Negotiating the Jurisprudential Terrain: A Model Theoretic Approach to Legal Theory

Christopher Roederer[*]

Jurisprudence addresses the questions about law that an intelligent layperson of speculative bent—not a lawyer—might think particularly interesting. What is law? . . . Where does it come from? . . . Is law an autonomous discipline? . . . What is the purpose of law? . . . Is law a science, a humanity, or neither? . . . A practising lawyer or judge is apt to think questions of this sort at best irrelevant to what he does, at worst naïve, impractical, even childlike (how high is up?).

-RICHARD POSNER[1]

Conceptual claims, conceptual theories and conceptual questions are assertions or inquiries about labels. . . . Conceptual claims are claims that cannot be directly verified or rebutted by empirical observation. . . .

-BRIAN BIX[2]

Jurisprudence is a ragbag. Into it are cast all kinds of general speculations about the law.

-J.W. HARRIS[3]

---

1. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 1 (Harvard University Press 1990).

2. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 16, 18 (Sweet & Maxwell 1996).

3. J.W. HARRIS, LEGAL PHILOSOPHIES 1 (Butterworths 1980).

I. INTRODUCTION

This paper explores borrowing a meta-theoretical approach to theory from the natural and social sciences in order to provide a framework within which to situate and evaluate the various theories one encounters in the field of law and jurisprudence.[4] Within the standard jurisprudence textbook, chapters often correspond to schools or traditions. Within those schools, there is often a range of views or theoretical positions that are more or less compatible with each other. The chapters on either side are often so placed because those schools come earlier or later on some view of the history of ideas or because they are the schools or traditions that generate the most amount of, or most interesting types of, debates. Of course, there is often a good deal of overlap between these two ways of organizing a jurisprudence text. Within the given schools, it is often easier to see how the claims are competing than it is between the schools. But, even here, there are many cases in which the different theories do not clearly engage each other. For example, natural law materials often appear this way. In many cases, the various schools of thought, like their chapters, simply sit next to each other with no clear connection. Of course, in some cases, the theories are set off against each other in debates, or as rivals for the "true" concept of law. However, outside of the debate, it is often hard to see how or if they really relate to anything else in the field. Often it is the case that students of jurisprudence go from one school or theory to another with one of three responses: (1) this makes no sense to me; (2) this makes some sense, but what is the point or relevance; or (3) this makes sense and seems true, but so do many of the schools, theories, and theorists we have studied.

How do we make sense of this feeling that many of the theories we encounter seem true? Is it that we really do not understand them, or is it because we are dealing with them too superficially? Is there a sense in which many, if not most, of the theories in jurisprudence are true?[5] If so, how do we distinguish those cases in which more than one theory can be true or provide true answers to legal questions and those in which more than one theory cannot be true? Can one meaningfully and usefully create a theory or model of legal theory or jurisprudence that helps us answer these questions, or is jurisprudence

---

4. Please note that this paper does not attempt to provide an overarching standard for evaluating legal theory; rather it provides a framework and set of tools for evaluating legal theory.

5. It will be argued that this is generally the case; and moreover, that one of the varied reasons why so many different theories in law and jurisprudence seem true is because they are not competing with each other. This is not the result of a failure of some scientific project in law, but is the result of the vast domain that is covered by law and legal theory.

really just a ragbag or set of conceptual claims about labels? Is the search for something called "truth" in law a mistaken enterprise?

Let us examine the pull of some of these questions by looking at the famous hypothetical case of the "Speluncean Explorers" developed by Lon L. Fuller in 1949.[6] The hypothetical case involved a trapped group of cave explorers who killed and ate one of their group members in order to survive. The survivors were prosecuted for murder under a statute prescribing that: "Whoever shall willfully take the life of another shall be punished by death N. C. S. A. (n. s.) § 12-A."[7] A guilty verdict was rendered in the hypothetical court of first instance. Thus, the case came to Fuller's five-member appellate bench with the facts determined. Fuller's judges, each with a relatively clear theoretical approach to the law, then set out to determine whether the survivors were guilty of murder under the statute. On the one side of the court are judges holding mild[8] and strong[9] versions of plain meaning positivism, both of whom defer to the executive and to the legislature in their roles as executive pardoner and legislative lawmaker.[10] On the other side of the court are a natural law theorist and a realist-pragmatist who both, in different ways, look behind the text of the law to the context; the natural law theorist looking to enduring principles,[11] and the pragmatist looking to whatever is necessary for achieving the common sense result of an acquittal.[12] Then there is Justice Tatting who, while critical of the natural law approach, cannot bring himself to decide that the survivors are guilty.[13] He appears as a deer frozen in the headlights, stuck between what is right and what the "law" seems to require. He is not clearly convinced that "law" requires a guilty verdict, simply cannot decide, and thus withdraws under a cloud of indeterminate confusion.[14]

One might want to know which decision in this case was the best, or most true. Was Fuller's point in creating this equally divided court that the decisions were all equally true or that there simply is no truth to the matter? Is the truest position that of Justice Tatting? Is truth

---

6. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949), *reprinted in* 112 HARV. L. REV. 1851 (1999) (subsequent citations are to the reprint). I am not suggesting by this example that jurisprudence can be reduced to theories of adjudication.

7. *Id.* at 1853.

8. *See id.* at 1851–54 (judgment of Chief Justice Truepenny).

9. *See id.* at 1863–68 (judgment of Justice Keen).

10. These are reflected in the judgments of Chief Justice Truepenny, *Id.* at 1851–54, and Justice Keen, *Id.* at 1863–68.

11. *See id.* at 1854–59 (judgment of Justice Foster).

12. *See id.* at 1868–74 (judgment of Justice Handy).

13. *Id.* at 1859–63.

14. *Id.* at 1863, 1874.

merely relative to the given theory used?[15] Is this just for fun? Fuller does not say. Some 25 additional judgments were made on Fuller's hypothetical between 1949 and 1999.[16] It is hard to imagine that all of these judgments could be correct or true. Several of the 30 judgments are far-fetched and unpersuasive. Many, however, are persuasive and will seem true to the student who reads them. With this in mind, can it be that only one of these 30 judgments is true? One might hope or expect that the latter judgments will have improved on those written in 1949; however it is in no way clear that all, or even most, of the subsequent judgments are better, more persuasive, or truer.[17]

If law were like the "hard" sciences of chemistry or physics, one might expect that our theories over time would, with perhaps some exceptions, improve. As time goes by, we expect our theories to improve our knowledge, improving our ability to explain the world and predict what will happen within the given aspect of the world that a theory covers. Rather than a simple proliferation of theories, we expect that theories with more truth content surpass and replace

---

15. *Compare* the view of Anthony D'Amato:

> My most important point is that we do these things not because we believe that any theory of the law explains the law, but rather because we understand that judges (from their internal point of view) believe that their own theories explain the law. To be persuasive in our advocacy, we must first identify the theory that the judge in our case believes in (to the extent we can from prior opinions) and then portray the facts of our case within that theory. We do not have to believe that the theory will work at all times and all places; no theory can "work" in that sense. All we have to believe is that the judge believes that the theory will work in the instant case. In order to be effective advocates, we need to persuade the judge by working within her theory. . . . The practice of law is not about advocating the best explanatory theories (there is no such thing); it is about persuading others whose theories are, to quote Stanley Fish once more, "self-evident."

Anthony D'Amato, *The Effect of Legal Theories on Judicial Decisions*, 74 CHI.-KENT L. REV. 517, 527 (1999). Is this a satisfactory account of law and legal theory? Is it even a satisfactory account of legal practice? Although only a hypothetical, the consequence of a guilty verdict in this case would result in a mandatory death sentence.

16. Fuller's hypothetical continues to draw theoretical interest. To my knowledge, there have been 25 additional opinions published, and there may be more to come. Anthony D'Amato added three opinions in *The Speluncean Explorers—Further Proceedings*, 32 STAN. L. REV. 467 (1980). Seven opinions were added by Naomi R. Cahn et al., *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754 (1993). Peter Suber added nine opinions. PETER SUBER, THE CASE OF THE SPELUNCEAN EXPLORERS: NINE NEW OPINIONS (1998). Finally, six opinions were added in 1999 by an all-star cast of judges, including Alex Kozinski, Cass Sunstein, Robin West, Justice Easterbrook, Alan Dershowitz, and Paul Butler. Symposium, *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834 (1999). Represented throughout these texts are natural law theorists, consequentialists, plain meaning positivists or textualists, purposivists, historical contextualists, realists, pragmatists, CLS scholars, feminists, critical race theorists, process theorists, and even minimalists (as well as various permutations of the above).

17. An evaluation of these judgments and the truth content of the theories used in making them is beyond the scope of the present paper.

earlier theories.   This phenomenon is not completely uncommon within some schools of jurisprudence. For instance, in moving from a view of law as a set of commands to a view of law as a set of primary and secondary rules, the history of legal positivist thought has perhaps developed in this way.[18] However, as will be demonstrated below, this is not always the case. Further, the multiplication of theories does not necessarily mean a lack of development, confusion, or a greater degree of indeterminacy. Significant gains in knowledge and understanding may also be taking place with the multiplication of theoretical approaches to the law. Whether one is talking of the natural sciences, the social sciences, or the law, it is important to distinguish those cases and senses in which multiple theories may be true, and those in which the theories conflict such that only one can be true.[19]

In everyday parlance, truth is immensely important to us. Most of us are raised to think that there is something to telling the truth, to speaking the truth, and to not telling lies. As we all know, if there is no truth there can be no lie. Jews, Christians and Muslims alike are raised with the injunction not to bear false witness against one's neighbor and I suspect most every other creed has some analogous injunction. Over the last 20 years or so, there has been a proliferation of "truth commissions" that have documented the gross violations of the "law" of human rights. It is probably safe to say that every legal system in the world punishes certain untruths in one way or another and every system relies on the notion. One of the goals of a modern legal system is to establish the truth of "facts" and to never convict unless the "facts" are certain. But our bedrock faith in truths that are self evident is often less secure when we talk about legal statements or propositions of "law" as opposed to statements regarding what we commonly refer to as "the facts." Nonetheless, even here there is a strong urge or need to think of there being answers to our legal

---

18. *See* H.L.A. HART, THE CONCEPT OF LAW 77–96 (Oxford University Press 1972) (1961). It is generally accepted that H.L.A. Hart's view of law as a set of primary and secondary rules has surpassed and replaced positivist views of law as a set of commands. The command theory of law was held by such non-positivists as Grotius, Coke and Hobbes. JM KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 236–38 (1992). The command theory is most often associated with John Austin. *See* 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE, LECTURE I 86–103 (Robert Campbell ed., Glashütten im Taunus, 1972) (1885).

19. I am not arguing that the alternative to truth is falsity. One may be a skeptic and think that it is hopeless to talk of truth or falsity, or one may hold that in some cases there is good reason to think that the answer is neither true nor false, but indeterminate. The answer may be that there are not true or false answers to some legal questions. *See* Alan R. Madry, *Legal Indeterminacy and the Bivalence of Legal Truth*, 82 MARQ. L. REV. 581 (1999). In this piece Madry uses Aristotle's and John Searle's notion of "institutional facts" (facts that exist by virtue of convention or agreement such as agreeing that the green piece of paper in your wallet is money) to argue for the tri-valence of law. *Id.*

questions that are true or false. We want there to be a distinction between facts and fictions when it comes to statements about the law. For instance, we want to be able to say, in no uncertain terms, that there is something called genocide, that it has occurred, and that it is both morally wrong and illegal. We want there to be no question about these "facts." The philosophical literature on truth is much more complex then our naïve realist views about lying and truth telling. When one puts on the philosopher's cap, the search for what makes particular statements about the world true or false (or neither) is more complicated. If it is simple, it only becomes so by way of a difficult path (like the ballet performer or the gymnast who appears to move with ease). We will not travel a great deal of that path but we will look to see where that path has taken philosophers over the last 50 years or so.

In the pages that follow, I will propose a theory or model designed to help us evaluate in what sense and under what conditions one or more different theories may be true. In this respect, there will be a strong component of evaluating how well a given theory fits the legal world as we know it, and how well it helps us work within the law as it is today. This, however, is only part of the story. Jurisprudence is just as valuable for its ability to evaluate the law as it "is" in terms of how we think the law ought to be—in terms of whether it meets the standards provided by jurisprudential theory. Legal theory can be just as important for showing that there are other possible models of the legal world. These may be models or theories that fit other societies and legal traditions or, conversely, they may be models that do not fit any existing system. They may be models of other possible legal worlds.[20] They show us that our legal world, or aspects thereof, could be ordered differently and perhaps in a better way.

