controversy.... When right exists on both sides of an issue, the job of the law is to mediate between the 'rights,' to accommodate, to adjust, to attempt to sacrifice as little as possible of what is 'right' on both sides." Paul Freund cited in Roger B. Dworkin, *Limits: The Role of Law in Bioethical Decision Making* 6-7 (1996):

16 Aristotle, *Posterior Analytics* (ca. 350 B.C.) Translated by G. R. G. Mure, Book I, Part 1. *Available at:* http://classics.mit.edu/Aristotle/posterior.1.i.html and at: http://www.rbjones.com/rbjpub/philos/classics/aristotl/o4219c.htm

17 Aristotle, Topics, in Aristotle, 1 Great Books 143 (W.A. Pickarel trans., Cambridge 1994) (1952).

18 E.g., "Any development, whatever its substance may be, can be represented as a series of different stages of development that are connected in such a way that one forms the negation of the other...In no sphere can one undergo a development without negating one's previous mode of existence." Marx, *Moralizing Criticism & Critical Morality, Oct. 1847, in* Marx Engels Collected Works, Vol.6, p.317 (1847) from Deutsche-Brüsseler-Zeitung No. 86, October 28, 1847. *Available at:* http://www.marxists.org/archive/marx/works/1847/10/31.htm

19 Stuart Bonner "Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand" Law and Society, Vol. 31, No. 1 2000. p. 47.

20 "En vertu de la loi dialectique, chaque mode de production ou infrastructure en place renferme, dès le début de son instauration, sa négation interne, qui, plus tard, se déclare ouvertement, par l'apparition au sein de ce mode ou de cette infrastructure, de nouvelles forces productives (outillage, mains d'oeuvre, etc.); celles-ci réclament pour s'affirmer un nouveau mode de production, une nouvelle infrastructure économique, de nouveaux rapports sociaux, une nouvelle superstructure. Le règle de droit, qui fait partie de cette dernière, se trouve, du même coup, elle même niée par ces nouvelles forces productives: son remplacement par une règle de droit nouvelle se fait alors sentir, mais comme l'effet, et non comme la cause du changement d'infrastructure." Stoyanovitch, La Philosphie du Droit en URSS, page 6. Paris: LGDJ (1965).

production or whether it will itself be replaced by one which is more developed.

The theoretical abstractions can be quickly and clearly illustrated in a concrete example: law is dialectical in the Aristotelian sense[21] in that every judge faces at least two competing monologues – antithetical positions – which are presented by the plaintiff and defendant. The arguments of the plaintiff are one pole of the dialectic and the arguments of the defendant are the opposite pole. The decision of the judge is the dialectical synthesis which arises out of the conflict of the competing positions. Thesis: plaintiff. Antithesis: Defendant. Synthesis: judge. But this dialectic is Aristotelian in that it is a synthesis of competing ideas of individuals – it is not a dialectic of competing classes. The judge, by comparing the competing ideas of the plaintiff and defendant (expert opinion) arrives at a best possible view synthesizing the correct points of each competing thesis and rejecting the incorrect points.

Although our understanding of facts is based on the material base that does not mean that we can ignore the ideology, i.e. the superstructure, which grows out of and justifies that base[22] – one element of which is "scholarly law". We now turn our attention to an analysis of the machinations of the legal system within a given mode of production and more specifically to an analysis of the superstructure of a given mode of production. What is scholarly law?

Scholarly law - law in the books - is law understood as the (supposedly) authoritative statements of legislators and judges and can be analyzed syntactically as consisting at least, and perhaps exclusively, of conditional statements and imperative commands. Most conditionals imply an imperative command activated by occurrence of the condition(s). Similarly, many, but not all, imperative commands are actuated by the occurrence of a conditional of "scholarly law" (law in the books). It is of course possible for a law giver to issue a purely imperative statement or for a

[21] See generally, Stanford Encyclopedia of Philo., *Aristotle's Logic* (2004) http://plato.stanford.edu/entries/aristotle-logic

[22] Raymond Williams, Base and Superstructure in Marxist Cultural Theory, in Rethinking Popular Culture: Contemporary Perspectives 407 (Chandra Mukerji & Michael Schudson eds.) (1984).

lawgiver to issue a hortatory conditional statement which in fact triggers no imperative. But the majority of laws invoke imperatives upon occurrence of a condition.

Conditional statements can be further analyzed as consisting of rules and of exceptions to the rule, and even of exceptions to the exception. This process of rule, exclusive exception, and inclusive exception could in theory continue indefinitely.

The conditional statements of the law may be either procedural rules of positive law or substantive rules which may (or may not) reflect principles of natural law and/or natural justice. Substantive rules of law are determined either by procedural elements of positive law (framework questions which influence practical outcomes) or by substantive aspects of natural law, natural justice or a combination thereof. The conditional statements of substantive law are themselves conditioned and in part determined by procedural rules and by general principles of law and/or fundamental rights. This paper refers to these over-arching guiding principles and rules about rule creation and enforcement as meta-rules.

IV. META RULES

A. GENERAL PRINCIPLES

To understand meta-rules we must distinguish them structurally and then compare them because of asymmetries in the common law and civil law.

The idea of "general principles of law", a source of meta-rules, is a central concept of civilianist law. General principles of law are a source of international law worldwide[23] but they are also a source of persuasive authority as to the domestic law in civilianist jurisdictions.[24] General principles of law are not however a source of domestic law in the common law,[25]

[23] See, e.g. Legal Information Institute, WEX, General Principles of Law available at: < http://topics.law.cornell.edu/wex/international_law> (last visited May 28, 2008) .

[24] "Il existe par ailleurs de nombreuses règles non écrites qui sont admises par la conscience collective et qui semble tellement évidentes que le législateur n'a pas estimé devoir les préciser dans un texte de loi : ce sont les principes généraux du droit (exemple : les droits de la défense)." Thierry Smets, "Les sources du Droit", http://users.skynet.be/sky19192/lessourc.htm

[25] Blackstone analyzes the common law as consisting of written law (statutes) and

generally speaking, though perhaps they are dimly reflected in the general principles of equity, embodied as maxims of law.[26]

B. FUNDAMENTAL RIGHTS AND RULES OF PROCEDURE

That asymmetry mirrors another one. Unlike many civil law jurisdictions, most common law countries have adopted constitutionally binding charters of rights and given their highest courts the power to review the constitutionality of ordinary legislation. Constitutional charters of fundamental rights are seen either as a reflection of fundamental rights and freedoms found in natural law and natural justice or are themselves taken as the source of fundamental rights and freedoms. In functionalist terms, the common law charters of rights and freedoms operate similarly to the civilianist general principles of law. Though fundamental rights, especially in the United States, are generally limited to individual freedoms (negatives "freedoms from" rather than positive "rights to") they sometimes contain collective rights as well. General principles of law / fundamental rights can thus be seen as

unwritten law (the common law). See 1 William Blackstone, Commentaries, 69. Common law is customary law, whether local or national.

[26] Blackstone specifically considers the maxims of law, which, in civil law, are expressions of general principles of law, as a possible source of the common law. Id. However, he rejects the maxims as a source of law, arguing that they are but expressions of custom and that maxims are vague and inchoate and must be proven via inquiry into custom. Id. These maxims of law, however, persist in the common law in equity and it may be argued that maxims are in fact expressions of general principles of law, as is the case in the civil legal systems. Examples of such maxims include: sic utero tuo ut alienum non laedes. See Bassett v. Company, 43 N.H. 569, 577 (1862); Swett v. Cutts, 50 N.H. 439, 442 (1870). Pacta quae contra leges et constitutiones, vel contra bonos mores sunt nullam vim habere indubitati Juris est --" Good morals"-- contracts against the constitution or good morals are void. Austin's Adm'x v. Winston's Ex'x, 11 Va. 33, 36 (1806). Because the common law, as opposed to statutory law, is induced from specific cases and not deduced from general principles, the simpler and better view is Blackstone's. Maxims and general principles continue to haunt the common law due to methodological incomprehension of the role of general principles as deductive instruments in a system of written law (i.e., the European civilian legal system). Thus in The Harrisburg, the U.S. Supreme Court quite correctly links the ideas of "natural equity and the general principles of law." 119 U.S. 199, 206 (1886). Blackstone appears to be the source of the split on the role of maxims and, by extension, general principles of law in the common law and civil law. One could accuse Blackstone of misapprehending the role of general principles in legal deduction. This may be because he assigns the role of general principles to ecclesiastical courts, where the general principles atrophied. See Blackstone, Commentaries *83.

conceptually similar. They can be seen structurally as:

- Binding or non-binding
- Independent sources of law or reflections of natural law and/or as reflections of natural justice
- Collective or individual
- Negative "freedoms from" or positive "rights to".[27]

In whatever form these rules are constituted, general principles of law and the concepts of fundamental rights and freedoms are, like procedural rules, meta-rules of any legal system. They are rules which determine how to form other rules. This implies the "substance versus procedure" distinction is somewhat spurious.[28]

Fundamental rights are essentially "substantive" and so are a more limited concept than general principles of law, which are both "substantive" and "procedural". But both fundamental rights and general principles of law are generally binding rules and thus they are similar. Because of the similarities between general principles of law and fundamental rights and because of the increasing integration of common law and civil law in the European Union, and for simplicity in our discussion of meta-rules this paper links them – though in legal practice general principles of law are both more abstract and wide ranging than fundamental rights and freedoms. They may be able to be invoked more often, in theory, but have less effect in practice because of their generality and ambiguity.

What difference, if any, exists between fundamental rights and fundamental freedoms? The bourgeois revolutions generally presented and defended negative human freedoms from government intrusion into the private sphere.[29] Those freedoms were asserted by the rising middle class of merchants and proto-industrialists as a limitation upon the power of the receding aristocracy.[30] The rights which they proposed were negative in the sense of being "freedoms from". Those were "first generation rights" –

[27] See generally, Eric Engle, Universal Rights: A Generational History, 12 Ann. Surv. Int'l & Comp. L. 219 (2006).

[28] See generally, Kennedy, Duncan. "Form & Substance in Private Law Adjudication," 89 *Harvard Law Review* 1685 (1976).

[29] See generally, Eric Engle, Universal Rigths: A Generational History, 12 Ann. Surv. Int'l & Comp. L. 219 (2006).