Throughout the paper I will refer to evaluations of fit and value as two distinct enterprises. This may lead one to think that I hold that there is a strong fact-value distinction that should be maintained. I hold that there is a weak, though important, distinction. On one level, establishing truth claims with regards to facts and to values are not different enterprises because, ultimately, the same evaluative approach establishes truth claims in both domains. As will be set out below, truth claims are established on the basis of coherence with a set of beliefs that are warranted given suitable or adequate conditions for knowledge. The conditions for obtaining knowledge include such

---

20. Note that Fuller's hypothetical case was set in the Supreme Court of Newgarth in the year 4300.

things as observation, experimentation, and open/critical analysis. Nonetheless, it does not follow that fit and value should be reduced to a one-and-the-same theory. Although our methods for evaluating our web of beliefs in the two domains may be the same on this general level, our sets, or subsets, of this web are different in these two domains. Perhaps there are some people who think that what "is" is truly what "ought" to be, or even that what "ought" to be "is." However, for the most part, we view such thoughts as severely abnormal. This is because, generally, such views do not cohere with our warranted distinction between the two domains of beliefs, for we neither live in the fairy tale best of all possible worlds, ala Leibniz,[21] nor a nightmare, ala Voltaire.[22]

After addressing a preliminary objection to this approach, the substantial treatment of the subject begins in section II with a brief look at the philosophical positions on truth and the extent to which views on truth more generally or metaphysically impact the search for "truth in law." Although the search for something worthy of the claim "true" for a proposition of law is consistent with a number of views on the ultimate status of truth, I will adopt a specific view of truth that I think satisfies both the criticisms against strong notions of truth (namely strong correspondence theories) and yet is still meaningful enough to be worthy of the title. After doing so, I will provide a brief explanation of the "model theoretic approach" to theory.

In section III, I will look at how the approach works in the natural sciences and will draw out some important theoretical tools for evaluating any given theory or model. After a brief defense of the virtues of this approach in the natural sciences, section IV will explore the relevance of this approach to the social sciences and then, in section V, to the field of law and legal theory.

Section V has three main subparts. In subpart A, I will defend this meta-theoretic approach against an approach by Brian Bix that tends to reduce legal theory to conceptual analysis. I will show that Bix's framework fits into the framework of the model theoretic approach. Subpart B will further illustrate the usefulness of the approach by applying it, albeit superficially, to a range of schools of legal theory. This leads into subpart C, which contrasts the meta-theoretic approach with the approach of Ronald Dworkin, who uses

---

21. *See* G.W. LEIBNIZ, DISCOURSE ON METAPHYSICS (R.N.D. Martin & Stuart Brown eds., Manchester University Press, 1988) (1686) (arguing that the world we live in is the best of all possible worlds).

22. *See* VOLTAIRE, CANDIDE (Richard Aldinton trans., Dodd, Mead and Company 1928).

similar language to describe his theory of adjudication. Finally, in section VI, I will turn to applied jurisprudence in the area of constitutional theory to show how the approach helps us understand and cope with the multiplicity of models that operate within the law, both in the U.S. and in contemporary South Africa.

This approach assumes that there is a pre-interpretive world or a world outside of our theories or models. It does not require, however, that we have direct access to that world. It is compatible with a view that we always come to that world from within a model, a framework, or a theory, with interpretive biases or prejudices. It does not, however, follow that we cannot gain perspective on the various models, or that we are prisoners to a given framework of understanding. It is an approach that is meant to capture the essential features of scientific practice and to illuminate the relation between theories and the parts of the world that they are meant to capture. This meta-theoretic approach can be viewed as a model of how theory works and thus can be evaluated by how well it fits, explains, and/or illuminates our practice of forming and using theory.

It may be argued that such a meta-theory is not really applicable to the field of law. Legal theory is sometimes split into the philosophy of law and the sociology of law. The former is generally more conceptual, and often about gaining clarity about the concepts we use. For example, what we mean by law, or justice, or a right. This often turns into a normative or prescriptive theory about what one ought to do. The latter, sociology of law, is more descriptive or empirical, and generally concerned with explaining, predicting, and testing theories about actual legal institutions and practice and the world that we experience through our senses. Theory that explains the behavior and practices of judges, lawyers, and citizens is one example. However, even here, few sociologists of law are content with simply describing legal institutions and practices.[23]

The case for the relevance of the model-theoretic approach is relatively clear and straight-forward in the case of some sociology of law, but less so for some in the case (of at least some) philosophy of law. Most legal theory does not come so neatly packaged, but combines conceptual analysis, normative analysis, and empirical claims (even if not actual empirical research).[24] This is so in the case

---

23. Realists like Karl Llewellyn advocate the temporary separation of what law does for people from what it ought to do. *See* Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). *See, e.g.*, the work of scholars collected in the LAW AND SOCIETY REVIEW. *See also* David. M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1 (1990).

24. *See* discussion *infra* Part V-A.

of natural law and in interpretative, economic, positivist, realist, and critical approaches. One of the perennial questions running through all of these approaches is the relation between what "is" and what "ought to be" when it comes to "the law."

This perennial question is a central feature of legal theory, partially because, for many, it is a central feature of the day-to-day phenomena we term "law." On at least one view, this feature of our practice is not the result of confusing what is the case with what we think ought to be the case (in other words, confusing reality with fantasy or fact with fiction); rather, for some, the "fact" of "law," properly understood, cannot be completely separated from the "value" of law. There is nothing fanciful or radical in this proposition. The question of how and where to separate "law" from morality or other values is not just a question for philosophers or other interested lay people; rather, it is a question explicitly or implicitly asked and answered by legal practitioners and judges every day.[25] The point of this paper is not to take sides in this debate, but to point out that one can accommodate a range of views on that debate from within the model theoretic approach.

While it often appears that the various schools of thought and the models that they employ are in conflict with one another, in many cases the conflict or competition either is based on 1) a failure to carefully understand or to delimit the scope of the claim made by the relevant theorist or model (the theoretical hypothesis, to be further explained in section III-A below) or, 2) such things as academic reputation rather than actual logical incompatibility. In other words, many of the theoretical positions put forth within jurisprudence are in fact compatible and, in many cases, complementary when it comes to

---

25. While this approach is appropriate to understanding legal theory generally, its most attractive features are accentuated in the context of states or societies that are in transition. The questions of what the law "is" and what it "ought" to be take center stage in societies that are trying to make the transition from authoritarian and unjust regimes, to more liberal and just societies. Basic and fundamental questions must be asked during this transition period. How are we to understand the law, and the law's role in the process of creating the more just state and society? In every case it is clear that what is most desperately needed is the opportunity to change from that which had dominated in the recent past, into something better. While it is relatively clear what the state and society is changing from, it is often less clear what it is changing into. Can it be maintained that the law simply "is" whatever comes out of the process of transition? Is law merely the repository of our moral and political development? Is law that piece of metal that gets created by the embers of social and political changes? Or is not law, and the practice of law, part and parcel of the change that is taking place? Is it not bound up in the transition? Does it not play an important role in establishing and solidifying the transition? Through legal practice, the laws we make, interpret, apply, challenge, limit, and expand, create and recreate this repository. Although we tend to only address these issues in times of transition, they are just as important in times of relative stability. Therefore, the question of what the law "is" and what it "ought" to be, should become the background of our social practice.

understanding the "truth" of law. Our venture through the natural and social sciences will help us see more clearly exactly why this is the case.

II. TRUTH, DO WE REALLY NEED IT OR DOES THE CONCEPT OF VALIDITY SUFFICE?

As Benjamin Zipurski notes, realists, feminists, critical legal scholars, and even positivists have challenged truth-seeking in law at some level or another, at least with regard to certain parts of legal discourse.[26] For some it makes no sense to talk about truth in law at all, while for others, including a number of positivists and realists, it makes sense to talk about truth-seeking if looking to practices or behavior but not with regards to values or principles such as justice or fairness. In other words, we may be happy talking about truth[27] when it comes to propositions or statements about those things we can perceive with our senses, but not when it comes to propositions about non-tangible things like justice, morality, or law. For at least some, we cannot prove these latter things to be true or false because our statements about them do not correspond to anything directly observable in the world. This accounts for the familiar positivist reduction of law to those things that can be empirically tested or falsified, and that which follows logically from empirically testable truths. On this view, for a statement to be true, it must correspond to the empirical world or be logically entailed by statements that do.

---

26. Benjamin C. Zipursky, *Legal Coherentism*, 50 SMU L. REV. 1679, 1717 (1997).

27. *See* Ken Kress, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, 95 Mich. L. Rev. 1871, 1900–03 (1997) (reviewing DENNIS PATTERSON, LAW AND TRUTH (Oxford University Press 1996)). In this piece Kress summarizes various truth theories as such:

> [T]he correspondence theory of truth maintains that a proposition is true if and only if it corresponds to the facts. If a proposition fails to correspond to the facts, the correspondence theory will withhold the honorific "true" and deem the proposition "false." The coherence theory of truth holds that a proposition is true if and only if it coheres with other propositions which are accepted, or otherwise suitably determined. The pragmatic theory denominates a proposition true if and only if it is useful to believe it. Warranted-assertibility theories call a proposition true when its assertion is justified. Correspondence, coherence, pragmatic, and warranted-assertibility theories provide substantive accounts of truth, in contrast to deflationism's nonsubstantive account. Although they disagree as to which substantive property or relation constitutes truth, they agree—in opposition to deflationism—that truth is a substantive property. . . . The disquotational thesis, which is frequently held as part of a robust deflationism, comes in two main versions. The strong version asserts that "' p' is true" means the same thing as "p." The weak version claims only that they are materially equivalent: "p" is true if and only if p. Disquotationalism further explains why deflationist accounts of truth are nonsubstantive. According to disquotationalism, asserting "'p' is true" adds no content beyond that already expressed by asserting "p."

Id. at 1877 (citations omitted).

This view of truth has largely been discredited over the last 50 years, even in the case of the natural sciences where such a theory is most at home.[28] In what Zipursky calls the "periphery" of the social sciences and law, this demise has led some to take a somewhat radical view of truth called "disquotationalism" or "deflationsim." This view contends that if our statements about what is true or false in law or morality do not refer or correspond to any facts, then maybe we shouldn't talk about truth at all. Or, perhaps we should acknowledge that when we add the predicate "true" to our statement (i.e., "it is true that killing innocent people is wrong", or "it is true that a premeditated killing is illegal") we are not actually adding anything of substance.

The first option is not necessarily as debilitating as one might think. Giving up on talk about truth would not necessarily render the law an indeterminate free for all. As it is, we do not give very many true-false exams in law school, nor do we spend a great deal of time trying to figure out what statements of the law or legal arguments result in true or false answers. In fact, we have another concept that generally does all the work we think needs to be done when it comes to legal arguments. Many people avoid talk of truth and instead use one or another conception about what it means for a legal proposition to be valid. This concept of validity is also reflected in the jurisprudence literature.[29] For example, one might hold that a legal proposition is valid if: (1) it follows from settled rules applied to given facts as established by the court or a jury and those rules are identified as legal rules by a rule of recognition that is accepted by officials in the given system; or (2) a judge decides it is valid; or (3) it corresponds with the

---

28. The following works are classically associated with the demise of the correspondence theory of truth (or at least the demise of the robust version). *See, e.g.,* LUDWIG WITTGENSTEIN, ON CERTAINTY (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., Harper & Row 1972) (1969); LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS (Harper & Brothers 2d ed. 1965) (1958); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., Macmillan 11th ed. 1965) (1945); WILLARD VAN ORMAN QUINE, WORD AND OBJECT (Leo L. Beranek et al. eds., M.I.T. Press 1960); SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANUAGE (Harvard University Press 1982). *See also,* DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION (1983); Alfred Tarski & R. Vaught, *Arithmetical Extensions of relational systems, in* COMPOSITIO MATHEMATICA 13, 81–102 (1956); Alfred Tarski, *The Concept of Truth in the Languages of the Deductive Sciences, in* LOGIC, SEMANTICS, METAMATHEMATICS, PAPERS FROM 1923 TO 1938, at 152–278 (J.H. Woodger trans., John Corcoran ed., Hackett 1983) (1956); Alfred Tarski, *The Semantic Conception of Truth,* 4 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 3, 341 (1944). *See also,* Zipursky, *supra* note 26; DENNIS PATTERSON, TRUTH AND LAW (Oxford University Press 1996), for a very clear and succinct rendition of the demise of this view of truth.

29. H.L.A. Hart generally uses the term valid when discussing legal rules. *See generally* HART, *supra* note 18.

forms or modalities of legal argument that lawyers typically use within the relevant jurisdiction. One can talk about validity by saying that a legal proposition is valid if it follows from certain accepted or given premises or a theory or a model. Under all the different models used, one can talk of valid statements about the law. One can be agnostic about whether or not the statement or proposition is true, or one can choose to talk about validity because she or he thinks that to talk of truth is empty or adds nothing to the statement beyond that it is. valid.

This is a view shared, if not exalted, by those who think that if there is anything to the notion of truth, it is theory dependent, and there is no way to show one theory to be better or to provide more true statements than any other. If this is so, then to add the predicate "true" to the statement is rhetorical in the crude sense of attempting to get more for the statement than what the statement gives alone. This is one rather strong version of the "deflationist" or "disquotational" notion of truth that, put crudely, contends that truth is just hot air, an exclamative almost equivalent to "!".

A somewhat less skeptical view may be the pragmatist view, although there is some disagreement over what the pragmatist view of truth is.[30] The pragmatist view of truth, or at least one version of it, would be content using the predicate "true" if the statement to which it belongs is useful or handy. A more principled pragmatic theory of truth would also require some level of coherence requiring that for a statement to be true, it must cohere with other statements or beliefs that we hold to be true. Thus, truth is not reduced to simply anything you want to assert at any time, regardless if they are useful; rather, assertions must be consistent with other assertions you would make. This is consistent with truth being relativist in a theory-dependant way (i.e., relative to the theory that determines the coherent set of

---

30. *See* Hilary Putnam, *Replies*, 1 LEGAL THEORY 69, 73–74 (1995) (arguing that the disquotationist view, as motivated by Dewey (the most famous American Pragmatist) and also Wittgenstein in his later writings, entails skepticism of the strong deflationist sort). Even the reduction of truth to "usefulness" seems too reductionist or too strongly deflationary for Putnam's view.   *See also* Richard Rorty, *Does Academic Freedom Have Philosophical Presuppositions?* in THE FUTURE OF ACADEMIC FREEDOM 21 (L. Menand ed., The University of Chicago Press 1996) (maintaining that in both the natural and social sciences, claims about reality are based on nothing more than what is handy or useful). Rorty writes:

> Given that it pays to talk about mountains, as it certainly does, one of the obvious truths about mountains is that they were here before we talked about them. If you do not believe that, you probably do not know how to play the usual language-games that employ the word "mountain." But the utility of those language-games has nothing to do with the question of whether Reality as It Is In Itself, apart from the way it is handy for human beings to describe it, has mountains in it.

Id. at 30.

beliefs) but not radically relativistic to anything you want to say at any time.

These theory dependant notions of truth, strong deflationism and even the "pragmatic" coherentist version of truth, are unsatisfying for those who want truth to have some kind of meaning on its own. Those who use the term generally mean to imply more than their endorsement of the proposition, and generally mean to imply more than that it is useful to hold the view. These views seem to reduce truth to mere opinion, coherent opinion, or coherent opinion backed by an instrumental justification. As unsatisfying as this may be, it may be all that we can legitimately get from the concept. Anything more might amounts to an illegitimate rhetorical advantage.

From the point of view of the legal profession, a more substantial notion of truth might prove very unsavory because it may show us that lawyers are often in the practice of lying. On the other hand, the deflationist notion of truth or theory dependant notion of truth is both useful and congenial to the profession because, on this view, it is much easier to be seen as telling the truth and much harder to be categorized as a liar. To illustrate, if all we mean by truth is that we are asserting or endorsing the statement, then lawyers can happily go about defending any client who is willing to pay and use any legal theory, argument, or tactic that is applicable.[31] They can be content that their propositions about what the law is are warranted because they are useful for the purpose of winning the case. They will be able to satisfy requirements of coherence because their propositions will cohere with a theory of the case and will be valid arguments in light of that theory.[32] Opposing attorneys will also put forth more or less coherent arguments based on their theory of the case (and one can always argue in the alternative) and we can all go happily about our business. Lawyers are not liars on these accounts because there really isn't much to the truth anyway and we can all be satisfied that we are pursuing some form of truth and justice—the truth and justice for our client or on the best reconstructed version of the clients case under one or more coherent theories of the law. We choose our legal theory, not based on some grand notion of its truth content, but because it is a coherent useful theory that will help us win a case. A more substantive theory

---

31. *See, e.g.,* James W. McElhaney, *Make 'Em Laugh,'* ABA JOURNAL, PRACTICE STRATEGIES: LITIGATION, October 2002, at 52–53 (arguing that when used judiciously "humor can throw off the other side's case enough to help yours.").

32. It is not inherently obvious what it means to satisfy the coherence requirement as there is a broad range of possibilities. A relaxed version may require nothing more than coherence with a given theory or model. On the other hand, a stricter version might require coherence with an entire set of beliefs or with a subset of beliefs that we believe we are warranted in holding.

of the truth may lead to the conclusion that, at least a great deal of the time, lawyers are highly paid and highly skilled liars and that law professors make their living training them.[33]

As unsavory as this may sound, I do think that a more substantial version of truth is warranted and, even if we are not teaching students and training new associates to willfully lie, we are often guilty of engendering a reckless disregard for the truth. I think we can squeeze a bit more substance out of the notion of truth than the nihilist, skeptic, or even the pragmatic coherentist. Doing so is not only useful in a general way of helping us achieve what we want across the board,[34] but also because it helps us parse out fact from fiction, truth from falsities, and that which is the law and that which is not. It gives us more tools for evaluating propositions of law and sheds more light on what we are doing. We can have a stronger notion of truth without that notion amounting to an unfair rhetorical advantage. I think that this slightly more robust notion of truth better coheres with what we mean and what we expect to get when someone puts forth the claim to truth. We want more than an assertion, more than a coherent theory, and more than a coherent useful theory. We want an answer to the question "why is such and such a statement true?" that goes beyond the answers given above. We want our claims of truth to be warranted, based on not only on coherence, but also in light of a web of beliefs that we have good reason to hold.

How do we know if our beliefs are warranted? My proposed view of "warranted assertability" borrows almost completely from Hilary Putnam and his reading of John Dewey.[35] If one turns to Dewey's pragmatism, one will find a view of truth that is more substantial and rich than the term "useful" implies. Ralph Sleeper puts the point nicely when he writes:

> Objects of knowledge, he [Dewey] wants to show, may be instrumental to satisfaction, but their warrant does not consist in

---

33. *See* Arthur I. Applbaum, *Are Lawyers Liars? The Argument for Redescription*, 4 LEGAL THEORY 63 (1998); Arthur I. Applbaum, *Professional Detachment: The Executioner of Paris*, 109 HARV. L. REV. 458, 459 (1995). Sanford Levinson describes one of the fundamental norms of legal practice as tending towards nihilism because lawyers are expected to put forward the best arguments possible, no matter what side she or he is on, regardless of whether she or he believes what she or he is arguing. *See* Sanford Levinson, *What do Lawyers Know (And What Do They Do With Their Knowledge)? Comments on Schauer and Moore*, 58 S. CAL. L. REV. 441, 458 (1985).

34. This concept may not be useful for lawyers, but it is potentially useful for judges.

35. Hilary Putnam, *Are Moral and Legal Values Made or Discovered?*, 1 LEGAL THEORY 5 (1995). For my own views on Dewey, *see* Christopher J. Roederer, *Ethics and Meaningful Political Action in the Modern/Postmodern Age: A Comparative Analysis of John Dewey and Max Weber*, 19 SOUTH AFRICAN JOURNAL OF PHILOSOPHY no. 2, 11 (2000) (on file with Seattle University Law Review).

that instrumentality. Dewey takes great pains to demonstrate that "warranted assertions" are the reliable means of obtaining desired results, that they function in controlled activity to resolve problematical situations and produce valued consequence.[36]

For Putnam, as for Dewey, we come to be able to talk about values objectively, not because we have a special sense organ that would satisfy the empiricist, but because we have the ability to subject our values to "intelligent reflection" or criticism.[37] Putnam elaborates on how critical inquiry works with three sets of propositions:

(1)   We come to an inquiry with a whole stock of assumed or unquestioned valuations and descriptions (value judgments and factual beliefs, i.e., a web of beliefs).[38]

(2)   We don't have and we don't require a single criterion for judging warranted assertability.[39] What we have in philosophy is "the authority of intelligence, of criticism of these common and natural goods."[40]

(3)   What holds good for inquiry in general holds good for value inquiry in particular.[41]

This is what Putnam calls the "democratization of inquiry,"[42] which obeys the principles of what Habermasians call "discourse ethics;" namely, it is inquiry that does not:

block the paths of inquiry by preventing the raising of questions and objections, or obstructing the formulation of hypotheses and criticism of the hypotheses of others. At its best, it avoids relations of hierarchy and dependence; it insists upon experimentation where possible, and observation and close analysis of observation where experiment is not possible. By appeal to these and kindred standards, we can often tell that views are irresponsibly defended in ethics as well as in science.[43]

---

36. RALPH W. SLEEPER, THE NECESSITY OF PRAGMATISM: JOHN DEWEY'S CONCEPTION OF PHILOSOPHY 141 (University of Illinois 2001) (1986). *See also* Putnam, *supra* note 35, at 9–10 *citing* SLEEPER.

37. Putnam, *supra* note 35, at 13 *(following* JOHN DEWEY, LOGIC: THE THEORY OF INQUIRY (Henry Holt & Company 1938)).

38. *Id.* at 14.

39. *Id.*

40. *Id. citing* JOHN DEWEY, EXPERIENCE AND NATURE 407, 408 (1926).

41. *Id.*

42. *Id.*

43. *Id.* at 14–15. Note that Dewey holds a similar position, which is captured in his conception of local open democratic communities. *See* JOHN DEWEY, *Individualism, Old and*

While it may be true that we are searching for a foundation for truth, at least to the extent that we are not satisfied with completely unfounded assertions as to truth, there is nothing mysterious or metaphysical about the foundation that is being put forward here. According to Putnam, such foundations are mysterious only if one sees the options for truth being either that one provide a substance to "truth" (in the form of some kind of metaphysical property that makes it such that when we use term "true" that substance somehow makes it, or causes it to be "true") or there simply is nothing that one is adding with the term besides perhaps the endorsement of the statement to which the term belongs.[44] Putnam originally accepted this dichotomy and put forth the substantive view of "warranted assertability under good enough epistemic conditions" as the substantive property for the predicate true;[45] "epistemic conditions" meaning the conditions for gaining knowledge. This is a moderate form of truth that does not require that one say that the predicate "true" is only warranted when the statement corresponds to some brute fact-like property. He no longer thinks that warranted assertability requires talk about metaphysical properties or substances.[46]

Putnam, in keeping with developments of analytic philosophy over the last 50 years, does not think the correspondence conception of truth is intelligible.[47] His is a coherence of truth in which what is warranted is based on the statement or proposition cohering with other accepted propositions that have been suitably determined by good enough epistemic conditions.[48] This allows one to be disquotational or deflationsit in the sense of denying that there are any "funny properties" that make a statement true (i.e., there is no metaphysical thing that does the job) without reducing such statements to

---

New, in 5 JOHN DEWEY: THE LATER WORKS 115–116 (J. Boydston ed., Southern Illinois University Press 1984). For Dewey, the scientific attitude is not only experimental, but also communicative. *Id.* Accordingly, every new idea and theory should be submitted to the community for confirmation and test. *Id.* Mobility and access to information are envisioned as allowing for the influx of new ideas and meanings from which the community may draw. JOHN DEWEY, *The Public and its Problems, in* 2 JOHN DEWEY: THE LATER WORKS 235, 370 (J. Boydston ed., Southern Illinois University Press 1984). Dewey states, if such community can be established, "it will manifest a fullness, variety and freedom of possession and enjoyment of meaning and goods unknown in the contiguous associations of the past. For it will be alive and flexible as well as stable, responsive to the complex worldwide scene in which it is enmeshed." *Id.*

44. Putnam, *supra* note 30, at 73–74.
45. *Id.* at 73.
46. *Id.*
47. *Id.*
48. *Id.* at 74.

something radically relative (i.e., it is no more than your personal opinion or belief that the statement is true).[49] Putnam attributes the latter view to Richard Rorty and argues that it is a distorted view of what follows from the later works of Wittgenstein.[50] What is true is also not simply a matter of what is useful, nor simply what coheres, but is a matter of what coheres with beliefs that we have good reason to hold after they have been subjected to scrutiny and criticism.