[30] See, e.g., Stephen P. Marks, Emerging Human Rights: A New Generation for the 1980s?, 33 RUTGERS L. REV. 435, 437 (1981).

negative "freedoms from" rather than positive "rights to".[31]

The socialist revolutions which have occurred since 1848 have increasingly inaugurated not negative "freedoms from" but positive "rights to". The rising working classes asserted a right to minimal standards of living – maximum hours, minimum wages, and a variety of insurance systems against accident, unemployment, and ill health. Thus the positive "rights to" expressed not only as fundamental constitutional rights but also as often as not in secondary legislative administrative law social insurance systems.[32]

What these waves of revolutions and the freedoms and rights they inaugurated have in common is a reordering of the principle of distributive justice.[33] Under aristocratic rule the principle of distribution was unequal and based on heredity. The bourgeois revolutions inaugurated an era of distribution based, supposedly, on merit.[34] And the socialist revolutions introduced a principle of distribution according to need.[35]

This historical evolution from negative individual freedoms, i.e. guaranties against coercion, to the affirmative rights of all classes to a decent life demonstrates the historical dialectical character of the elaboration of rights. This dialectic expresses itself in a taxonomy which in turn reflects a theory of justice. General principles, fundamental rights, fundamental freedoms, and rules of procedure are all examples of meta rules: they are rules about making rules. However, procedural rules are purely technical constraints. They do not touch upon substantive justice. As such they are creations of positive law. General principles/fundamental rights in contrast are reflections of the ruling class's notion of natural justice. They determine – or at least so holds a ruling class – how substantive justice is to be achieved. General principles themselves may express either distributive or corrective justice. This

[31] See generally, Eric Engle, Universal Rigths: A Generational History, 12 Ann. Surv. Int'l & Comp. L. 219, 257 (2006).

[32] Eric Engle, Universal Rights: A Generational History, 12 Ann. Surv. Int'l & Comp. L. 219, 259 et seq. (2006).

[33] Aristotle Nicomachean Ethics, 1131 a 24-28.

[34] Schiller An die Freude "crowns but to those who have earned them".

[35] Karl Marx , Critique of the Gotha Programme 1875 Available at: http://www.marxists.org/archive/marx/works/1875/gotha/index.htm

is the interplay of history, law, and justice.

V. LAW AND JUSTICE

A. "LAW" AS DESCRIPTION AND "LAW" AS PRESCRIPTION

Our understanding of the law must also consider the relationship between law and justice. Some assert that there is a necessary connection between law and justice, and thus that a bad law is not a law at all but merely a sham pretending to be law.[36] This is true in the sense that one is justified in breaking an unjust law -- there is no crime in breaking a law itself criminal. But it is not true in the sense of law as conditional predictive statements. This is the difference between law as description and law as a prescription. The prescriptive power of law -- it's normative character -- arises from the idea that law does or should reflects and express of morality. But the description of a conditional or command of law as law is merely positive. Unjust laws have no moral prescriptive force but can have a practical descriptive validity.

B. LEGAL SCIENCE IS NOT STRICTLY NOMOTHETICAL

The dual character of law as prescription and law as description can also be seen from the fact that legal science is not strictly nomothetic because both ruler and ruled have volition. Since legal science is not nomothetic we account for the variance between what is prescribed (scholarly law) and what actually happens (practical law) as the difference between prescription and description. The dual character of law as prescription and law as description can be seen from the

empirical method which shows the positive validity of a law is not dependant on its moral character or degree of enforcement.[37] Empirically we know those who break unjust laws do so at their own peril and that a truly unjust law can well be

[36] "What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly.... [T]herefore Law is the distinction between things just and unjust, made in agreement with that primal and most ancient of all things, Nature; and in conformity to Nature's standard are framed those human laws which inflict punishment upon the wicked but defend and protect the good." See, Cicero, "Laws" in: Clarence Morris, (ed.), *Great Legal Philosophers: Selected Readings in Jurisprudence* 51 (1997).

[37] H. Kelsen,: "L'efficacité n'est pas une <<condition per quam>> de la validité" en La Positivisme Juridique, M. Troper, C. Grzegorczyk, (editeurs) Paris: LGDJ (1992) page 326.

generally enforced. Likewise we know the legislator cannot always enforce its will.

C. LAW AS PREDICTION

As well as being a description of what is and a prescription of what should be law is also a prediction of what will happen in the real world when a condition occurs.[38] When we examine the facts it is clear that law is not in practice inevitably just. The laws of a tyrant are certainly bad laws but they are none the less positive laws because the tyrant -- unlike the thief -- has state power. However, when law is immoral then one is justified in breaking it. It is not criminal to violate a law which itself is a crime. Unjust laws eventually provoke a backlash and ultimately become unenforceable – in that sense, natural justice is self enforcing i.e. quasi-nomothetic. We cannot say with certainty whether or when any particular unjust law will become unenforceable however we can say they generally do and are more likely to become so as time goes one.

[38] O. W. Holmes, Justice, Supreme Judicial Court of Mass., The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 Harv. L. Rev. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

D. POSITIVE LAW AND NATURAL JUSTICE

The connection between law and justice is not a necessary one -- there can indeed be just laws. When a law is just it may be said to partake of natural justice. But a law may partake of natural justice without having the needed force to make it effective. So a just state must exhibit a tempered union of natural law (force) and natural justice (morality).[39] There are at least two types of unjust states: states which are powerless and lack the capacity to enforce what appear

[39] See, Hobbes, Leviathan, where he explains the relation between natural justice and natural law. I combine Hobbes and Aristotle; Aristotle rightly argues that laws are natural and positive and argues, I think correctly, that the natural justice is inherent in the human condition. Hobbes attempts to refine Aristotle by distinguishing further between natural law and natural justice. However, Hobbe's natural law is merely the law of the jungle - the law of the strongest. Hobbes natural justice is merely conventional. I do not see natural justice as merely conventional because I don't believe any state of nature ever existed: Aristotle was correct that political (social) life is inherent to the human condition. However, because natural justice may be temporarily ignored by positive law (an unjust state and unjust laws can exist) it is useful to distinguish between natural law and natural justice. Natural law is the practical material realization of natural justice; natural justice is the theoretical concept which arises out of empirical observation.

to be just laws, and states which are powerful but enforce unjust laws.

E. DISTRIBUTIVE AND CORRECTIVE JUSTICE

Justice may, as Aristotle teaches, be considered either distributive or corrective.[40] Distributive justice, sometimes known as geometric or social justice, determines the general principle according to which (public) goods are to be distributed: merit, need, equality, or inequality.[41] Distributive justice also determines which goods are public. The fact that the choice of distributional principle can be different in different states indicates that the choice of which system of distribution to take up is positive and conventional rather than natural and inevitable.[42] Distributive justice is positive not natural. Corrective (transactional) justice in contrast sees to it that (private) exchanges are fair and equal[43] – that contracting parties are not cheated, that victims of other's negligence are compensated (restitution).[44] As such it appears to be universal, i.e. natural. However, corrective justice may not be translated into practice: natural justice is not inevitably translated into natural law. An unjust regime could in fact enact positive laws of corrective (in)justice.

F. EX ANTE LEGISLATION AND EX POST JUDGEMENT

From a temporal perspective, legal decision making is of two kinds: ex ante, that is prior to the act being adjudicated or ex post, that is, a decision made after the act. Statute laws are almost always enacted ex ante. Judicial decisions are, as to the parties, ex post – though they may (common law) or may not (civilianist law) also have ex ante effect as to future litigants.

For example, the crime of genocide was, in terms of positive law, ex post – there were no treaties against genocide until after World War II.[45] Very few people would argue that it is substantively unjust to arrest mass murderers. Nevertheless, the statute laws against genocide were in fact laws ex post: the mass murder of

[40] Aristotle Nicomachean Ethics, 1131 b 30-34.
[41] *Ibid.*, 1131 a 24-28.
[42] *Ibid.*,1131 b 30.
[43] *Ibid.*,1131b 24 - 1132a 2.
[44] *Ibid.*,1132a 24, 1132b 18-20.
[45] See generally, Sévane Garibian, « Génocide arménien et conceptualisation du crime contre l'humanité. De l'intervention pour cause d'humanité à l'intervention pour violation des lois de l'humanité », *Revue d'Histoire de la Shoah*, n° 177-178, 2003, pp. 274-294.

Armenians by the Ottoman Empire[46] was a violation of natural justice - but it was not a violation of any then existing treaties of positive law.[47]

One of the objectives and achievements of the bourgeois revolutions was to replace arbitrary tyrannical rule with decision based upon merit. As such, the bourgeois revolutions represented a change between one principle of distributive justice (merit reflected in birth) to another (merit reflected in action). One way in which the arbitrary character of (ossified) aristocratic rule was to be replaced was by the elimination of ex post facto laws[48] That is, no crime would be made after the fact (nul crimen sine lege). Statutes could only prospectively ordain behavior. Likewise, merit rather than birth would become key by eliminating hereditary priveleges (titles)[49] and disabilities ("corruption of blood").[50]

One of the features of bourgeois liberal government and of socialist governments is the specialization of the different organs of state. The role of a legislator is to establish, ex ante, rules which will prospectively bind members of society. As such the pronouncements of the legislator are general – though admittedly not as general as fundamental rights or the general principles of law. In contrast, the role of the judiciary is to make decisions ex post, relying (supposedly) upon rules promulgated by the legislator ex ante. As such the decrees of courts are highly specific and much of courts' reasoning is dedicated to developing the linkage between the specific facts of the case before the court and the law as it is promulgated by the legislator.

G. COLLECTIVE JUDGMENTS[51]

[46] *Ibid.*

[47] See generally, Reservations to the convention on the prevention and punishment of the crime of genocide, Advisory Opinion of 28 May 1951, ICJ Reports (1951), p.15-58.

[48] E.g. U.S. Const., Art I. Sec. 9 (no federal ex post facto laws), Sec. 10 (no state ex post facto laws).

[49] U.S. Const., Art. I, Sec. 9 "No title of nobility shall be granted by the United States"

[50] U.S. Const., Art. III Sec. 3 "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood" – no hereditary status as criminal. This was not so in the USSR where SS officers children would also be considered as enemies of the state and subject to particular control.

[51] On the rise and fall and rise of collective responsability see George P. Fletcher, The

Another achievement of the bourgeois revolutions was the replacement of collective judgment by a strict principle of individual accountability. Rather than being judged based on social class, i.e. membership in the nobility, the bourgeoisie insisted on judgment of individuals as individuals and appropriate condemnation. Thus for example a criminal's descendants would not be judged for the crimes of their ascendant. [52] Again these freedoms were however generally negative, i.e. freedoms from the state's interference with the life liberty or property of the individual.

The socialist revolutions partially reverted to or advocated a return to collective judgment and accountability.[53] Thus, historically dominant classes would be held liable for exploitation of historically dominated classes and forced as a class to pay reparations. At the same time however the socialist governments would not impose disabilities on the offspring of a criminal.