While I generally hold some form of a naïve realist view, particularly with regard to the physical world, the view that there is something out there beyond our frameworks or models that we use does not entail anything like the strong correspondence theory of truth. It is not clear that we can have access to "the facts" in a "brute fact" way, be it in the natural sciences, social sciences, or law. It is likely more correct to say that any given proposition is true or false in light of the way it coheres with a whole web of beliefs that we believe we are warranted in holding about the world. Thus, when I use the terms "correspond" or "fit," it is more accurate to read these terms as corresponding or fitting with that web of beliefs, rather than corresponding to any discrete fact, set of facts, or substances in the world.

The model theoretic view put forth here is compatible with all of the above sets of views on truth. In other words, one could disagree with my view of truth while still seeing the model theoretic view as having value. Models can be viewed as modeling or corresponding to brute facts, as cohering with our accepted web of beliefs, as providing warranted assertability, or as simply being useful. It is important to note that "truth" in law can be pursued under a number of different theories of "truth." As noted by Benjamin Zipursky, many theoretical approaches to law are compatible with multiple theories of truth.[51] While jurisprudence theorists may more or less explicitly rely on different theories of truth, it is not generally the case that legal theorists put forward a theory of truth.[52]

As Zipursky states:

They are all views of what is being said when one asserts some proposition of law, of what one is accepting when one accepts or

---

49. *Id.*

50. *Id.*

51. Zipursky, *supra* note 26, at 1694.

52. Patterson, *supra* note 27, at 1583. *But see* Jules Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33, 38 n.5 (Cambridge University Press 1995) (putting forth that no jurisprudence has, to his knowledge, put forth a coherence theory of truth for law). *See also* Putnam, *supra* note 35 (putting forward a pragmatist "warranted assertability" coherence theory of truth in law and morals).

believes a proposition of law, and of what it is for things to be as the proposition of law says they are. These are views purporting to tell us what legal propositions are, at bottom, about. They are not really theories of truth; they are theories of what law is. They are all, in fact, entirely compatible with many different theories of the predicate "true" and of truth more generally. A positivist can just as easily be a coherentist as a correspondence theorist or a redundancy theorist. The same goes for instrumentalism and formalism. The key lies not in what is said about the nature of truth or the predicate "true," but in what is said about law.[53]

Nonetheless, I do think the slightly more robust version of truth set forth above provides a better set of criteria for evaluating the claims that theorists make about the law. With this conception of truth in mind, we can now turn to the model theoretic approach to theory to see in what ways multiple models or theories are either competing for truth or may be said to be compatible or even complementary with each other in helping us arrive at the truth.

III. A MODEL THEORETIC VIEW FROM THE PHILOSOPHY OF SCIENCE

A model theoretic view[54] of science is one that originally comes from formal semantics and mathematical models. It is a view of scientific theory developed over the last 50 years or so by philosophers of science.[55] It is generally accepted that the core role of natural scientific theory is to describe, explain, and predict; however, scientific theories do not deal with actual phenomena in all of their complexity. In fact, according to the model theoretic view, scientific theories do

---

53. Zipursky, *supra* note 26, at 1694.

54. This is sometimes also referred to as the semantic view. As a point of clarification, this semantic view of science should not be confused with the semantic view of law, which is said by Ronald Dworkin to be held by legal positivist such as H.L.A. Hart. RONALD DWORKIN, LAW'S EMPIRE 31–44 (Belknap Press 1986). The model theoretic or semantic view put forward here is not meant to set down definitions for "law" nor is it intended as a way of understanding what we mean when we say or use the word "law." Thus, Dworkin's critique of the semantic view does not apply to the discussion here.

55. *See, e.g.,* RONALD GEIRE, UNDERSTANDING SCIENTIFIC REASONING (Jo-Anne Weaver, Steve Welch eds., Holt, Rinehart and Winston, Inc. 3rd ed. 1991) (1979); FREDERICK SUPPE, THE SEMANTIC CONCEPTION OF THEORIES AND SCIENTIFIC REALISM (University of Illinois Press 1989); BAS C. VAN FRAASSEN, THE SCIENTIFIC IMAGE (L. Jonathan Cohen ed., Clarendon Press 1980); Patrick Suppes, *What is a Scientific Theory?, in* PHILOSOPHY OF SCIENCE TODAY (Sidney Morgenbesser ed., 1967); *See also,* Emma B. Ruttkamp, *Semantic Approaches in the Philosophy of Science,* 18 SOUTH AFRICAN J. OF PHILOSOPHY no. 2, 100 (1999). She also notes the work of NANCY CARTWRIGHT, NATURE'S CAPACITIES AND THEIR MEASUREMENT (1989); *False Idealisation: A Philosophical Threat to Scientific Method, in* 77 PHILOSOPHICAL STUDIES 339 (1995).

not describe, explain, and predict actual phenomena at all, but rather they attempt to describe, explain, and predict models.

In the natural sciences, models are "highly abstract and idealized replicas of phenomena, being characterizations of how the phenomena *would have* behaved *had* the idealized conditions been met." Take, for example, a model of how motion or gravity behaves in a vacuum, or a double-helix model of DNA.[56] In these cases, the model is built or created by selecting and abstracting from the phenomena based on certain idealized parameters or conditions. Data that goes into the model in some sense needs "cooking" in order to make it "hard data." Once hard data is obtained, the theory can predict and/or explain normal phenomena by showing how given phenomena would have behaved had the idealized conditions been met.

The law-like generalizations of theory work with the model like a logical axiomatic system.[57] The theory can often predict the behavior of the model through fairly straightforward mathematics or logic; however, it cannot predict or explain normal phenomena in the same straightforward way. According to Suppe, there is a two-stage transition: one from the "raw data" to the "hard data" of the model (the empirical/experimental stage) and another from the model to the theoretical postulates (the computational stage).[58] An example from the social sciences of how humans make choices is illustrative. At the empirical stage, we may observe humans over time and detect that the human ability to make choices in a rational way (weighing up the costs and benefits of the alternatives) is the one thing that tends to set the human apart from many other creatures. Instead of trying to address our ways of choosing in all of their complexity, we abstract a feature that we think is key or central to human choice (i.e., our rational ability to choose). Thus, our idealized condition or parameter is rationality. We create a model of the rational choice person by extracting those aspects of our reality. Once that is done, we can make theoretical generalizations and predictions about how that model would behave, or how an actual person would behave if acting only on those idealized conditions (e.g., how a rational person would behave).

---

56. *See* SUPPE, *supra* note 55, at 65.

57. Standard Euclidean geometry is perhaps the most commonly known axiomatic system. A law-like generalization works in the following way. For all of *x*, if *x* is an object in motion it will tend to stay in motion with the same speed and in the same direction unless acted upon by another force. It follows axiomatically, or logically, that if *x* is a soccer ball that has been kicked, and is therefore an object in motion, then it will tend to stay in motion with the same speed and travel in the same direction, unless acted upon by another force such as gravity, wind, the field of play, or another player.

58. *See* SUPPE, *supra* note 55, at 69.

As is probably obvious, the theoretical generalizations apply to the model in a logical and straightforward way, but would not apply to actual humans in the same way. We can perhaps easily predict what a rational human might do in a certain situations, but often have difficulty predicting what the typical person might do in the more complex situations of the real world. Because we are affected by many other things besides pure reason when making our choices, in some cases this leads us to act irrationally.[59]

The alternative to the model theoretic view of scientific theory is sometimes called the "received view."[60] On the received view, theories include law like generalizations coupled with a set of rules that link the theory to the world. These rules, commonly named correspondence rules, stipulate the procedures for data collection, experimental design, etc., and are meant to dictate how empirical evidence (phenomena we experience in the world) is to be worked into the theory. The rules also function to keep observational language (empirical statements about what we observe in the world) separate from theoretical statements. On the received view, this is thought to be necessary so as not to pollute empirical inquiry with theory, which would taint the inductive process of theory formation by making at least some of the empirical claims theory dependent. On the received view, this is illegitimate because it would rob observation of its neutral and independent power to confirm or falsify theory.[61] This is the same notion held by positivist philosophers of law, who wish to keep what "is" the case separate from what "ought" to be the case, and to separate legal facts from legal theory.[62]

---

59. This is illustrated by the laws of motion in note 57 *supra*. It is easy to predict when and where a kicked ball will land if no other force is acting upon it but on a windy day with good defenders it becomes much less certain.

60. This is the common label used by semantic theorists. Ruttkamp, however, identifies the two main approaches to the philosophy of science as the 'statement' or syntactic approach and the 'non-statement' or semantic approach. Ruttkamp, *supra* note 55, at 101.

61. The 'received view' is championed by authors such as ERNEST NAGEL, THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION (Harcourt, Brace & World 1961); Rudolf Carnap, *The Methodological Character of Theoretical Concepts, in* MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE (H. Feigl & M. Scriven eds., 1956); RICHARD B. BRAITHWAITE, SCIENTIFIC EXPLANATION: A STUDY OF THE FUNCTION OF THEORY, PROBABILITY AND LAW IN SCIENCE (Cambridge University Press 1ª ed. 1953); and CARL HEMPLE, FUNDAMENTALS OF CONCEPT FORMATION IN EMPIRICAL SCIENCE (Otto Neurath et al eds., 10th ed. 1969) (1952). *But see* CARL HEMPEL, *Formulation and Formalization of Scientific Theories, in* THE STRUCTURE OF SCIENTIFIC THEORIES 245–54 (Frederick Suppe ed., University of Illinois Press 1974) (abandoning the 'received view').

62. It is the position of positivists like H.L.A. Hart that confusing "is" with "ought" robs us of our ability to critically evaluate the law as it "is." *See, e.g.,* H.L.A. Hart, *Legal Duty and Obligation, in* ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 127, 147–61

There are a number of criticisms of the "received view." Philosophers of science have critiqued the received view on the basis that:

(1)   It is doubtful that all of the correspondence rules can actually be stipulated;

(2)   It is impossible to keep observational vocabulary completely separate from theoretical vocabulary;[63]

(3)   Changes in experimental methods require a new, or altered theory; and, perhaps most importantly,

(4)   The received view ignores the way science often proceeds.

As an alternative to the received view, the model theoretic view does not require set correspondence rules, thus allowing for changes in experimental design without requiring changes to the theory. This feature in itself is argued to be more consistent with the way actual science is carried out. This approach is more flexible and, furthermore, draws attention to the relation between the theory and the model, and also between the model and the "real" world. In fact, it allows for much of science to proceed without reference to law-like generalizations. One can simply proceed by working to develop models that are meant to correspond with the world.[64]

(Oxford University Press 1982) (criticizing Dworkin's view that legal rights are a species of moral rights in the context of wicked legal systems).

63. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTION, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE no.2 (Otto Neurath et al. eds., University of Chicago Press 1970); Paul K. Feyerabend, *Consolations for the Specialist, in* CRITICISM AND THE GROWTH OF KNOWLEDGE 197 (Imre Lakatos & Alan Musgrave eds., 1970). Philosophers of science such as Paul Feyerabend and Thomas Kuhn argue that it is impossible to separate observational language from theoretical language in the first place, for all observation is theory-laden. Feyerabend and Kuhn also claim that observation cannot play the role intended by the positivists—that is, it can neither confirm nor falsify theory. This is largely because different communities interpret observational language differently. Following from this, observation cannot account for the different interpretations and thus interpretation/theory infects observation all the way up and down. Thus, a correspondence view of knowledge is abandoned for a coherence view. "The world" has no independent role to play in scientific knowledge. What is required is that theories and observations cohere with each other. It should be noted, however, that Kuhn is somewhat less radical in his relativism than Feyerabend. At the end of the day, it is the shared beliefs within a given scientific community that constrain interpretation. If there is relative consensus, as there often is in the natural sciences, then one need not adopt a radically skeptical view of the independence of observational language, nor a radically relativist view of scientific truth. *See* Thomas S. Kuhn, *Logic of Discovery or Psychology of Research* and *Reflections on My Critics, in* CRITICISM AND THE GROWTH OF KNOWLEDGE 1–24, 231–78 (Imre Lakatos & Alan Musgrave eds., 1970).

64. Note that this correspondence does not need to be a model to some purported hard fact. A model can correspond to our web of beliefs, or to a certain subset of our web; those beliefs we

Models can come in all different shapes and sizes.[65] There are theoretical models, and there are physical models or scale models. Everything from metaphors to schools of thought can be conceived of as models. In every case, the model is created by abstracting and/or idealizing certain features of the given phenomena under study. Geire uses the example of a map, which is a particular type of scale model, to illustrate the point.[66] There are numerous types of maps designed for different purposes yet, in every case, a map, if it is to count as a good map, is meant to model certain important features of the physical world. No map ever purports to capture or correspond to everything one might find in the physical space the map is mapping.[67] Data is extracted from the phenomena and placed on the map based on certain criteria depending on the purpose of the map. The average city tourist map does not generally include topographical information (information on the elevation of the terrain), and the average hikers' map does not include descriptions of historical sites or the distance to the next McDonalds. There are erotic maps (highlighting sex tourism venues), bird watchers maps (highlighting areas where certain birds may be found at various times of the year), and to make matters even more insidious, many maps in Europe are sponsored by the McDonalds corporation, and thus, while you may have difficulty finding the national museum or various art galleries, every McDonalds will be clearly highlighted.