VII. CONCLUSION

This essay has presented a structure for decomposing the ambiguous term law into determinable parts. Law is a term with a several competing meanings. Thus the term must be complemented and contextualized. Natural law, positive law, law as a prescription and law as a description coerce the otherwise ambiguous term into tractable forms. By distinguishing between law (lex) and justice (ius) we are able to focus on different aspects of both command and right. Thus, unlike Kelsen,[54] I see the fundamental element of law not as hierarchically ordered "norms". Instead I see potentially conflicting conditional statements with contingent enforcement imperatives as two atoms of law. However those conditional and imperative statements are only scholarly law -

Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt, 111 Yale L.J. 1499, 1539 (2002).

[52] U.S. Const., Art. III Sec. 3 "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood" – no hereditary status as criminal. This was not so in the USSR where SS officers children would also be considered as enemies of the state and subject to particular control.

[53] Beate Sibylle Pfeil, *Kollektivschuld und Völkerrecht. Eine Initiative aus der Parlamentarischen Versammlung des Europarats*, Europäisches Journal für Minderheitenfragen, EJM 1, (2008), 73–77 http://www.springerlink.com/content/4855501631j80704/

[54] Hans Kelsen, Théorie Générale du Droit et de l'Etat Paris: Bruylant (1997) p. 166.

law in the books. They are theoretical predictions. To be considered "practical law" -- effective positive law --they must be enforced. This highlights the distinction between natural law, which is nothing more or less than the law of the strongest, and positive law, which is the arbitrary statements of a legislator. Hobbes was right to distinguish natural law from natural justice but was incorrect in seeing propositions of natural justice as conventional rather than natural. The mediation between force and morality is natural justice.

The first portion of this essay raised the concept of natural law and supplied the Aristotelian and Hobbesian definitions of that term. The second portion turned its attention to the relationship between law and justice. This paper is founded on the premise that there are indeed universal moral principles: thus, there can be a natural justice; however, it also takes the view that there is nonetheless no inevitable connection between natural law and natural justice – principles of natural justice are normative, not nomothetic. In analysing both law and justice the paper has revealed how dialectical reasoning allows us to speak with reasonable exactitude of legal science. We thus apply historical materialism[55] to understand the evolution of the relation between law and justice, to illustrate distinctions between corrective and distributive justice and to explain the changing relationship between natural law and natural justice as exchanged via alterations in the conception of the correct measure of distributive justice which must inevitably touch upon aspects of corrective justice.

How can differing societies have differing rules which nonetheless reflect a universal morality? While differing societies have different standards of justice those differences are functions of their mode of production which, due to technological advances, is constantly improving. Within a given mode of production however the moral standards of society are generally accepted and are intersubjective. They reflect the moral judgment and capacity of judgment of the society depending upon the society's state of economic development. So the standards are universal in the sense

55 Josef Stalin, *Dialectical And Historical Materialism*, (*1938) From* Josef Stalin, *Problems of Leninism*, Foreign Languages Press, Peking, (1976). Available at: *http://www.marx2mao.org/Stalin/DHM38.html*

that we cannot condemn a poor society for its poverty when there was no alternative to that poverty. At the same time that fact implies that an economically developed society will be held to higher standards than one which is less well off. In this sense, fundamental human rights are like a ratchet, ever moving forward. Even outside of the intersubjective sense, there are universal moral standards in that some standards, such as the prohibition of unlawful killing, are timeless and universal. Further, the moral principles of a society at one phase of development tend to survive its transition as it enters into its next developmental phase. Thus the sphere of protected conduct in fact expands with increasing economic well being consequent to progress in the mode of production of society. Universal moral principles do exist – but they are not inevitably or necessarily enforced. The naturalist theories of law, like the positivists, only have half of the answer to the question "what is the relation between law and justice". Each should reexamine the other, preferably from the perspective of historical materialism, to understand its own flaws and the contributions that the other perspective might bring.

THE HARTIAN TRADITION IN INTERNATIONAL LAW

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Jeremy Waldron has recently argued that Public International Law (PIL) is the only major area of law not yet explored and explained by those operating in the Hartian tradition of legal theory.[1] I hope in the present paper to demonstrate the incompatibility of Hartian methodology with PIL, and thus the extent to which PIL illustrates the limitations, indeed the outright failure, of the Hartian approach to legal theory.

Nonetheless, I also hope to show that Neil MacCormick – sometime wayward son, sometime protégé and champion of the Hartian tradition – has quietly re-invented British Positivism, or at least offered a new and preferable trajectory for its development. This is the task of the present paper: to develop ideas outlined or latent in MacCormick's work and to demonstrate how these move legal positivism away from sociological positivism (or philosophical positivism) and consequently manifest a rupture with the Hartian Tradition of empirical theorising.

Before turning to the advances made by MacCormick, we can sum up the problems faced by a British Positivist analysis of International Law in the following two propositions:

1. There is no single British Positivist Tradition.

2. Of the two major traditions available for study (Austin and Hart) *neither* is conducive to understanding PIL as Law.

There is no single British tradition in legal positivism, and there quite possibly never has been. Hobbes was an odd sort of positivist, Austin and Bentham differed as much as they agreed, British legal positivism was fractured from its inception. The same was true of legal positivism as such. However, this fracture deepened with the arrival of H.L.A. Hart. Hart re-oriented the field, abandoning the "normative positivism" of Bentham and Austin in favour of the "descriptive sociology" which now characterises

[1] In Kramer, *et al.* ed.s, *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (Forthcoming)

the orthodox (Oxford) British approach.

As Gardner has pointed out,[2] legal positivism is both a broad church, and a much maligned one. Before locating myself within this movement, it is first worth briefly delimiting the movement as a whole. If legal positivists are to be understood or classified as a group or a school (at least within legal philosophical debate) they must be "united by a thesis rather than merely a theme".[3] That is, it is not enough that legal positivists emphasise focus "on certain aspects of legal thought and experience (namely the empirical aspects)",[4] but we must also have a unifying philosophical proposition. Gardner kindly provides this:

> In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).[5]

In other words, legal positivism's prime concern is to identify what the law *is*, not what it ought to be. Of course this is *also* true of "anti-positivist" theories, as critics of legal positivism are also concerned with what the law is. However, whereas anti-positivist theories would hold that what the law *is*, is in some manner dependent on what the law ought to be, the specific claim of legal positivism is that what the law *is* is *in no way dependent upon what the law should be*. The question then becomes what to identify as law, and how best to describe it; a question which ought also to be focussed specifically on PIL.

However, although a British Positivist, Bentham, coined the term "International Law", both Austin and (in a different, perhaps lesser, but also much more fundamental, way) Hart have rejected the idea that PIL is "Law properly so called". As I personally begin from the presumptions that PIL *is Law* and that it is best understood from a positivist perspective, I wish to outline the methodological commitments which cause Hart and Austin to reach conclusions diametrically opposed to my own.

[2] Gardner J. "Legal Positivism: 5 ½ Myths" 46 *American Journal of Jurisprudence* (2001) p. 199.
[3] *Ibid* p. 199.
[4] *Ibid.*
[5] *Ibid* p. 201.

AUSTIN'S DEFINITION EXPLORED, BRIEFLY:

Austin sought to define law first and *then* identify its scope and limits, to determine the "province of jurisprudence". Thus Austin's work is primarily analytic,[6] or conceptual, in nature. Working syllogistically, Austin concludes that PIL is *not* "law properly so called"; on two counts PIL fails to meet his definition of law, and therefore it is not law: this can cause us to question any of three things: PIL's status as law; Austin's definition of law; Austin's methodology (of legal theory).

Law, according to Austin, was a *confused object of observation*, and therefore pure observation could not help to define law. His first aim is to distinguish "law, simply and strictly so called" from things with which it "is often confounded".[7] That is Austin sought to clearly differentiate law from those "objects to which it is related by *resemblance* [or] …*analogy*". Put simply, not everything called or considered to be law actually is law, and failure to recognise and combat this leads to confusion and the failure of legal theory. Austin's task, therefore, was to define for law "the largest meaning which it has, without extension by metaphor or analogy";[8] to eliminate the confusion surrounding what is to be classified, and observed, as law.

Law – the specifically legal – had to be defined before it could be observed. This is why Austin concludes that definition is the key to understanding law, and that laws properly understood as the imperative commands of a determinate sovereign provide "the key to the science of jurisprudence".[9] In short, Austin had to, and did, *posit* a definition of law:

> A rule laid down for the guidance of an intelligent

[6] Austin can, perhaps, be credited with inventing the school of analytic jurisprudence, however I have chosen to reject this term on the basis of what I perceive as subsequent misuse, but at any rate because the term can too easily give rise to misunderstanding. This is because Hart (whom I see as the exemplar of empirical legal positivism, or "descriptive sociology" in his own designation) is often termed – and indeed in certain respects is – an analytic jurist. Thus, for the purposes of the present work the crucial distinction is between the conceptual and the empirical, with the possibility that the analytic in fact straddles this border denying that term utility here.

[7] Austin, *The Province of Jurisprudence Determined,* p. 18.

[8] *Ibid.*

[9] *Ibid* p. 21.

> being by an intelligent being having power over him.[10]

For Austin, "laws or rules, properly so called, are a *species* of commands",[11] and commands are significations of desire "distinguished from other significations of desire … by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded".[12] This gives rise to Austin's infamous sanction based model of duty:

> Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it.[13]

However, for present purposes there are two problems with Austin's definition, though not with his methodology.[14] Firstly his definition of law was unsupported and secondly, from the perspective of PIL, it was wrong.

International law is not law properly so-called according to this definition, having neither emanated from a sovereign body, nor being supported by sanctions in the event of non-compliance.[15] Instead public international law is a branch of positive morality in the Austinian system, but no less a science of rules because of this.[16] Nor is it necessarily less efficacious:

> The given society may form a society political and independent, although that certain superior be habitually affected by laws which opinion sets or imposes.[17]

This is *not* a (positive) legal limitation because it is not obedience to rules posited. That is public international law does not emanate from a determinate source, and so cannot be understood as a command.[18] Thus public international law forms a

[10] *Ibid.*
[11] *Ibid.* p. 21
[12] *Ibid.*
[13] *Ibid.* p. 22.
[14] In this regard, and *contra* orthodox understandings, I would claim that it is Hart and not Austin who was methodologically naïve. However, as should be apparent, my acceptance of Austin's *methodology* does not entail an acceptance of his *theory* on my part.
[15] See *supra*, note 7, e.g. pp. 112 and 123.
[16] *Ibid.* p. 112.
[17] *Ibid* p. 170
[18] See *ibid.* e.g. pp. 117-8. However, it is, I believe, possible to define public international law *as law* within a(n at least) neo-Austinian model. This is because Austin accepts that the "members of a Sovereign body" are subjects in relation to that body as a corporate entity. There is no reason not to perceive this as an accurate description of (the ideal of) the relationship between independent states and the "international community", although of course, Austin does not do so. On this possibility, see *ibid* pp. 218-23.

branch of positive morality, this is a direct implication of the consistent application of Austin's definition of law to the data of international intercourse. It is not, however, a pejorative classification. The Austinian task, as noted is conceptual in nature. He set out to differentiate law from other normative orders, and in order to do so, he realised that he had first to define law.

A NEW BEGINNING: H.L.A. HART:

Hart develops much of his work from a critique of Austin. In short, Hart perceived Austin's work as too crude, and too dogmatic plausibly to describe a phenomenon as complex as the law or legal system. To move beyond such naïveté, Hart abandoned the method of advance definition. Consequently, Hart *does not offer* a definition of law. Speaking of, and in, the *Concept of Law*, he advises that "Its purpose is not to provide a definition of law".[19] The key defect Hart perceived in Austin's work was the idea that only one kind of rule, the sovereign command, could be considered to be law. Hart disagreed as, for him, this would "distort the ways in which [laws] are spoken of, thought of, and actually used in social life".[20] Austin's description was incomplete and inaccurate, he had allowed logical consistency to override empirical observation, that is, he had fallen into the classic dogmatist's pitfall. This was a mistake Hart would endeavour not to repeat.

Hart's alteration in focus, necessitated by his re-orientation of legal positivism as descriptive sociology or *elucidation* of legal concepts, is well captured by Gardner:

> Hart showed how … legal norms have no "essence" nothing that makes them distinctively legal, except that they are norms belonging to one legal system or another … One needs to begin by asking what property or set of properties all legal systems have in common that distinguish them from non-legal systems. Only when armed with that information can one identify legal norms

[19] Hart H., *The Concept of Law* (2nd ed.) p. 17.

[20] *Ibid* p. 78. Here, I believe, we see the impact of the linguistic philosophy of Hart's friend J. L. Austin; Hart, following Austin, believed that "a sharpened awareness of words [would] sharpen our perception of the phenomena". (*ibid* p. v). The observational overtones of Hart's language are revealing, Austin's work 'distorts' an object of analysis (the law) itself extant externally to that act of observation.

> (including laws) as legal norms. One distinguishes laws … as norms belonging to legal systems. [With all due respect to] Kelsen, one does not distinguish legal systems as systems made up of laws … legal systems are the basic units of law.[21]

This is a paradigmatic shift in thought. Hart rejected the idea of advance definition as a technique for reaching or improving our understanding of legal concepts. Instead, he shifted the focus of analysis to the contextualised *use* of legal terminology, and claimed to be *elucidating* the underlying concepts.[22] However, in order to develop and test understandings in this way the Legal System must itself be *presupposed* as the objective domain of analysis. In other words, absent a controlling definition, some other external arbiter of truth or accuracy is required, and only a legal system *presupposed as extant and legal*, can fulfil this role. The problem of course is that this technique cannot then be transferred to the legal system as such, unless *another* system (or category) is posited as providing the objective domain of analysis in which the correct identification and elucidation of legal systems (as such) could be evaluated. In fact, Hart simply 'smuggled in' a common-sense *definition* of legal system; the very definition I wish to expose and problematise.

Hart does not claim that PIL is not law – in fact he recognises the possibility that it is law – but he does reject the idea of its being a *legal system*. PIL, for Hart, is merely a primitive "set" of laws, some form of normative primate requiring remedial measures to accelerate its evolution into a proper legal system: its emergence from the pre-legal into the legal world. Consequently, only two issues can be problematised: PIL's status as law; or Hart's methodology.

Law existed, it could be observed and described, but only by focussing upon "simple truths about different forms of social structure [, truths which] can, however, easily be obscured by the obstinate search for unity and system where these desirable elements are not in fact to be found."[23] Observation must be given priority over dogmatic definition, and – assuming the

[21] Gardner J., "The Legality of Law" 17 *Ratio Juris* (2004) 168, at pp. 170-1 paragraph breaks suppressed, and note omitted.
[22] See e.g. *supra* note 19 p. 208.
[23] *Ibid* p. 230.

"system" in the quotation to be a legal system, as no other system seems appropriate – law as such must be conceptually separated from the legal system.[24]

A contradiction begins to surface here, as Hart seems – to say the very least – unsure about the relationship between law and legal system. Outwith the *Concept of Law*, as Gardner suggests, Hart's work appears to indicate that the two are inseparable, that understanding of the law is derivative on understanding of the legal system. One way to avoid contradiction would be to ignore chapter 10 of the *Concept*, to treat it as a mistake, or a red herring. But, of course, that chapter was *not* excised from the second edition, and thus we can assume Hart did not perceive it in that way. Consequently, we must consider other ways of reconciling this apparent contradiction.

They key lies in Gardner's analysis itself:

> One needs to begin by asking what property or set of properties all legal systems have in common that distinguish them from non-legal systems.[25]

This "property" in Hartian analysis is the *authority* of the legal system; all legal systems are *empirically* observable as the actions of the *factually* authoritative organs (institutions) of their host societies. However, a "primitive society," i.e. a society lacking such centralised and authoritative institutions, can nonetheless have laws. Consequently, it must be assumed that these 'laws' *themselves* – and individually at that – possess this stamp of authority. The contradiction can be resolved by assuming the authority of the legal system into *each individual norm* of a primitive 'set' of legal rules.

Hart's methodology is particularly instructive here. Even leaving aside his *decision* to restrict his study to "municipal legal systems" as the paradigm instance of law,[26] we must take issue with the nature of observation entailed by Hartian

[24] This seems to me to be the basic claim of chapter X of the *Concept*; however, Hart never talks about primitive sets of "laws", but only ever of sets of "rules" (which seem in his analogies to cover everything from etiquette to PIL). Moreover, and more confusingly, he does at times refer to the international *legal system* but he also notes expressly "the rules [of PIL] which are in fact operative constitute not a system but a set of rules" concluding that a basic rule of recognition does not (as yet) "represent an actual feature of the system"; *Concept* p. 231.

[25] See note 21, *supra*.

[26] *Supra*, note 19, p. 17.

methodology. Hart's is a theory of institutionalisation, of the centralisation of violence, and the necessity for a monopoly of both legitimate force *and* authoritative decision-making.

> The absence of an official monopoly of 'sanctions', may be serious … however … the lack of official agencies to determine authoritatively the fact of violation of the rules is a much more serious defect.[27]

Law in this theory is the ordered observation of official conduct; law *is* what(ever) tribunals actually do. However, this can be discovered *only if* the institution from whose behaviour law may be observed itself has a *real existence* (i.e. the institution must be a brute fact); and a real monopoly on decision and force (again, an empirically verifiable brute fact).[28] This is Hart's *definition* of legal system.

As Dyzenhaus notes:

> Hart's account of the rule of recognition explains legal authority as an institution which comes into being to maximise the efficacy of command structures in a complex society[29]

In other words, Hart elides law with "deference to constituted authority"[30] and recognises a legal system only when the monopoly on legitimate violence is already in place and effective. Law is what officials recognise as law, no more and no less. There is no theory of the specifically legal, because Hart was less interested in the legal than the institutional: his theory is, ultimately, Hobbesian; a theory of control. Hart does not openly acknowledge the link between law and the centralised monopoly on legitimate violence, but it is the implicit condition which (alone) makes his work intelligible. The following quotes are taken from the second edition of *The Concept of Law*:

> For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers. There is, of course, a difference in the use made

[27] *Ibid*, pp. 93-4.
[28] See Gardner , *supra* note 21, at p. 168.
[29] Dyzenhaus D. "Fuller's Novelty" in Witteveen and van der Burg (eds.) *Rediscovering Fuller* 78 at p. 94.
[30] The phrase is Fuller's, and comes with the warning that law must *not* be confused with such deference. See *The Morality of Law* p. 106.

> by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, what they say has a special authoritative status conferred on it by other rules. (101-2)
>
> The assertion that it [the rule of recognition] exists can only be a question of fact (110)
>
> its [the rule of recognition's] existence … must consist in an actual practice (111)

So, the rule of recognition is a *fact*:

> the question of whether a rule of recognition exists and what its content is … is regarded throughout this book as an empirical, though complex, question of fact. (292)

Its existence is identified (and its content verified) by actual observation of the conduct of system officials (especially judges). *But*, what makes someone an official, and what *creates* a Legal System?

> From the inefficacy of a particular rule … we must distinguish a general disregard of the rules of the system. This may be so complete in character and so protracted that we should say … it never established itself as the legal system … or … that it had ceased to be the legal system (103)
>
> One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious. (104)
>
> There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. … those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and … its rules of recognition specifying the criteria of legal validity … must be effectively accepted as common public standards of official behaviour by its officials. (116)

The existence of a legal system, therefore, is *also* a question of fact (efficacy). The fact in question must be the official monopoly on legitimate violence, primarily in terms of determining *when* it may be deployed, but also in holding a *de*

facto monopoly on its actual deployment. A legal official is one *empowered* under such a (factually extant) legal system to access the monopoly on official violence. A legal 'rule' then becomes any condition under which the official may access that violence. This is summed up by Raz's claim that "the concept of law is not a product of the theory of law."[31] This is a strong *ontological* claim. Law, the concept of law, has a real existence, it effectively *is* a brute fact. Thus, the concept of law (for Hartians) resides *outside* legal theory, and the latter exists to describe the former.

The concept of law is a way of understanding (interpreting) official behaviour. The legal system is the union of primary and secondary rules, unified by a rule of recognition. The rule of recognition tells us how other legal norms are to be identified (recognised):

> This [the rule of recognition] will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts (94)

These "features" are identified inductively, they are the features which judges typically accept as distinguishing legal from other rules in any given system. Thus, for Hart, law *is*, and law is what legal officials consider it to be. Law is discovered by observing, classifying, and understanding the activities (and rhetoric) of legal officials. Moreover, the rule of recognition is based on the *assumption* that a consistent agreement on the "set of features" which distinguishes and identifies a legal rule will be empirically identifiable within the actual practices of actual judges.

In short, "[f]or Hart, the foundation of any legal system is an observable rule of recognition that guides official behaviour in the ascertainment of laws."[32] The rule of recognition *actually exists*, and is *actually observable*, it is observed in the regularities of official conduct, the law – in its counter-factual existence – is the *product*, the effect, of these regularities, thus it cannot be their cause. In primitive, or pre-legal,

[31] Raz "Two Views of the Nature of the Theory of Law: A Partial Comparison" in Coleman J. (ed.) *Hart's Postscript* 1 at p. 36.