In the remainder of this section we will explore the notion of a theoretical hypothesis (the hypothesis that links the model to the world), look at devices for testing models such as experiments, quasi-experiments, and counterfactuals, and look at how a model can be scrutinized in terms of its constitutive and contextual value. We explore the first notion to help us gain clarity on what exactly the model is purported to achieve so that we might subject it to critical evaluation in light of the further devices explored in the remainder of the section.

---

think are warranted once the beliefs have been subjected to adequate scrutiny under appropriate conditions. If the model fails to cohere with enough of these beliefs, then it may be rejected as false. I sometimes use the term "correspondence" because it sounds more natural in the context of some of the examples to talk of correspondence in this naïve or folk realist way. However, when I refer to "correspondence," I am actually talking about cohering with this subset of our webs of belief as set out in Part II. *See supra* Part II.

65. Although the examples are solely my own, much of the following explication is derived from Ronald Geire. *See* Geire, *supra* note 55.

66. *Id.* at 24–26, 30.

67. In fact, maps are useful to the extent that they leave most of the physical space being mapped unobstructed. *See, e.g.*, RICHARD SAUL WURMAN, INFORMATION ANXIETY (Doubleday 1989).

A. Theoretical Hypothesis: Claims of Correspondence or Fit and of Value or Standards

In scientific terms, scientific models come with theoretical hypotheses that claim the model is similar to the world in the specified way and to a specified degree of accuracy. For example, a map may stipulate that it is true on the date published (e.g., 1949), that it is a particular scale (e.g., 1 cm = 10 km), and that it is meant to capture or highlight certain things (e.g., roads). If the world does not correspond to the model in the specified way, the theoretical hypothesis is false (e.g., there is good evidence that there were ten roads in this area in 1949 and only three are on the map). If the hypothesis is false, one will either have to change the model or modify the hypothesis (e.g., by making it less ambitious in scope). For instance, one could say that this map is a road map of the main roads in the location in 1949. If the seven missing roads were not main roads, then the map again corresponds in the way that the hypothesis says it does (note the possible disagreement over how to interpret "main.")

In any given case there are at least two sets of standards for evaluating any given map or model. The first set of standards addresses the fit or value of the map to the world it purports to represent. It takes the map or model on its own terms and inquires if the map corresponds to that part of the world that it purports to represent. Does it in fact fit the phenomena, or does it fit our warranted web of beliefs about the phenomena? Has the map got it wrong? If the map effectively claims that there is a McDonalds, or massage parlor, or the National Museum, on the corner of Fourth and Main Street, and it simply is not there, then the map is wrong. Likewise, if the map claims to depict all of the McDonalds, important sex venues, or important cultural venues, and it fails, then it has got it wrong. Within this first set of standards there are, of course, more subtle ways of "getting it wrong" given that every map is inaccurate to some degree.

The second set of standards for evaluating a map or model addresses the value of the parameters chosen for the map itself. Say, for example, I'm going to Prague in the Czech Republic for a visit. I tell you this, and you respond, "Wonderful, I have a number of great maps that you can take." You then proceed to pull out a topographical map, the erotic city plan of Prague, and a 1950 city map with highlights of communist monuments. These maps may be "great" in and of themselves according to standards of fit or correspondence noted above. However, I could not care less about the elevation of the site where the Prague Castle is, where one might be

able to view pornography, or even where the communist monuments were in 1950. I do not value those maps if I know the castle is on a steep hill, I have friends who can either tell me how to get to or to avoid the notorious sex venues, and I know for a fact that nearly all of the communist street names have changed and the monuments have been removed or destroyed. (There is a nice big statue of Lenin that has been shipped to Seattle, USA from Poprad, Slovakia, where it sits on a city corner).[68]

The value of any map may be brought into question for being too detailed, for not being detailed enough, or for focusing on unimportant things. Nonetheless, if the map does, in fact, do the job by the first set of standards, then the map does contain some truth content in that it accurately models (fits/corresponds to) some aspect of the "real" world. There is knowledge to be gained from looking at all of these different maps or models, even if you'd rather not gain such knowledge. This allows for multiple true maps of any given area in the world. Likewise, one can have multiple true models of a given phenomenon in the world. However, it does not follow that any model is as good as any other model. One may always evaluate the model on both sets of criteria: first, does the model actually correspond/fit those aspects of the phenomena it purports to reflect; second, is the model of value in that it provides important or useful information?

B. Experiments

Scientific practice, of course, is not as straight-forward as looking at a map and the corresponding street corner to see if the McDonalds is actually there. Much of science is concerned with that which is not directly observable. Scientific reasoning often requires that one conduct experiments to test predictions. If the resulting data agrees with the prediction, then this agreement is evidence that the model fits the world in at least that respect. If the resulting data disagrees, either the model does not fit the world in that respect, the experiment was flawed and gave inaccurate data, or the reasoning providing the prediction from the model was flawed. It is also possible for a flawed

---

68. You might say that I declined the map because it no longer has truth-value; that is, it does not correspond to Prague as it is. Here one should be careful. If the map is dated 1949, then the theoretical hypothesis is limited to that historical period. The map may or may not have been accurate for that period. If the map was accurate, then the map has historical truth-value (as stipulated in the limited theoretical hypothesis). However, if someone tried passing the map off as representative of Prague today, then it would be fair to say that the map has little value because it is false, whether or not one valued seeing the monuments.

experiment to erroneously support a prediction, which is one of the reasons that repeat experiments are critical.

1. Crucial experiments and counterfactuals.

In cases where more than one model accurately predicts a given result, it is ideal if one can create what Francis Bacon termed "crucial experiments."[69] A crucial experiment requires picking out an area where the two models predict different results in a given experiment. If the data resulting from the experiment lies squarely within the prediction of one model and outside the other, then this is good evidence that the one model fits the world better in the given respect than the other model. Take another example from the social sciences. One can have a situation in which both rational choice theory and some other moral economy view explain a great deal of the behavior of people in a certain village in central Africa. Both theories, for example, can explain phenomena such as gift exchanges and other ways of distributing assets. However, any redistribution that does not include some kind of expected marginal return is not compatible with rational choice theory. If we discover or can set up a situation in which this occurs, then the test result would count against the rational choice theory.

As in the social science case above, there are many cases of competing claims in law where actual experiments are not possible or are not ethical. For instance, it is difficult to set up an experiment to test whether judges make decisions based on their own socio-economic status, race, or on their political views. In these cases, we test the model with quasi-experiments, or counterfactuals (if x then y), to determine which model best explains the phenomena under question.[70] Thus, rather than set up a laboratory, we simply observe what judges actually do. We ask questions like, what is the judge's socio-economic background. *If* this is a factor in judges' view of the law, *then* we expect that judges with similar backgrounds will tend to make similar decisions in like cases, and that across like cases these

---

69. ROBERT KLEE, PHILOSOPHY OF SOCIAL SCIENCE; CUTTING NATURE AT ITS SEAMS 63 (Oxford University Press 1997). Note that this idea is generally attributed to FRANCIS BACON, ADVANCEMENT OF LEARNING. NOVUM ORGANUM (Encyclopedia Britannica 1955) (1952).

70. A counterfactual is a conditional statement to the effect that *if* x is the case *then* we expect y to follow. We often test each other in our personal relations this way. For instance, *if* you care about someone *then* you should be willing to wear a condom to protect him or her. Thus, the argument may follow that *if* you are not willing to wear a condom *then* you must not care for him or her. *See e.g.* Frederick Suppe, *Development of the Received View*, in THE STRUCTURE OF SCIENTIFIC THEORIES, 36–45 (Frederick Suppe ed., University of Illinois Press 1974).

judges should reason and decide in a like manner. This would also be the case if we were trying to test if certain principled or purposeful views of the law were at play in legal decision-making.[71] The counterfactual test is to see if we actually get y when we have x; do they make similar decisions in similar cases?

One could also create something like a crucial experiment for a given aspect of the legal world under study. One could put two theories side by side and ask the *"if-then"* question of each (if model A is true, then one would expect x, and if model B is true, then one would expect y). One may then look to that aspect of the world that the models are meant to capture to see if x, y, or something else is present.

Some models go wrong by claiming to fit aspects of the world that are outside of the model's explanatory scope; that is, beyond what the model is capable of explaining. Often, the theoretical hypothesis linking the model to the "real" world (or our warranted beliefs about it) is overly ambitious.[72] This is seen when one claims that all of the law is fundamentally political or can be explained in terms of patriarchy, or that all of the law can be reduced to a set of commands, or even that contract can be explained in terms of the notion of keeping one's promises. When this happens, and one runs the counterfactual test across all of the law, it will often be the case that instead of finding the thing that the model is meant to predict, one will find a different result. For example, instead of finding that law is a set of commands, one will find things that look like permissive rules, or perhaps even principles. Although one might try to describe permissive rules and principles as some attenuated form of a command, it makes more sense to acknowledge that the law contains more than mere commands.[73]

---

71. Of course it is always difficult to control our situation in order to make sure that some other factor is not influencing the outcome. The proper approach to such situations would be to do statistical correlation studies on the possible variables. However, outside of the behavioral social sciences, few social scientists would proceed in this manner. It is simply too tedious to analyze all the possible variables. Rather, social scientists rely on quasi-experimental data and counterfactual arguments to argue that the other potentially relevant variables were insignificant for various common-sense reasons. The result is admittedly rough science.

72. Ironically, this is often what makes a theory interesting. When we apply an out-of-scope model, we not only stretch the model, but we often stretch our perceptions of that part of the world.

73. John Austin attempted to defend the viewpoint that law is a set of commands, but history has proved his view unconvincing. *See* AUSTIN, *supra* note 18. *But see* HART, *supra* note 18 (critiquing Austin's viewpoint).

2. Multiple models that fit.

Generally, it is thought that if two different models are used to analyze a single phenomenon, then they are in competition. Thus, one needs to continue experimentation until it can be shown that either one model is true or the other model is false. This, however, is not true in all or most cases when more than one model is used to explain a given phenomena.

Nancy Cartwright persuasively argues that we can often be quite comfortable with having multiple theoretical explanations of a given phenomenon.[74] In the field of physics, she argues that there is considerable redundancy in the equations and models used to make up theoretical explanations.[75] In other words, a range of models equally explain the phenomenon in question.[76] While at first this may seem to be bad for science, particularly if one wants her or his theoretical laws to be true, multiple models provide multiple models of prediction. Such models not only allow us to capture a range of phenomena into a general framework, but they also allow for precise calculations.[77]

Cartwright uses the example of models used to explain quantum damping.[78] Although there is one generally agreed causal account, there are at least six different standard theoretical approaches and, when used in the quantum treatment of lasers, the theoretical models multiply to the point of "theory overkill."[79] If one takes these theoretical models to be statements of objective laws of the same phenomena, then they are normally seen as competing. But, as Cartwright points out, the models do not compete, but instead complement each other.[80] Some of them are better at measuring different aspects of the phenomena under different experimental conditions.[81] There is no need or benefit to be gained by discarding useful tools, even if one adds an even more useful tool to the toolbox.

---

74. Nancy Cartwright, *The Reality of Causes in a World of Instrumental Laws*, 2 PHIL. OF SCI. ASS'N no.2, 38 (1980), *reprinted in* THE PHILOSOPHY OF SCIENCE 379 (Richard Boyd et al. eds., 4ᵗʰ ed. 1993) (1991). The Author would like to thank Don Ross in general for his help in addressing the problem of competing versus non-competing models and specifically for directing him to the work of Nancy Cartwright.

75. *Id.* at 380.

76. *Id.* (noting that the redundancy of theoretical explanations has lead to arguments against scientific realism by Pierre Duhem and Hilary Putnam).

77. *Id.*

78. *Id.* at 381–84. Quantum damping is concerned with the natural line-width of photons that are emitted from de-exited atoms or atoms that are being dampened.

79. *Id.* at 382.