[32] Kramer M., "The Rule of Misrecognition in the Hart of Jurisprudence" 8 OJLS (1988) 401, at p. 406.

societies, law can still exist, but it cannot do so counter-factually. In other words, in such societies, the *existence* of laws is real, and is to be ascertained from the empirical regularities of *actual conduct*. A legal rule exists where its subjects actually modulate their behaviour according to its demands; should this actual regularity wither, so would the rule. The rules have no distinct ontological status, only empirical existence, and when they can no longer be empirically observed, they no longer exist. "The rules of the simple structure are, like the basic rule [the rule of recognition] of the more advanced systems, binding if they are accepted and function as such."[33]

SUICIDE CLUBS: MINIMALISM: & THE FETISHISATION OF LAW:

Hart's theory is presented by Simmonds as "minimalist", in that it seeks only to "frame" or "clarify" debates. Both seem to agree that the purpose of the concept of law is to "adequately reflect the features of the social phenomena of law that are most important and distinctive".[34] Therefore the theorist needs an "evaluative perspective" from which to engage in this "clarificatory exercise".[35] And, "Hart seeks to find a suitably minimal perspective in the need for survival".[36] Simmonds is at pains to point out the minimalist nature of this perspective (we can all agree on the desirability of human survival, so the claim can be widely assented to) and the *importance* of Hart's claim to be merely clarifying the phenomena; not evaluating, critiquing, or advancing it:

> The concept is perspicacious because and in so far as it reflects features of the social phenomenon of law that are distinctive and important when judged from the viewpoint of a concern for human survival. Such a concern is sufficiently widespread to be shared by all participants in the debate about juridical duty.[37]

Or, as Hart puts it, "our concern [in theorising law] is with social arrangements for continued existence, not with those of a suicide

[33] Hart, *supra*, note 19, at p. 230.

[34] Simmonds N., "Bringing the Outside In" 1993 OJLS 147, at p. 154. It does, however, minimalist thesis or not, seem worth noting that in both Hart and Simmonds' presentation, the "social phenomena" of law seem to exist – *as law* – outside of legal theory. Indeed law, itself, *as a social phenomenon* appears to exist outside legal theory, as a real object, simply awaiting discovery and description; like an uncharted island patiently awaiting mapping.

[35] *Ibid* pp. 154-5.

[36] *Ibid* p. 154.

[37] *Ibid* p. 156.

club."[38] However, it is *within* this "minimalist" claim that the fundamental error, or confusion, lies: the elision between law and human survival. Of course Simmonds is correct to claim that we are all (or at least, I strongly suspect most of us are) concerned with human survival, however, that need not make human survival relevant to debates over *law*. To make the point bluntly, even flipply, we *remain concerned with human survival* while we discuss the relative merits of varying brands of chocolate, *but* that concern is not germane to the debate, as it would be germane to a debate on governance or war (as *opposed*, perhaps, to the *legal regulation* of either).

Thus the assumption Hart *actually* makes is less obviously minimalist than Simmonds claims; this is the assumption that law is *necessary* for the maintenance of human survival: that, absent law, we would die in a war of all against all. In the Marxist sense, Hartian scholars *fetishise* the law.[39] In other words, Hart's Hobbesian assumption, that imposed order is necessary to human survival, is augmented by a legalist assumption that only *law* can bring about that order. This appears to contain the corollary assumption that *any* regulatory regime which brings about (imposes) order is *automatically*, *definitionally*, a legal order, law and a legal system.[40] That, however, is very much a non-minimalist assumption, it is a huge and debateable assumption, albeit one subsequently *presented as a truism*.

In other words, Hart's theory does not merely elucidate legal concepts. Instead, it *defines* a legal system: it defines the data against which legal theory should be evaluated. But the very existence of that definition renders the theory contingent: in terms of Simmonds' (false) dichotomy, Hart's theory is "maximalist" and thus persuasive only to those who share its substantive commitments.[41] It is *not*

[38] Hart, *supra* note 19, at p. 192.

[39] Fetishisation in this sense is the ascription of properties to an object or system which does not in fact possess or inculcate them; it is a prelude to reification, the objectification of social relations as natural facts. For a simple introduction, see Collins H. *Marxism and The Law*.

[40] In his famous debate with Fuller, Hart went so far as to affirm that, in his view, even the Nazi system of government was a legal system, albeit a bad one; see Hart H.L.A "Positivism and the Separation of Law and Morals" 1958 *Harvard Law Review*.

[41] An alternative way of looking at this would be to recognise that Aquinas' theory was, probably, in Simmonds' terms, a *minimalist* theory in its own time. The *assumptions* which form Aquinas' "perspective" *were* probably sufficiently orthodox to be understood as "sufficiently

a neutral epistemic grid through which the contents of any given legal system must be identified; because the idea of a legal system – the data of the enquiry – *is* constituted by the act of observation: the concept of law (i.e. the definition which, necessarily, *precedes* the identification and elucidation of the legal system) *is* a product of legal theory.

However, from within his own methodological protocols, Hart is correct, PIL is not a legal system. But this tells us only that Hartian methodology, whatever its other merits (if any), is inappropriate to the study of PIL. Moreover, and more importantly, Hart's theory cannot even provide an intelligible understanding of the contents of a legal system *according to its own definition*.

LAW UNDERSTOOD AS A BRUTE FACT DOES NOT ADEQUATELY REDUCE COMPLEXITY:

To understand law as necessarily enforced is an attempt to reduce the complexity of reality so that legal norms might be identified. This identification is to be validated not by its utility, but by its empirical accuracy. It will allow us accurately to identify the legal norm applicable to a given case; and to justify that choice by reference to its empirical accuracy, *not* its substantive appeal. The law is presented as an empirical fact (enforced decision) which may be empirically observed. This technique allows theorists to identify law by reference to the actions of those institutions, courts, whose decisions are enforced: the enforced decision becomes law, an extant legal norm. Social practice methodology, to remain 'pure' or consistent, must treat all such decisions as equally valid extant legal norms.

From this perspective, the ontology of the norm is almost empirical. The norm is, in effect, a speech act, it comes into being at the point of its articulation; it can then be treated as a fact. The legal system is the composite of these facts, these legal norms manifested as legal decisions. The legal decision does not merely reflect, or even embody, the legal norm; it *becomes* the legal norm. Moreover, the arguments which led to the 'recognition' of this legal norm, having been recognised by the

minimal" for widespread agreement. What this highlights – and what Simmonds and Hart ignore – is the *contingency* of general agreement, the self-referentiality of orthodoxy. On a related note, see note 86 and accompanying text, *infra*.

judge,[42] become (or are confirmed as) licit legal arguments, valid argumentative techniques, constituent parts of the "grammar" of (that) legal practice.[43]

Subsequent legal arguments are then constructed by applying a choice of these legal argumentative techniques to a choice of extant legal norms; to produce a logically entailed 'chain' of decisions pointing to the applicability of a particular 'norm' to the instant case. The judge then chooses from amongst these norms, based I would argue (alongside Legal Realism and Critical Legal Studies (CLS)[44]) upon nothing more than personal preference, even if the judges themselves remain ignorant of that fact:

> It only shows the inevitability of political choice, thus seeking to induce a sense that there are more alternatives than practitioners usually realise, that impeccable arguments may be made to support preferences that are not normally heard; that if this seems difficult through the more formal techniques, then less formal techniques are always available – and the other way around.[45]

This is analogous to MacIntyre's refinement of the emotivist claim, whereby emotivism is transposed from a theory of meaning into a theory of *use*, and where:

> Meaning and use would be at odds in such a way that meaning would tend to conceal use. … Moreover the agent himself might well be among those for whom use was concealed by meaning. He might well, precisely because he was self-conscious about the meaning of the words that he used, be assured that he was appealing to independent impersonal criteria, when all that he was in fact doing was expressing

[42] This refers, specifically, to the judge in the institutional sense (and location) of the word: the authorised decision-maker *cum* law cognisor; the institutional privileged *locus* of decision. It does not refer to the abstract paradigm of the judge, as the embodiment of the legal ought. Nonetheless, the implicit and underlying argument of this paper, is that the decisions of the 'actual' judge, are legally legitimate only to the extent that they correspond with those of the abstract paradigm.

[43] Koskenniemi, *From Apology to Utopia*, 563.

[44] CLS, perhaps best understood as a reincarnation and development of the American Legal Realist project, offers a wide ranging critique of the functioning of legal orders, focussing on their outcomes, innate biases, and most famously, on the claim that law is radically indeterminate. For an introduction to CLS in international law, see Beckett J. "Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project" 2006 *German Law Journal* 1045; for a more general introduction to CLS see Kelman M. *A Guide to Critical Legal Studies*.

[45] Koskenniemi, *supra* note 43, p. 602.

> his feelings to others in a manipulative way.[46]

In effect, this leaves judges with an almost unlimited discretion to choose the norm which will 'control' or 'determine' their decision. Hart *assumed* that this discretion would be controlled by the judges as a collegiate body, that their decisions would be consistent, and thus produce an obviously visible set of rules by which norms were consistently recognised (the rule of recognition as empirical fact):

> The rule of recognition actually accepted and employed in the general operation of the system … could be established by reference to actual practice: to the way in which courts identify what is to count as law (108)

Hart was wrong.

The rule of recognition, understood as an empirical fact, does not determinately identify what is to count as a legal rule or norm. There *is* no self-evident core of reason unifying and systematising legal systems understood as brute facts. Judicial discretion is *not* limited by previous judicial decisions, but is rather a *result of* the multiplicity of previous judgments.

This can be demonstrated by a comparing Unger's CLS inspired critique of dogmatic legal analysis, with MacCormick's defence of the Hartian project in the face of the CLS attack. Thus, where Unger calls for a process of "mapping and critique" of the legal order, MacCormick defends and refines the Hartian approach, claiming that legal theory is (or should be) engaged in a process of "rational reconstruction":

> Give the name *mapping* to the suitably revised version of the low-level, spiritless analogical activity, the form of legal analysis that leaves the law an untransformed heap … a requirement for the accomplishment of this task is that we resist the impulse to rationalise or idealise the institutions and the laws we actually have.[47]

This would appear to be the logical conclusion, or perhaps the *reductio ad absurdum*, of the Hartian project of descriptive legal theory: a non-evaluative description of legal practice. However, such a process would illustrate confusion and contradiction, not rational order:

[46] MacIntyre A., *After Virtue*, p. 14.

[47] Unger R. *What Should Legal Analysis Become?* pp. 130-1.