80. *Id.*

81. *Id.*

In response to the argument that this relates to the pragmatic attitudes and practices of scientists rather than to how we should view explanatory theories, Cartwright says that we do not have the same pragmatic attitude when it comes to causal explanations.[82] The reason given for this difference is that a causal explanation is an explanation about what brought about the phenomena in question.[83] But for the cause, there would be no effect. While it can be the case that one can have multiple non-competing causal factors (i.e., w, x, and y combined to bring about z),[84] it is not possible to have two different causal explanations of the same phenomena without them competing. Here, a better causal explanation provides reasons for abandoning a less convincing causal explanation. Those reasons come from our ability to set up tests or crucial experiments that are often not possible in the case of other theoretical models. In those cases, the best we can often do is infer the best explanation (i.e., the more a theoretical model explains, the more comfortable we are in calling it true).

These models may capture different aspects of the same phenomena, or they may be said to be alternative non-competing ways of interpretation, like having multiple non-competing maps of a city. The topographical map would not generally be seen as conflicting or competing with the McDonald's map, even if both maps covered the same terrain, because their theoretical hypotheses are not in competition. They could compete if, for instance, they were the same size and were meant to depict the same area, but had different scales. There would then be a conflict at the level of what exists and not simply differing ways of capturing what exists. Sometimes our models in the human sciences and in law are only meant to help us better understand or interpret human behavior. In such cases we do not have to postulate that a model or theory provides a causal explanation of the behavior in order for it to help us understand the behavior.

Thus, as long as theories are not making causal claims or claims about the existence or creation of phenomena in the world, there is little need to see the theoretical models as competing. When it comes to understanding the relationship between the various theoretical models used in the field of law, it is important to determine if the given theories are making causal claims, or claims about what does or does not exist in the world, and what it is that has brought the given phenomena about. If the theoretical models are not making such

---

82. *Id.*

83. *Id* at 380.

84. For instance, it makes a significant difference whether one is claiming that personal politics are the cause of judicial decisions, or that they are a causal factor. It is easier to falsify the former view than the latter.

claims, there is perhaps little need to see them as competing; rather, they can be seen as bringing different aspects of our legal world to light in different ways.   They are different, non-competing interpretations, which may add to our stock of knowledge if they can satisfy our conditions for warranted assertability.

C. Value: Constitutive vs. Contextual [85]

Multiple models may fit but differ in their value in two different respects. On the one hand, there are values that are concerned with the nature and function of the scientific or theoretical endeavor itself, sometimes called constitutive values. On the other hand, there are broader contextual values such as justice and morality, by which we may judge a theory and its results. The first set of values gives rise to such questions as: (1) is theory to be concerned with quantification, regularities, generalizations, causal explanations, axiomatic theories, abstraction, breadth, depth, simplification, accuracy, prediction, truth, understanding, rules, meaning, thick or in-depth description, or principles and values themselves; (2) is it important that our legal theory capture all of the "law"; (3) do we need to be able to generalize across time and across cultures with our theory; (4) is it enough if it captures just one aspect or area of the law (e.g., tort, or one area within tort); and (5) is it more important that we be able to predict results or that we be able to understand the thicker, inner workings of legal thought?   Different approaches and their corresponding models equally address these constitutive values. They need not necessarily be seen as competing if they look at different aspects of the phenomena and give us different tools for understanding, providing data, or even making predictions of the phenomena. In other words, models do not necessarily compete if they are doing different jobs or answering different questions.

The performance of different models will also vary depending on more broadly conceived values, or "contextual values." Here, the value of a model may depend on what one finds interesting or important in terms of aesthetics, politics, or morality. It gives rise to the following types of questions: (1) does the model have a critical political slant; (2) can the model be used to legitimate and entrench the status quo; (3) does it help provide stability and predictability; (4) does it have transformative potential; (5) does it fit in with our views

---

85. *See, e.g.,* HELEN E. LONGINO, SCIENCE AS SOCIAL KNOWLEDGE (Princeton University Press 1990) (providing a treatment of the distinction between constitutive and contextual value).

of democracy or justice; or (6) is it fun, interesting, or exciting to play around with?

Some may have a hard time seeing how an approach to theory that is developed in the natural sciences could be relevant to law, which we often view as more akin to the social sciences. In the following section, however, we will see that this approach is equally at home in the social sciences as in the natural sciences, if not more so.

IV. SOCIAL SCIENCE

David Braybrooke in his *Philosophy of Social Science*[86] analyzes three models or approaches to the social sciences: naturalistic, interpretative, and critical. In a like manner, Daniel Little in his *Varieties of Social Explanation*[87] analyzes three models of explanation: causal analysis, rational choice theory, and interpretation theory. It is often thought and argued that these foundational models are competing and incompatible.[88]   Proponents of these different approaches are often seen to be fighting it out for the mantel of the paradigm social science methodology.[89]   Alternatively, the view is taken that methodological pluralism is essentially what social science is about, and the more methods and models, the merrier.[90]   A central claim of both of the above works is that, contrary to the idea that these foundational models are competing and incompatible, they are in fact picking out different aspects of the phenomena under investigation. In model theoretic language, they are modeling different aspects of the same phenomena; different aspects of society. Braybrooke goes beyond arguing that naturalistic and interpretative social science are mutually compatible, arguing that the key ideas of naturalistic and interpretative social science (regularities and rules) mutually presuppose each other.[91]   While his arguments for mutual

---

86. DAVID BRAYBROOKE, PHILOSOPHY OF SOCIAL SCIENCE (Prentice-Hall, Inc., 1987).

87. DANIEL LITTLE, VARIETIES OF SOCIAL EXPLANATION: AN INTRODUCTION TO THE PHILOSOPHY OF SOCIAL SCIENCE (Westview Press 1991).

88. *Id.* at 1.

89. This is to take natural science as the model for understanding the paradigm battle.

90. This view is often associated with interpretivists. It follows nicely from the Kuhnian/Feyerabend views of science. *See* Kuhn, *supra* note 63; Feyerabend, *supra* note 63. If science is all about interpretation, that is, if the interpretation of observation is relative to a given community, then one can have as many interpretations as communities, or imagined communities for that matter. Social science can proliferate, thus offering a virtual smorgasbord of seemingly equally legitimate methodologies, theories, and models. Taken to its logical extreme, this view would make it very difficult to maintain any intrinsic distinction between fact and fiction, between the scientific and fictive accounts of events.

91. Braybrooke argues that critical social scientific approaches reduce to either interpretative or naturalist approaches, with the addition of the critical question. In other words, one may either do interpretative or naturalistic social science and one may do so either critically

compatibility are very convincing, his arguments for mutual presupposition require a reductionist definition of both interpretative and naturalistic social science. For his argument to work, one must accept that interpretive social science is about the study of rules and that naturalistic social science is about the study of regularities. Baybrooke argues that the "social" in social science requires at least the presupposition that the regularities of social science are concerned with rules, and the "science" of social science requires the presupposition that the rules of social behavior concern regularities.[92] These presuppositions allow him to postulate the possibility of a model theoretic approach that makes use of a single model to understand a given society (i.e., a model of regularly followed and enforced rules). Unfortunately this would exclude a great deal of arguably important social science research, knowledge, and particularly, understanding.[93]

Interpretative social science is not exclusively concerned with rules, and naturalistic social science is not exclusively concerned with regularities. Nonetheless, in the area of settled social rules, the two approaches are compatible, mutually support each other, and important (if not "key") ideas are mutually presupposed. Here, the models converge; the more regularly the rule is followed and/or enforced, the better the evidence for the rule.

Interpretative social science is often concerned with ideas that cannot be captured by, nor reduced to, rules. Much of social science is concerned with trying to understand social relations and practices, and this often requires more than a catalogue or list of rules. Attempts are often made to provide thick description or even a narrative, in order to

---

or uncritically. *See* BRAYBROOKE, *supra* note 86. In a like manner, Little argues that: (1) functional and structural explanations depend on causal explanations; (2) materialist (Marxist, etc.) explanations depend on both rational choice and/or naturalist explanations; and (3) statistical explanations are a part of causal explanations. *See* LITTLE, *supra* note 87, at 11–87. Braybrooke would place causal explanations under naturalistic social science, *see* BRAYBROOKE, *supra* note 86, at 7–11, and rational choice explanations under interpretative social science, *id.* at 11–15. This is because he sees interpretative social science as being primarily concerned with rule governed behavior. *Id.* at 12–13. Little would be more likely to subsume rational choice explanations under causal explanations. LITTLE, *supra* note 87, at 39–45. In the case of rational choice theory, the causes of regularities are the intentional states of agents rather than the fixed objective features of entities and the natural laws that govern them, as in natural causal explanation. *Id.* at 39.

92. Braybrooke has acknowledged that there is some "leakage" when going from causal regularities to rules, as human choice/freedom always makes it possible for individuals to act independently, or even in defiance, of rules—social, personal, settled, or otherwise (personal communication). BRAYBROOKE, *supra* note 86 at 128–29.

93. Some legal positivists may find this conception of social science congenial because in this view, jurisprudence is simply a subset of the larger set of regularly followed and enforced rules.

understand the significance and/or meaning of social practices. While attention to rules, and particularly settled social rules, may give you some "core" idea about a society, a great deal may be left out. A mere description of rules will not tell you why the rules are there, what their function is, what principles underlie them, or how significant they are. Inattention to unsettled rules, changing practices, the meaning and function of institutions and practices, and the principles or values that compete within society severely limits the understanding and predictive power of social science. For instance, one cannot get at the significance of a rule or practice merely by seeing how often it is followed or sanctioned. We might follow a rule all the time but be unclear about its significance (e.g., wearing neckties on certain occasions) and we may break certain rules that are very significant (e.g., that one not cheat on one's spouse).

Braybrooke's response would be to say that these ideas or approaches that do not deal with regularities fall outside of social science proper (they are off the map) and are within the domain of philosophy, poetry, or perhaps prophesy.[94] For Braybrooke, social science must be concerned with regularities in order to be considered science.[95] Principles, values, and meaning are not easily quantifiable. Many things that are important to us cannot be reduced to a number or a dollar value. According to Braybrooke, we may include such things in social studies but not social science.

Even naturalistic approaches may move away from Braybrooke's proposed key idea of regularity. A naturalistic approach may focus on establishing causal explanations that are not centrally concerned with regularity or frequency. For instance, if one is trying to establish the cause(s) of a singular event, say the fall of the Berlin Wall or of the negotiations at Kempton Park that brought about South Africa's new constitutional order, there may be a number of causal factors that have uniquely combined to give rise to that event. There may or may not be an attempt to establish causal generalizations about other cases at other times or in other places. Of course, such an approach may rely on causal generalizations and thus rely on regularities. Alternatively, one may propose a functional explanation of an event or practice. While other events or practices may serve such a function, functional approaches do not centrally depend on any regularity. Braybrooke is likely correct in holding that, for naturalistic social science to be "social" science rather than natural science, it must pay attention to

---

94. *See generally* BRAYBROOKE, *supra* note 86, at 47–67, 110–11.
95. *Id.* at 43–45, 66–67.

what is social.[96] Physics, like philosophy, is off of the social science map.

Unlike Braybrooke, Daniel Little does not try to reduce social science to one model, and states, ". . .rational choice theory, materialism, and cultural science are competing research programs, each founded on a valid insight into one aspect of human behavior and society."[97] Little maintains a version of methodological pluralism that is based on the irreducibility of certain key aspects of the world that the different models attempt to explain.[98] The different models are able to answer questions that simply cannot be answered by the other models.

Interpretative social science tends to focus on answering questions regarding cultural meaning by providing thick, descriptive answers to these questions. It does not systematically pursue the deliberative rationality of agents and rarely attempts to answer questions regarding the regularities of human behavior or causation. Conversely, rational choice theory attempts to answer these questions, although by abstracting to a thin theory of human action. However, rational choice theory does not provide thick, descriptive answers to questions about cultural meaning, nor does it look to other possible non-intentional and non-rational choice causal explanations except to the extent that they inform rational choices. To the extent that the models address different questions and different aspects of the world, they complement each other in providing knowledge. In fact, such knowledge often informs other models or is presumed as background knowledge to those models. In those cases where multiple models make claims to explain the same phenomena, it may be possible to devise experiments, quasi-experiments, or at least counterfactuals to determine which model best explains the phenomena under question. This would amount to something like a crucial experiment for the given aspect of the world under study. For instance, one may look for a specific type of behavior that cannot be explained by one theory but that is predicted by the other.

However, it does not follow that such an experiment would tell us which model was true in the sense of truly corresponding to the world across all time and cultures. The problem is that social phenomena change over time and from place to place. Thus, the correct understanding, explanation, or cause of the social phenomena may change as well. For example, a ritual performed for the first time

---

96. *Id.* at 114–35.