> Legal doctrine produced in this way degenerates into mere casuistry where it purports to reconcile and work in every single case and statute in some grand scheme; there has to be some discrimination between the parts that belong in the coherent whole and the mistakes or anomalies that do not fit and ought to be discarded.[48]

Instead of this, the work of rational reconstruction:

> Calls for the exercise of creative intelligence and disciplined imagination to master the large and always changing bodies of material involved, to grasp them all together [presumably with the 'necessary' excisions already having taken place], and to reconstruct them altogether [except the excised pieces] into systematized and coherent wholes.[49]

In short:

> Normative order as order is not a natural datum of human society but a hard won production of organizing intelligence … the raw materials don't bear any one clear scheme on their face. Of course they don't. The juristic task has always been to establish intelligibility, not merely to discover it.[50]

In other words, MacCormick, *contra* Unger, recommends that we *indulge* "the impulse to rationalise or idealise the institutions and the laws we actually have". However, the empirical theorists are then confronted with the limit point of their own theorising. Absent its informing values, the empirical evidence does not support a consistent set of criteria for the identification of legal norms. Instead this must be imposed according to the desires of the theorist's "*creative* intelligence and disciplined *imagination*". Nonetheless, MacCormick can conclude:

> In a modern state, the continuing intelligibility and operability of law depends crucially on its continuing servicing by academic commentators as well as by practitioners and judges.[51]

Yet, by MacCormick's own admission, such a process must be arbitrary: it cannot take all available data into account, and yet can admit of no informing values by which the

[48] MacCormick N. "Reconstruction After Deconstruction: A Response to CLS" 1990 OJLS 539 at p. 556.
[49] *Ibid* p. 557.
[50] *Ibid* pp. 557-8.
[51] *Ibid* p. 558.

choice of which material to excise could possibly be justified. This is *precisely* the charge Dyzenhaus levels against contemporary legal positivism.[52] MacCormick has in effect *conceded* the impossibility of the Hartian descriptive project. The rationalising process is indeed "mere casuistry", and *ex post facto* casuistry at that. But that fact is disguised and denied "by academic commentators as well as by practitioners and judges"; and that *denial* constitutes the "continuing intelligibility and operability of law".

Consequently, the dynamics of perception must be resolutely reductivist in function. The first reduction is that from the overwhelming data of pure existence to the isolation of institutional behaviour. This may be presented as a mere identification of the relevant data, but is, in fact, the construction of the practice 'identified'. However, even once that is accomplished, the 'fact' of the social practice *constituted* by this structured and reductive observation, will remain too complex to facilitate rational exposition, ordered presentation, and predictable responses.

Instead, we require *three* consecutive processes of data reduction, identification, and ordering, which operate cumulatively to make the rational ordering, the rational reconstruction, of law as a social practice *appear* possible. *First* cognition is limited to the actions of those who constitute "authoritative decision-makers"; this delimits the social practice. *Second* a distinction is drawn between winning and losing arguments; this purifies the data (in a manner analogous to what Cover has termed the "jurispathic" function[53]). *Third* a final set of exclusions are enacted *amongst the winning arguments*, in order to create the impression that these can be understood as a coherent whole. Only then can we 'identify' 'chains' of cases giving rise to 'recognised rules'.

Unger captures this move, and its disguise behind banality, when he recognises legal analysis as a "spiritless analogical activity".[54] He then seeks to expose its true nature to light. The radical banality of Unger's ideal of "mapping" is to highlight the process of task *evasion* inherent in rational reconstruction or

[52] Dyzenhaus D., 'Positivism's Stagnant research Proposal' 2000 OJLS 703, at p. 711-2.

[53] Cover R., "*Nomos* and Narrative" 97 *Harvard Law Review* (1983) 4 at p. 40.

[54] *Supra*, note 47.

paradigm case methodology. The banal radicality of the process is to bring to light the full impact of a task normally considered banal, the doctrinal analysis of legal systems, the imposition of order through exclusion, the nature of "reconstruction" as *creation*. *That* is the utter impossibility of empirical analysis, and the delusion which disguises value imposition behind a claim to describe what "is".

The Relationship Between Municipal and International Legal Theorising:

Hart stipulated that the task of legal theory was to "provid[e] an improved analysis of the distinctive structure of a municipal legal system"[55] and from this, to develop an enhanced understanding of law as such. Consequently, municipal law formed, and continues to form, the paradigm of legal theorising. Almost all theory of international law simply develops, transposes, or transplants municipal legal theory to the alien environs of international life.

Schematically speaking, theorists, black letter academics, and practitioners of international law, transpose – or probably more accurately transplant[56] – assumptions about the "nature of law", from the theory and practice of municipal law to the alien environment of international society. Thus, Koskenniemi is correct to draw attention to:

> The domestic analogy that persuades us – contrary to all evidence – that the international world *is* like the national so that legal institutions may work there as they do in our European societies.[57]

Two problems arise as a result: first municipal law is not, itself, a coherent, nor an unproblematic, concept;[58] and second PIL is *not municipal law*. This is not necessarily problematic, but can become so when institutional centralisation is posited as the defining feature of the legal system. This is so for two reasons: firstly, PIL is not an

[55] *Supra*, note 19, at 17.

[56] The, very useful, distinction between transplanting and transposition was developed, and is elucidated, by Esin Orucu; see "Law as Transposition" 51 ICLQ (2002) 205.

[57] Koskenniemi M., "International Law in Europe: Between Tradition and Renewal" 16 EJIL (2005) 113, at p. 122.

[58] See Kammerhofer J., "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems 15 EJIL (2004) 523 at p. 550; see also Kletzer C., "Kelsen's Development of the *Fehlerkalkul*-Theory" 18 *Ratio Juris* (2005) 46.

institutionalised legal system, and secondly; because of that fact, the problems inherent in descriptive legal theory are greatly exacerbated in PIL. As a corollary point, the problems are more easily identified in PIL. Consequently, the relationship between the two branches of theory ought to be conceived as symbiotic, rather than a uni-directional transfer of knowledge from the "advanced" municipal orders to the "primitive" international order.

This becomes obvious if we think about the (necessary) three stage process of reduction outlined above. The first stage is the most awkward, because there *are* no centralised institutions by reference to which the data can be 'identified' (purified and reduced). This is why PIL cannot be a legal system in the Hartian sense: legal *systems* are necessarily (definitionally) institutionalised forms of social control.[59]

Instead, empirical theorists of PIL must turn their attentions to the actions of "authoritative decision makers".[60] This identifies a vast category of relevant data. To make matters worse, the absence of centralised institutions *also* subverts stage two of the process of reduction: there are no courts (of compulsory and general jurisdiction) by reference to which the distinction between winning and losing arguments can be identified:

> there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law.[61]

Consequently, only the third stage of the process – the most radically under-theorised stage – is actually active in PIL. The 'reconstruction' of the legal system becomes a *construction* of the legal system, and *that* creates the "personalisation", the descent into idiosyncrasy, of PIL.[62] The indeterminacy which gives rise to this personalisation is inherent in the empirical ('British positivist') methodology, but is more apparent in PIL, where it is less likely to be disguised by institutional centrality,

[59] See notes 25-30 and accompanying text, *supra*.

[60] For a sympathetic, but nonetheless useful, account of this notion, see Higgins R *Problems and Process: International Law and How We Use It* pp. 1-16, esp. pp. 9-11.

[61] *Legality of the Use of Force (FRY* v. *USA) Preliminary Objections* ICJ Order of 2nd June 1999 para. 30, 1999 ILM p. 1188 at p. 1195

[62] See Beckett J. *The End of Customary International Law?* (Forthcoming) esp. ch. 4.

authoritative decisions, institutional bias, and the continued (and *consistent*) servicing of academics and practitioners.

TWO VIEWS OF THE LEGAL SYSTEM:

There is no necessary reason to understand law as enforced, nor as socially central, nor indeed as a social practice or a social institution. These commitments may well combine to form the orthodox perspective within legal theorising, but that in itself grants them no virtue, as it offers them no support beyond the "staying power" of orthodoxy. Social practice theorising precludes law from meeting the standard of rational determinacy. There may be good reasons for accepting that outcome, but definitional fiat does not rank among their number.

Law can be understood differently, as an ideal idea[63] structuring, justifying, but imperfectly reflected within, a social practice: law as the *reason for* judicial decisions, not merely the *fact of* judicial decisions. Consequently, there are (at least) two possible understandings of law, and these give rise to two quite different views of (what constitutes) 'the legal system'.

1. Law as a social practice.

2. Law as an Ideal Idea.

From the first perspective, law is what judges say the law is. Consequently, all extant judgments must be understood as brute facts; and these brute facts (the texts of the judgments, the arguments accepted by the Court as legal arguments, the techniques acknowledged by the Court as constitutive of legal norms) in total *constitute* the 'legal system'. The task of the 'lawyer' is to select from amongst these facts, seeking those most suitable to constructing the argument their 'client' desires. But, of course, these 'facts' do not form a coherent system. Consequently the task of the judge is to make a free choice between the competing arguments (and then deny that this has occurred), and the task of the 'orthodox' academic is to aid

[63] The ideal idea is a concept which I have adopted from Jörg Kammerhofer (see Kammerhofer J., "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems 15 EJIL (2004) 523 at 544) however, we deploy this term in slightly different senses. His is more Platonic, relying on an abstract realm of the ideal, and in particular on the ideal ontology of norms; whereas my use of the term refers to the *human construction* of ideals, which can then form essences, or categories in the semantic sense.

and abet this disguising and denial of the fact of judicial decisionism.[64]

From the second perspective, the law is not a brute fact. Consequently, the texts and 'facts' and decisions which constitute the legal system in the first analysis are, at most, evidence of the underlying ideal of law. Instead, each legal argument is understood as the manifestation of a particular theory of law. From this perspective, the law is an ideal idea, a direct product – an actualisation or realisation – of the underlying theory of law. The legal system is understood as a manifestation of the dominant theory of law. The legal system too is an ideal idea, the idea which ought to structure, or even determine, the judicial decision; *and* define the actions which may be acknowledged as law constitutive, and the argumentative techniques which may be acknowledged as *legal* arguments. The critical question is how to decide which theory to adopt as dominant.

However, when law is understood as a social practice, this question regarding the ideal idea cannot be brought into focus. This is because it precedes the legal judgments, and the judgments *themselves* are understood as 'the law'. Consequently, the 'problem' of indeterminacy, whose existence seems incontestable within the arena of social practice, cannot be resolved within that arena. The solution, therefore, must lie, at least initially, with the full articulation of the decision the judge must actually make. The decision as to *which ideal idea* to endorse, which definition of law to concretise into the legal norm.