97. LITTLE, *supra* note 87, at 86.

98. *Id. See generally id.* 222–38.

in culture X might be understood and explained given properly
tailored models from all three of Little's general models of
explanation. There may be a perfectly respectable rational choice
explanation of certain aspects of the ritual: it may have been caused
by a certain confluence of social and natural factors and may serve a
new social function. The ritual may have a given meaning or
significance that is partially attributable to this confluence of events.
However, as years go by, the original function and meaning of the
ritual may have changed due to changing economic, political, or even
natural conditions. People may choose to participate in the ritual for
different reasons. Perhaps the ritual performed a significant economic
function but was also coupled with deeply religious significance due to
its origins. It could very easily happen that the economic function and
the rational choice aspect of the ritual fell away and became merely
symbolic of the original exchange, or that, while the ritual still serves
important economic functions, the religious aspects have diminished
due to the introduction of new religious beliefs. It may also be the
case that the ritual takes on new significance or serves new functions.
Ponder in this connection the exchange of gifts by Christians at
Christmas in the year 2004, or the exchange of lobola (sometimes
interpreted as bride-price) in a marriage between a black South
African who has some lingering traditional values and someone from
outside that tradition (e.g. someone from Kansar). What meaning do
such traditions have in current contexts?

The membrane separating constitutive and broader contextual
values in the social sciences and in law is often semi-permeable and, in
some cases, there appears to be no membrane at all. Models that rely
on statistics, functionalism, and rational choice explanations often
provide relatively hard data that has a fair amount of predictive power.
This would be true of certain sociology of law and law and economic
models. Thus, they are supported by a number of the above values;
however, they are often attacked because they are based on over-
simplifications, sacrifice depth, and do not provide enough
understanding. This would be the argument for moving to a more
interpretive approach. If the subject matter is of social significance in
terms of the contextual values mentioned above (i.e., political,
cultural, and moral values), then it will often be difficult to separate
how we value the method from the different types of results that we
get and/or want to get. This is because the different models
illuminate different aspects of the reality under study.

Thus, for example, we may question the value of a theory that only does the job of telling us how to identify rules of law.[99] We may question its value for a number of reasons. We might think that, on the constitutive front, it does not cover enough of the legal terrain. We might want a more general theory that covers other legal phenomena like standards and principles. On the same set of criteria, we might want a theory that tells us more about what to do with the rules and principles when we find them or after we identify them, as well what to do if they conflict or are ambiguous. We might want these latter things from a theory, not simply because of some abstract view about what constitutes good theory, but because we think it profoundly matters what kind of results our legal theory leads to. We might think that some forms of theoretical certainty do not lead to enough legal stability or that they lead to too much stability. We may actually want our legal models to allow room for change and certain degrees of non-predictability. We might think that it is true, and perhaps interesting, that a theory works so well in describing our practice, but may lament that fact because we believe that it is evidence of bad lawyering and bad judicial practice.

Value interacts with theory in law and the social sciences in another interesting way that is not thought to be possible in the natural sciences. Given that we have the ability to think and choose, it is always possible that people will change in response to a given model, even if the model is meant to be purely descriptive. Take, for instance, a legal community that views itself as making decisions based on principles of justice worked out over centuries of common law that the community believes respects the equality and dignity of parties before the court. Say someone puts forth persuasive arguments that these legal actors have stopped applying their minds and are now formally relying on set rules that, within the present context, sometimes undermine equality and dignity rather than support them.[100] There are likely two claims here: one, lawyers are making formalist arguments and judges are deciding on those formalist

---

99. *See* Anton Fagan, *In Defence of the Obvious—Ordinary Meaning and the Identification of Constitutional Rules*, 11 S.A.J.H.R. 545 (1995) (providing a South African example of someone who puts forth such a theory).

100. This may be one way of depicting John Dugard's critique of positivist interpretation under apartheid. *See* JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (Princeton University Press 1978); John Dugard, *The Judicial Process, Positivism and Civil Liberty*, SO. AFRICAN L.J. 182 (1971). Dugard's attack fits into the overall anti-formalist attack of the American realists. For a history of the legal realist anti-formalist attack in the context of such attacks in other disciplines at the time, *see* MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (Beacon Press 2d ed. 1957) (1949).

grounds; and two, this formalist practice does not support the values that lawyers and judges think it does, and thus it is better for the actors to change and to be substantive thinking members of the legal community.[101]

The model of judges and lawyers as formalists may be true in the sense that it fits current practice. Notice, however, that the model is used, not in the hope that it will always be true, but that by bringing the truth to light, lawyers and judges will change their behavior and adopt a different model. Some may choose to change their behavior simply based on the first charge, while others would only do so based on the combination of claims. Others might not change at all, and there may be a number of counter-reasons for their not doing so.

Having established that the model theoretic view is quite at home in the social sciences, we have yet to show that it is a fruitful way of approaching legal theory. In the section ahead, we will begin with a challenge to the view that approaches from the natural and social sciences are applicable to legal theory. After meeting that challenge the section will continue by illustrating the usefulness of the approach across a sample of jurisprudential schools of thought.

V. LAW–JURISPRUDENCE: A ROAD MAP

A. *Introduction: Can Legal Theory be Captured by Models?*

In JURISPRUDENCE: THEORY AND CONTEXT[102], Brian Bix claims that legal theory is different from theory in the social and natural sciences because it is rarely concerned with understanding why past events occurred or with predicting how future events will come about.[103] Theory in the natural and social sciences, he claims, are often testable, verifiable, and rebuttable;[104] however, according to Bix, legal theory often reduces to conceptual theory, or theory about

---

101. This is quite similar to what Ronald Dworkin calls the interpretive and post-interpretive stages. DWORKIN, *supra* note 54, at 65–66. At the interpretive stage one settles on a justification for a given practice that makes it the best it can be. At the post-interpretive stage, one reflects on the practice in light of the justification and "adjusts his sense of what the practice 'really' requires so as to better serve the justification he accepts at the interpretive stage." *Id.* at 66. Notice that in my view, it is not necessarily the case that the second stage takes place or that it works the way that Dworkin suggests, because we often fail to engage in this type of reflective equilibrium.

102. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT (Sweet & Maxwell Ltd., 1996).

103. *See id.* at 16.

104. *Id.* at 16–17.

attaching labels or delimiting the boundaries of categories.[105] Conceptual theories are not directly rebuttable or verifiable through empirical observation or testing.[106] Bix points out that conceptual theories in law are odd in that they not only fail to be predictive and falsifiable, but that they claim to be descriptive at the same time.[107] At the extreme, conceptual theories are merely definitional (e.g., "law is x" and thus when I speak of law I am speaking of x).[108] In some cases, conceptual theory attempts to follow linguistic usage or convention, yet in other cases, as Bix points out, conceptual theory attempts something more by trying to capture "interesting or important aspects of the practice."[109] At the other end of the spectrum, theory sets a standard that the practice or activity must achieve before it can fall under the concept, e.g., to be a family, a democracy, a legal system, etc.[110]

For Bix, the only real way to evaluate such conceptual legal theories is by virtue of the purpose for which the theory is put forward.[111] Is it:

(1) an arbitrary stipulation/definition;
(2) the tracking of linguistic usage/convention;
(3) a theory that captures something important or interesting about something; or
(4) does the theory set a standard or evaluative test for the label?

This approach is somewhat akin to first trying to establish the model or theory's theoretical hypothesis and then evaluating the model in light of its hypothesis. One should note that once one moves away from mere definition in (1) to linguistic usage in (2) and significant aspects of a practice in (3), then one moves from a merely conceptual claim to one that is also in some sense empirical. Claims (2) and (3) cannot be established on purely conceptual grounds because they rely on what we "actually do" as well as how we perceive what we do. The move to claims (3) and (4) combine empirical claims with normative claims. Claims within (4) generally come out of natural law theories about what the law ought to be, about pure value.

---

105. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 17 (Carolina Academic Press 2d ed. 1999) (1996).
106. *Id.* at 14.
107. *Id.* at 15.
108. *See id.* at 17.
109. *Id.* at 19.
110. *Id.*
111. *Id.* at 14–15.

Thus, one way of reading Bix's conceptual claims is that they actually fall on a spectrum of "fit" and "value" corresponding to our practice, cohering with our warranted beliefs about our practice, and bringing out something of value and significance in our practice

However, for Bix, the result of legal theory being conceptual is that it is not possible to say that a given conceptual theory is "right" or "true." Rather, all one can say is that a given theory is good or perhaps better or worse than another theory for a particular purpose. Thus, on this view, we can understand why it is so often the case that various jurisprudential views are simply set along side each other in a book with little overall treatment of how they either do or do not fit together. Even when two theorists seem to be in direct conflict (engaged in a debate), on Bix's view, it would not be possible to say one was false while the other true.[112]

To use an example given by Bix, one cannot falsify (rebut) the definitional statement "swans are white" by finding a black swan-like creature.[113] By definition, the creature is not a swan; however, the empirical statement that "all swans are black" may be refuted by finding a white swan. If you have a hard time following the distinction made by Bix, your intuitions may be telling you something important. You may be thinking that the definition of a swan or the concept of a swan should be informed by our empirical and scientific interaction with swan-like creatures. If we run into numerous black swan-like creatures there is a good chance that we would reject the definition of a swan as being a white bird. Similarly, while the empirical statement that "all swans are white" can clearly be rebutted with the production of a black swan, it is always up for argument that the black swan-like creature is not a swan.

Take for example that someone holds both the conceptual and the empirical views stated above about swans. What happens when that person is confronted with a black swan-like creature? Is the one view more shaken than the other in such a case?

Bix quotes Rosenberg to the effect that "the results of conceptual theory are not immediately or primarily about discovering new facts, 'but rather a new clarity about what are and aren't the old facts.'"[114] This statement is important. Our conceptual theories are formed out

---

112. Bix notes the view once put forward by Colin McGin that we cannot even disagree about the meaning of concepts for in fact any such disagreement means that we are using different concepts. *Id.* at 14 n.20 (citation omitted), and BIX, *supra* note 102, at 17 n.8 (citation omitted).

113. BIX, *supra* note 105, at 14; BIX, *supra* note 102, at 18.

114. BIX, *supra* note 105, at 14, *citing* JAY ROSENBERG, THE PRACTICE OF PHILOSOPHY 8 (Prentice-Hall 2d ed., 1984); BIX, *supra* note 102, at 18 (citation omitted).

of the facts as we know them. They are, or should be, induced from our experience. As Bix notes, we decide on our concepts/categories by reference to what we think are necessary and sufficient conditions for the category. The full concept of a swan depends on what we think are the necessary features of anything that we would call a swan in conjunction with a sense of what we think are sufficient features to capture our concept of a swan. Whiteness may be one feature that we think is necessary in order to determine what is or is not a swan, but it most certainly is not sufficient. In other words, there may be a whole list of features that we think are necessary for something to qualify as being a swan. Some of them, like a unique bone structure, may by thought to be more important than the feature of whiteness. Thus, the empirical discovery of many birds that are not white with bone structures nearly identical to that of white swans may lead us to revise our conception of a swan (to think that "whiteness" is no longer a necessary condition). Similarly, it may lead us to accept that we have found a "non-white swan" which falsifies the empirical statement that "all swans are white." The empirical claim cannot be refuted until we are willing to accept the possibility of changing our conception of a swan.

As exciting as the various taxonomical disputes are in the natural sciences, the disputes within the social sciences and legal theory are even livelier. What counts as a revolution, a rebellion, a state of emergency, a democracy, or a law? These conceptual questions are important, not just for ticking the correct box in your birdwatchers book, but because people's lives often depend on them. A great deal of human action depends on how we conceptualize given events around us. It matters whether or not we conceive of the United States of America as a democracy or as a republic, whether post apartheid South Africa satisfies the conditions for a legal revolution, or whether our behavior is captured within what the courts conceive as the protective ambit of a law (e.g., a right) or within a prohibition under the law (e.g., a crime). We rally our efforts and resources behind such conceptions and stand to loose or gain rights, freedoms and resources (material and otherwise) should our conception fail to carry the day.

In the social sciences and in law, debates over our concepts/conceptual theories are heated because they often go to the core of those things of the greatest human significance. It matters whether a given theory meets the necessary and sufficient conditions, not just in the empirical sense noted above in connection with swans, but also in a deeply value-based way. It matters, not only in the sense

that the conceptualization fits our experience or our practice in some way, but that it fits and coheres with the values we hold dear.