As there are no "agreed criteria" for legal decision-making, it is delusional to assume that judges apply such criteria.[65] Instead they must, implicitly, choose between different, contesting, and irreconcilable visions, or *theories*, of law in order to reach their decisions. However, such theories are merely implicit in the legal arguments actually offered; hence the *silence* of the "prologue",[66] the unarticulated nature of the theoretical assumptions driving the argument.

[64] Ricouer eloquently denounces this strand of positivism as "the complicity between the juridical rigidity attached to the idea of a univocal rule and the decisionism that ends up increasing a judges discretionary power" see, 'Interpretation and/or Argumentation' in Ricouer P., *The Just* 109 at p. 114.

[65] Carty A. *The Decay of International Law* p. 25.

[66] Dworkin *Law's Empire* p. 90. See also notes 74-5 and accompanying text, *infra*.

Even *within* the arena of 'social practice' these inarticulate theories are being deployed and decided amongst. They ought to be brought to light. This will entail only an *apparent* widening of legal argument, to encompass legal theory. In practice, legal argument and legal decision-making already encompass legal theory. That this fact goes unacknowledged does not make it untrue. Consequently, the fact should be engaged, and its implications contended with.

This allows us to understand the true nature of 'technical legal analysis' – of the masquerade of the empirical – which is, in reality, no more than a random selection of 'extant' norms; understood as the brute facts of articulated legal judgements, which MacCormick terms "the large and always changing bodies of material involved". The collections presented as identifying the applicable norm owe nothing to internal logic, but gain their force from the substantive appeal of the norm itself. If we reject (or at least bracket) Dyzenhaus' thesis on structuring this substantive preference through the imposition of a substantive morality,[67] the question ought to turn to the 'criteria for collection' themselves. Focus should be directed to the *reasons for inclusion* within the rational reconstruction, and *not* on the 'data' from which that material is to be selected, especially as that 'data' is itself *constituted* by the legal theory adopted, which is in turn a manifestation of those 'criteria for collection'.

The key point is that *both* orthodox responses to the deficiencies of the social practice method are, themselves, pathological. The British legal positivist response does not engage the real problems, but functions in denial. Consequently, it serves merely to perpetuate the problems. The natural law response retains the hubris of moral imperialism.[68] Neither response should be adopted. Despite being presented as exhaustive of the field of possibilities, these theories do not, in fact, constitute our only available options. Instead, we could abandon social practice methodology.

MacCormick offers a way out of this dilemma; albeit one he does not take, nor even adequately develop. MacCormick is, undoubtedly, correct

[67] Dyzenhaus, *supra*, note 52.

[68] See Beckett J. "Behind Relative Normativity: Rules and Processes as Prerequisites of Law" 2001 EJIL 627.

that the key is to further reduce the data. Moreover, with all due deference to the contingency of the tautology, it stands to reason that this should be done rationally rather than irrationally. However, this merely poses the key question, it does not resolve it. That question is: how ought we to *substantivise* the rationality structuring the rational reconstruction? What I am developing is a specific technique to accomplish this legitimately; a technique to 'operationalise' MacCormick's theory.

In doing so, I am merely drawing the disparate strands of MacCormick's own arguments together. The structure of an operative rational reconstruction is best developed from the choice between competing legal theories, themselves understood as (manifestations of) thought objects. This amounts to an immanent completion of MacCormick's own project.

THE NATURE OF LAW

MacCormick argues that law should be understood as an "institutional fact". This idea, expounded at length by MacCormick and Weinberger as the Institutional Theory of Law,[69] is encapsulated by the former's insistence that law is a "thought object", and that these:

> Exist by being believed in, rather than being believed in by virtue of their existence.[70]

The central focus is on the question of what law is, on how we identify the raw data for legal theory. This is a second order question, thus the concern is not with what the law says, nor with what legal rules, ideas, or norms mean. These are first order questions, but they depend for intelligibility on the second order question, what makes the law law (what counts as law)? From what data do we identify what the law says?[71] How do we recognise legal rules, ideas, or norms? What is law?

There are two distinct ways of answering this question, the descriptive and the normative; and consequently two distinct ways of

[69] MacCormick N. and Weinberger O., *The Institutional Theory of Law*.

[70] MacCormick N., 'The Ethics of Legalism' 2 *Ratio Iuris* (1989) 184 at p. 191.

[71] Whilst this problem is particularly apparent and acute in PIL, no convincing reason has been given (to my knowledge) as to why municipal law theorising should focus exclusively on the (higher appeal) Courts, rather than, e.g. prosecutors, contract lawyers, or even policemen.

understanding law as an institutional fact. We can accept a fixed, natural, existence for law in institutional practice, (law – or at least legal system – as brute fact) and then judge theories by their correspondence to this. *Or*, we can accept that law is an ideal, and thus outside of institutional practice, an ideal which legitimates institutional practice, and therefore provides a point of critique for institutional practice (law as thought object).[72] Hart takes the former route, I am advocating the latter; MacCormick provides an ambivalent median, or perhaps is simply unwilling to take sides.

Nonetheless, MacCormick, has indicated another way of conceiving of law's "institutional existence". By taking legal counter-factuality seriously – as MacCormick does – we can (*contra* the Hartian in MacCormick) 'de-institutionalise' law (and thus also de-institutionalise the rule of recognition as law's empirical identifier) and focus on pedigree and form to provide a *duty* to recognise norms based on *law* (however defined) and *not* on *power* (however imposed) as an institutionalised form.

Despite being widely regarded as one of Hart's most acute critics,[73] Dworkin also maps neatly onto this debate. Dworkin's theory elides law and adjudication, claiming that legal philosophy is the "silent prologue" to adjudication:

> Jurisprudence is the general part of adjudication, silent prologue to any decision at law.[74]

Consequently, the role of legal philosophy is to identify this "silent prologue", through analysis of adjudication. In perceiving legal philosophy as the prologue to adjudication, Dworkin appears to suggest that we privilege the thought object, and our understanding of this determines our identification of legal rules (definition preceding description). In Dworkinian terms, focus on the law as such constitutes the "preinterpretative stage".

However, in reducing this prologue to silence, Dworkin then makes the opposite move, privileging the actual

[72] See Beckett J., "Countering Uncertainty and Ending Up/Down Arguments: *Prolegomena* to a Response to NAIL." 2005 EJIL 213

[73] See e.g. Hart, *supra* note 19; esp. the "Postscript"; and Dworkin R. *Taking Rights Seriously*.

[74] Dworkin, *supra* note 66.

institutional behaviour. In both cases, the thought object still exists, but in the former it speaks for itself while in the latter it can only be identified through an analysis of institutional behaviour, hence its "silence". "We may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given".[75] In other words, for all practical purposes, the law remains for Dworkin what it is for Hart, a matter of *social fact*; an object susceptible to empirical identification.

The patent disadvantage to the empirical approach is that it *does not work*. This is so on several levels. The project is impossible on its own terms, empiricism inexorably relies on categorisation and definition; denying this does not prevent it. Absent such techniques of classification, empiricism would degenerate into unintelligibility.[76] Consequently, a definition of legal system – the exercise of authoritative and socially central decision-making – must be 'smuggled in'. The law *can* then be derived from this definition; *but* the process becomes contingent rather than necessary.

Moreover, the 'chosen' definition *fails* to adequately reduce complexity. The category of decisions is too vast and too disparate to be unified under a functional rule of recognition. Instead, the process relies on further acts of reduction. The second stage – the distinction between winning and losing arguments – is not only absent in PIL, but inadequate in municipal law. As a result, it is the third and final process of reduction which is vital. However, this process is not theorised by British positivists, and the natural lawyers resolution is normatively objectionable. This is where the understanding of law as a thought object or ideal idea comes to the fore.

This perspective allows us to realise that the legal decisions which the empirical approach takes to be the raw data of legal theory, are in fact the products of legal theory. Moreover, the legal system is a composite of these products. However, the norms are not produced by reference to one dominant or orthodox theory, but are in fact a mixture of different, incompatible, and *competing* legal

[75] *Ibid* p. 66.

[76] MacIntyre A. 'Epistemological Crises, Dramatic Narrative and the Philosophy of Science' 60 *The Monist* (1977) 453, at pp. 462-3.

theories.[77] The absence of an orthodox theory means that each norm is chosen for its substantive appeal in the instant case. Yet, surely, the whole point of law is to move away from discretion of this type:

> It [internalised value conflict] compels the move to "discretion" which it was the very purpose to avoid by adopting the rule-format in the first place.[78]

As a result, the final stage of reduction must be more carefully theorised. What MacCormick's work on the institutional theory of law allows is a new (and better) understanding of this process. The law can be made coherent by adopting a single orthodox theory (for each legal system). The theory can be chosen for its formal appeal, its appeal as a general theory, not the desirability of the norms it produces in any instant case. The final stage of reduction (the only functioning stage in PIL, the only important stage in municipal law) can be structured and made determinate *only* by adopting such an orthodox theory.

The final point I must demonstrate is the preferabilty of a form of positivism to play the role of orthodox theory.

The Formal Purpose of PIL/CIL and its Ontology is *Not* The Same As The Substantive Purpose of the System and its Deontological Content:

Dyzenhaus is correct that law *as such* must be understood purposively.[79] Absent a purpose we have no way of justifying our choice of the phenomena we will observe under the name of law. Mere "empirical accuracy" cannot be a criteria of success if the theory itself can define the relevant empirical data against which the accuracy of description is to be evaluated.[80] This would leave positivism in danger of irrelevance, pursuing a strained analysis of its own stipulated (but unjustified) objects of observation. Only by engagement with purpose – with the reason for having law at all – can we justify the choice of phenomena to be observed, and justify unifying this observation under the name of law or legal system. Law must be defined to be observed, and purpose is required to bring determinacy and justification to the definition offered.

[77] Beckett, *supra*, notes 62 and 72.
[78] Koskenniemi, *supra*, note 43, p. 592.
[79] *Supra*, note 52.
[80] See note 71, *supra*.

Moreover, Dyzenhaus *may* also be correct that any coherent theory of adjudication must attribute an overall purpose to the legal system being analysed. That is, the application of law *also* presupposes that law have a purpose. Naturally, this is disputed by the hard positivists, for them judicial discretion takes the place of the overall purpose of a legal system.[81] This, as Dyzenhaus disparagingly notes, would leave legal theory with the task of merely describing the exercise of an unconstrained judicial discretion; rather than structuring or evaluating, or even predicting judicial application of the law. Thus any theory of adjudication seeking to constrain judges must posit an overall purpose for the legal system within which those judges operate. This is the concession soft positivists offer to the identification thesis, that the identification of (the content of) norms in moments of relative indeterminacy may be subject to moral criteria.

Thus the understanding of law as such must be purposive, *and* the identification of legal norms (at least in hard cases) requires a purposive understanding of the legal system. So, Dyzenhaus concludes, if the identification of law is a purposive practice and the definition of law is also a purposive practice, then the concession in the identification thesis must inexorably create a like concession in the separability thesis. This means that the separability thesis can no longer be maintained, and the moral nature of law must be conceded.

But this is simply not so. That both law (as such) and each legal system require recourse to their posited purpose to be fully understood does not in any way imply that each must share the same purpose. Law requires purpose at the ontological level, to identify the phenomena to be observed as law. A legal system requires purpose at the deontological level, to give determinate content to the norms already assumed to exist at the ontological level. The two operate quite independently of one another.

In other words, the positivist "claim that understandings of the point of law, which inform theories of adjudication, operate in a different conceptual space from theories of

[81] Gardner J. "Legal Positivism: 5 ½ Myths" 46 *American Journal of Jurisprudence* (2001) p. 199 at p. 201.

law"[82] the very claim derided by Dyzenhaus,[83] is in fact perfectly *correct*. What the law *is*, and what it is being deployed for in a particular setting *are* two different things. That we need a purpose to determine the content of some norms does not mean that this purpose also determines the form of law as such. The form of law as such may vary, but moreover and more importantly a single form for law (e.g. Fuller's definition, drawn from purpose, and encapsulated in the eight principles) can sustain a variety of different purposes to be pursued by different legal systems.

The fact that each legal system *may* require a substantive purpose to determine the content of (some of) its norms cannot lead to a requirement that these purposes each feed into (and moralise) the abstract purpose of law as such. That the identification thesis may rely on "understandings of the point of law", which constitute a substantive morality, does not entail that the separability thesis must give way to the same morality. Understandings of the coherence of the content of particular legal systems which inform theories of adjudication are deontological in effect. Understandings of the purpose of law which define the phenomena to be considered law are ontological in effect. Thus the two do, by definition, "operate in … different conceptual space[s]"

The purpose of "law" as such is very abstract, social-engineering of some form, or the delimitation and evaluation of society. But how this will be substantivised requires focus on a second (itself more substantive) purpose, the (political) purpose pursued through the legal order. Thus the purpose of law does not determine how the law should be substantivised. It does not posit (deep enough) presumptions about the nature of man or the good life, such as would be necessary to substantivise the purpose of law as such. Yet this is exactly what Dyzenhaus is suggesting purpose does. The key is the necessity for two purposes, one to ontologically define law[84] and another to deontologically substantivise it.

That is, although he rejects authority as law, Dyzenhaus (and other natural

[82] Dyzenhaus, *supra* note 52, at p. 709.
[83] *Ibid.*

[84] However, this purpose is also based on a series of assumptions about the nature of people, their amenability to regulation, and the 'parts' available from which the legal system in question can be constructed.

lawyers) continue to assume the authority *of* law, and the absolute necessity for a unitary understanding of the form (and so for them some of the content) of law, "good for all times and all places".

However, in Dyzenhaus' defence, this disembodied essence is common ground, it is law's identifying feature in observational language, it is legal common-sense. Hence the (pluralist) "politics of definition" is given prominence over a normativist "politics of decision". This (preferred focus) manifests itself awkwardly in PIL, as the authority of law is less apparent, therefore theorists struggle to redefine "law" (away from clear rules) to preserve its "essence" (enforcement) and its definitional (paradigmatic) centrality.

This is an orthodox assumption, but it cannot be defended solely on the grounds of that orthodoxy; nor can it be defended on the ground of empirical accuracy, as it has no data outside of itself against which it may be evaluated or validated. Instead, the assumption must be analysed purposively. What is the purpose of socially central law? At first glance, the answer is obvious: its purpose is to regulate human behaviour. However, it cannot achieve this by reference to rules, as Koskenniemi among others has shown. Socially central (definitionally authoritative) law is *necessarily indeterminate*, because this is the price for its political acceptability.

The "essence" imputed to law by common agreement is itself ungrounded, and that is why PIL theorising runs so frequently into trouble, or is dispersed as the fractured remnants of a discourse rendered fatally indeterminate by its own lack of theoretical cohesion. It is the singular point of (definitional) agreement which is itself inaccurate and misguided:

> This [the commitment to centrality] may require lowering the expectations of technical certainty and increasing sensitivity to the ways in which law gets spoken.[85]

This returns us to the central concern, the need to re-engage fully and openly, without prejudice or dogmatic definition (disembodied essence) with the purpose of PIL, and the role or function that PIL must perform – within an international society, however

[85] Koskenniemi, *supra* note 57, at p. 119.

defined – in order to fulfil this purpose. It is only once this has been achieved that one can show that (ideal) PIL is capable of neutral rule formation; legal norms are best understood as agreed manifestations of commonality. This provides a perspective from which *both* PIL itself (the substantive body of norms actually accepted or argued as PIL) *and* the actions of states vis-à-vis PIL can be consistently evaluated. As this ideal is also the *justification for* PIL (for the imposition of PIL as a coercive order) it carries a normative force within itself.

The purpose of PIL is to provide a baseline of *agreed* general standards for the consistent *legal* evaluation of conduct by all actors. This can be accomplished *only* within the positivist – value-neutral – system. Positivism is less *lingua franca* than *franca lingua*: not merely a language which all can speak, but a system which can speak for all. To deny this is to impose one's own moral code on the World at large; it is tantamount to the imperialist claim to *know* objective moral truth. And *that* is a denial of the very processes of abstraction and reduction through which (alone) thought is possible. That we see ourselves as 'good' is no guarantee that we are good. That our morality appears to work for us is no reason to impose it on others.

PIL *ought* to be about the discovery – or negotiation – of commonality, not the imposition of a unitary system of right passed off as universality. Only a positivist theory can meet this challenge.

CONCLUSION

Michel Foucault's work concerns the creation of the normal from the marginal,[86] and perhaps this perspective can provide an intelligible context for the arguments above. Inherent in Foucault's claim is, I think, an acceptance of Kierkegaard's point that "the exception … thinks the general with intense passion",[87] and its converse; that the paradigm case does not. The paradigm is *identified* by its banality, its regularity and commonness; it is hum-drum, and so, opposed to thinking. The paradigm case can *never* cause us to think about the paradigm itself; only the exception, or marginal case, can facilitate this.

[86] See, e.g. *Madness and Civilisation*, or *Discipline and Punish*.
[87] Quoted in Schmitt C. *Political Theology* p. 22.

The paradigm of legal theory is the institutional centrality of legitimate violence, the monopoly over legitimate violence which the municipal legal system claims, and by which the municipal legal system is identified. My claim is that this elision of law and the monopoly of institutional violence (the elision we call the Rule of Law[88]) is the product of human choice; and moreover, of a problematic human choice at that; the agreed baseline, the orthodox elision of law and centralised force is *wrong*. At the very least, this elision should be opened to critique, rather than transcendentally posited and shielded. Paradigmatic reasoning is necessarily blind to its own contingency, as "central cases" – which anchor reasoning – are defined by the presence of the paradigmatic features of which the paradigm is constructed, thus they can never expose the contingency of those features. The effect is to move these features beyond critique.

If we accept the baseline of institutionalised coercion then we say – with some variation of mediation, e.g. between Hart, Dworkin, and the American Realists – that law is what is enforced; that central social institutions *are* legal institutions.[89] But this would seem to entail, as the Realists accepted, that what is not enforced is not law. To take a recent example from international law, this would indicate that the absence of enforcement, of Security Council condemnation, and of an armed or coercive reaction, *proved* that the Anglo-American invasion of Iraq was *lawful*. Yet this answer seems problematic, at the very least, when put so bluntly, it seems too glib. Perhaps then the simple absence of coercion is not dispositive of the claim to illegality.

But, *if* this is so, *if* that nagging doubt remains, then what does that fact (the continued existence of the doubt) tell us about law, or about our own attitudes to law? It is at least possible that this doubt (or "anxiety" as Heidegger might have it) begins to expose the methodological

[88] There are two ways of understanding this elision, from a Hartian perspective, the important point is that law *rules*; the rule of law is a claim of legal sovereignty. Consequently, law is taken for granted in the sense that the expression of authority is law. From the opposite perspective, consider e.g. E. P. Thompson's claims about the rule of law (see *Whigs and Hunters*), it is 'rule' and *not* law which is taken for granted; law becomes the evaluative variable. The question refocuses entirely: is it rule by *law*, or rule by something else, something other than law?

[89] See Raz J, "Authority, Law, and Morality" in Raz J., *Ethics in the Public Domain* p. 236.

presumptions to light, to illuminate a hidden truth from the margin: we expect more from law than the imposition of order. I call this "more" the specifically legal. The specifically legal is that which the law has which other discourses and techniques do not; that which distinguishes, or *specifies*, the legal; that which makes it unique, and distinct from other concepts.

And it is in ignoring this more, in ignoring the specifically legal, that orthodox theories of legal positivism fail. But it is here, also, that the difference between the empirical and conceptual methodologies comes to light. The empirical methodology *had to be* wrong, whereas the conceptual methodology merely *is* wrong.

In other words, both sets of theories (the empirical as manifested in Raz, Hart, and possibly Gardner; and the conceptual as manifested in Austin and Kelsen) are wrong. Consequently, there is little point in analysing too closely what they have to say about international law as they have examined the topic back to front; anything these theories could have told us about international law is *already tainted* by the original error they transpose from municipal law. But only one methodology (Hart's) *had* to be wrong. Thus we can accept Kelsen's methodology – that there is a "static aspect" of law, which distinguishes it from other normative orders and social practices – but reject his theory that this "static aspect" should be the relation between norm and force. This is what allows, methodologically, the conceptual approach to facilitate examination of the specifically legal.

Things are bleak for empirical legal positivism. By understanding law as having a real existence, and being capable of direct observation, empirical legal positivism limits itself to focus on the ascription of power itself. The object (law) to which power must be ascribed, is perfectly shielded from the focus of empirical legal positivism, which is so in thrall to centralised power that it is capable of perceiving nothing else. For this reason, Hart was in fact correct to claim[90] that public international law was not a legal system; but this tells us more about the methodological weaknesses of the Hartian model than it does about international law, or its status *as law*. That Hart's definition of law is anchored paradigmatically in municipal law is one, forgivable, thing; that it, while

[90] Hart, *supra* note 19, chapter 10.

claiming to be a theory of law, overlooks even the *possibility* of the specifically legal is another matter altogether.