Unlike in the natural sciences and in some of the social sciences, where the membrane between constitutive values and broader contextual values is relatively solid, in the social sciences and the law, permeation is nearly as often the rule as it is the exception.[115] This is because our legal concepts, our models, not only give us clarity about the "old facts," but they also tell us how to deal with present facts and future facts. They organize our present and future world into legal categories created by the model. In many cases our models work not only as the average city map, guiding us to where things are, but as a town planner's map, guiding us to where things will be.[116] They provide a blue print for what the law may soon be.[117] They tell us whether someone is guilty or innocent, is liable for damages, or can or cannot rescind a contract. They tell us if we will be able to adopt or retain custody of a child. Different·conceptual theories will often give us different answers to our legal questions. Law also brings with it the coercive arm of the state. Thus, it matters profoundly what is a necessary and sufficient condition for something to count as law or to count as one of the many legal concepts.

For example, it matters whether you conceive of the law as simply a set of commands,[118] a set of rules,[119] a set of rules and principles,[120] or something more. It matters whether or not law is simply about guiding human conduct in some orderly fashion[121] or is about good order.[122] It matters whether you think this is sufficient, or if you think that a conception of law must also offer a moral

---

115. In the natural sciences, those who argue for the permeability of the membrane tend to be on the fringe, while those in the mainstream tend to be in the social sciences and in law. Those who argue that there is no membrane, or no need for a membrane, are also often at the fringe.

116. My thanks to Andrew Rens for this suggestion in response to a presentation of this paper to the staff of the University of the Witwatersrand School of Law.

117. JOHN CHIPMAN GRAY, NATURE AND SOURCES OF LAW 83 (The Macmillan Company, 2d ed. 1972) (1921). Gray holds the position that statutes are not law, but only sources of law, which become law when interpreted and enforced in a court of law. If this is so, then there is considerable scope for models of interpretation and adjudication in telling us not simply what the law is, but what it may be in the future.

118. AUSTIN, *supra* note 18, at 86–103.

119. HART, *supra* note 18.

120. DWORKIN, *supra* note 54.

121. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (holding that law guides human behavior); *see generally*, HART, *supra* note 18.

122. *See* Lon L Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

justification for state coercion.[123]   Under these different conceptual frameworks one is apt to get different legal results.

B. Examples from Standard Schools of Jurisprudence

If we turn to some of the standard schools of jurisprudential thought and the models they produce and use, we can perhaps come to a better understanding of how the model theoretic approach works and how some of the above concepts (e.g., fit, value and theoretical hypothesis) can be used to bring clarity to our understanding of jurisprudence and legal arguments in general.[124]

In trying to signpost our roadmap of jurisprudence, it is most important to try to gain some clarity about the theoretical hypothesis that is meant to link the theory to our world. To gain that clarity, a number of questions need to be asked of any given model. Those questions include:

- What is the specific issue or question the theory is trying to answer?
- What exact aspect of the law is the theory trying to explain, bring to light, or help us understand? Is it trying to address the same aspect of the world as other theories, or is it trying to get at another aspect, question, or problem?
- What is its proposed answer to the question or problem?
- Does the proposed theory or model actually correspond to the world in the way it proposes?
- Is it too ambitious, or could it explain more?
- Are the models meant to be models that correspond to our practices, or are they meant to be models that set a standard for aspects of the law?[125]

---

123. *See* DWORKIN, *supra* note 54.

124. The survey below is necessarily introductory and oversimplified for the purpose of illustration.   Furthermore, the treatment below is not necessarily meant to address the core concerns of the given theory, theorist or school of thought.

125. Perhaps an analogy to physical models of human beings would be helpful here. In anatomy classes, one often looks at models of humans, or a part thereof. These models are useful because they are meant to correspond with certain aspects of the human that the future doctor or scientist will find when actually trying to deal with the problems of actual human beings. The model may be idealized in the sense that it deals only with muscles, only with veins and arteries, or only with nerves, but it most likely is not meant to be an ideal model of the human in any other sense. Other models, like fashion models are chosen to represent some ideal standard of the beautiful human form. They are not chosen because they accurately reflect the appearance of the statistically average person. They are chosen because, in trying to aspire to their beauty, we buy the things they model, even though those things often look silly on our imperfect bodies. Of

- Or is the model meant to do both; is it meant to both model aspects of our reality and provide a standard based on our ideals?
- Finally, how well does the model do by the standards of fit and value?[126]

1. Pure Natural Law: Is it Value without Fit?

Natural Law theories are often associated with the notion that, in order for something to be a law, it must meet some minimal set of moral standards. This is admittedly an overgeneralization, for many natural law thinkers see the "natural law" as a set of moral standards by which to evaluate what one may call "positive law," or the law as it "is." There is, in fact, a range of views within the natural law school about the relationship between "natural law" and "positive law." Theorists as far apart as R. Dworkin and J. Finnis, or L.L. Fuller and St. T. Aquinas, have been considered natural law thinkers.[127] In every case, the distinctive contribution of natural law theory is the direct treatment of the "value" of law. In some cases, the theorist is concerned with values that are internal to the legal system in question, while in others, the relevant values are considered universal, and as setting a standard for any and every legal system.

As noted above, the question of value can often be as important as the question of how well our model corresponds to the legal system as it is, or how well it coheres with our web of warranted beliefs about the world. Some models either minimally fit the system "as it is" or

course, some models do both. For instance plus-sized models, who are chosen because they both fit the plus-sized look and because they are beautiful people.

126. One should be careful not to confuse these standards for evaluating the whole range of models within jurisprudence with one theorist's views on the law. Ronald Dworkin is famous for using the notions of fit and value to determine what the law is in a given jurisdiction in hard cases. Dworkin's specific approach will be distinguished from the present one below.

127. *See* ROBERT L. HAYMAN JR. ET AL., JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM (Robert L. Hayman et al. eds., West Group 2d ed., 2002) (discussing St. Thomas Aquinas and John Finnis, natural law theorists). For clarifications on the extent to which Ronald Dworkin is a natural law theorist, *see* STEPHEN GUEST, RONALD DWORKIN, JURISTS: PROFILES IN LEGAL THEORY, 84 (William Twining & Neil MacCormick eds., Standford University Press 1992). Here, as elsewhere, the treatment of Fuller and Dworkin are as challengers to positivism's insistence of the separation of law from morality. They sometimes are not considered full-blown natural law theorists because each of them attempts to limit the ways or the extent to which morality intersects with the law as it is. Bix call's Fuller's approach a "Second Kind of Natural Law," while Dworkin is referred to as either a natural law lawyer or a third path theorist. BIX, *supra*, note 102, at 79–101. John Mackie has termed Dworkin's theory as the "third theory" of law because, as he states, "[I]t contrasts both with legal positivism and with the doctrine of natural law and is in some ways intermediate between the two." John Mackie, *The Third Theory of Law, in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 161 (Marshall Cohen ed., Rowman & Allanheld 1983).

fail to fit it at all. In such cases, it is an open question as to whether or not this lack of fit reflects badly on the model or on our current legal reality? If no just model of the law fits the system, as with Nazi Germany, that is a poor reflection on Nazi Germany and not the just model. It will of course be rare that a court will accept arguments based on such models that fail to fit the system. However, there is no magic ratio of fit to value when trying to put forward a persuasive argument. (The correct or legitimate ratio is partially what legal theorists are debating.) This comes out most pointedly in transitional contexts or in the early infancy of new regimes, but it is in no way limited to those contexts. This is the "stuff" that impact litigation or test case litigation is made of. For instance, for many years prior to *Brown v. Board of Education*[128], the model of equality law that *Brown* was decided upon was not thought to fit our legal practices. The NAACP lawyers and activists working towards the result in *Brown* were aware of the fact that one could not simply move from *Plessy v. Ferguson*[129] to that result in a single case.[130] A colour-conscious approach to equality law may have been the more just model, and may have been more appealing on a number of different dimensions for understanding the Fourteenth Amendment[131], but it was not a model that fit the beliefs and practices of the courts who took the "color blind" approach at the turn of the century. Thus, the NAACP had to move by getting the thin end of the wedge in, and driving until the law that fit was roughly commensurate with what it ought to be.[132]

But, more importantly, jurisprudence isn't simply about what will win your case in front of the judge. Legal theory can be just as important for showing that there are other possible models of the legal world. These may be models that fit other societies or other legal

---

128. 347 U.S. 483 (1954).

129. 163 U.S. 537 (1896).

130. *See* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW AND HIST. REV. 97 (2002) (providing an early history of the NAACP's test case strategy and arguing that the NAACP's aggressive test case approach brought it into potential conflict with legal and ethical rules). For a treatment of the conflicts from the 1930's to the present, *see* MARK TUSHNET, MAKING CIVIL RIGHTS LAW (Oxford University Press 1994). *See also* Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, UNIVERSITY OF CHICAGO LAW SCHOOL ROUNDTABLE 8, 281–311 (2001). The NAACP found considerable repose from the professional ethical claims brought against it when the Supreme Court decided that its litigation strategies were protected against claims of professional ethics violations based on the First Amendment in *NAACP v. Button*, 371 U.S. 415 (1963).

131. U.S. CONST. amend. XIV.

132. *See* JACK GREENBERG, LITIGATION AND SOCIAL CHANGE: METHODS, LIMITS AND ROLE IN DEMOCRACY 16–23 (The Association of the Bar of the City of New York 1974). This occurred because the remedy in Brown was woefully inadequate and our equality jurisprudence has not yet arrived at where it ought to be.

traditions, or they may be models that do not fit any existing system at present. They may be models of other possible legal worlds; perhaps the most fair and just legal system or perhaps the most efficient. They show us that our legal world, or aspects thereof, could be ordered differently and perhaps in a better way. Although it may be a rare case in which a judge in a domestic case is inspired by such models, they may inspire a future legislative draftsperson or an advisor, whether she or he is looking at drafting a new Constitution or simply a new piece of consumer protection law. Furthermore, it may influence a bureaucrat in her exercise of discretion or a lawyer in deciding whether or not to take a case.[133]

2. Realists

Legal realists have been labeled as philosophical naturalists.[134] Philosophical naturalists apply empirical inquiry from the natural and social sciences to the law.[135] Oliver Wendell Holmes is famous for, among other things, his proposition that the law is a prediction of what a judge will in fact decide in a given case.[136] The realists, and particularly Justice Holmes, have put the law and the role of legal theory into the realm of testable, verifiable, and prediction-giving theory. If a lawyer's job is to determine what the law is for her or his clients, and the law is a prediction of what a judge would in fact decide if the case came before her or him, then a lawyer will need more than merely conceptual theory to make the prediction. This has given rise to certain behavioristic and sociological approaches to the law that try to predict how a given judge will decide a case based on past decisions or other social, economic, or psychological factors. In places where, like the U.S., there is a jury system, considerable resources are expended on determining the preferences, biases, and/or inclinations of potential jury members based on demographic information. Here, legal theory is put to the test in actual jury selections and in forum shopping (to the extent that it is possible) to find the most congenial judge, and finally, to shape or mold arguments before that judge so as to ensure the most favorable outcome.

---

133. It is important to note that for such theories to be meaningful they must fit in with a significant amount of our accepted beliefs. These beliefs will be both law related and related to a myriad of other beliefs about the world.

134. BIX, *supra* note 102, at 30 *citing* Brian Leiter, *Legal Realism, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson ed., Oxford: Basil Blackwell 1996).

135. BIX, *supra* note 102, at 30.

136. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

While the above makes the case for realist models on the level of fit, what about value? The realists came to the fore in the U.S. in the early 1900s.[137] They were reacting to notions of law as a formal logical system of rules that dictated results with little or no need for human intervention.[138] In the first two decades of the century, this so-called "formal logical system" was producing decisions that had serious, and often adverse, consequences.[139] Much of the point or significance of legal realism was to show that the law did not operate on logic alone, but was based on decisions made by flesh-and-blood humans.[140] Much of the point was to unmask the formal logical view of the law, to take off the veneer, and to show what was "really" going on in judicial decisions.[141] By making law students, lawyers, and judges understand the forces at work in "declaring" or "making" the law, they hoped to make lawyers and judges account for their role in this process.[142] The question of the value of a given realist model went hand in hand with the question of the model's fit. The two were separate but never far apart.

3. Law and Economics

Other models or schools of thought tend to reduce the law to one significant social factor. The most ambitious of these is the law and economics approach. The law and economics approach tends to explain and evaluate legal rules and decisions in terms of economic efficiency and wealth maximization. Advocates of this approach, which is closely related to the rational choice and public choice approaches in the social sciences, can even be found to claim that this approach best fits and explains the way judges decide common-law

---

137. REGINALD W. M. DIAS, JURISPRUDENCE 621–22 (Butterworth & Co. Ltd., 4th ed. 1976).

138. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9–10, 32–64 (Oxford University Press 1995). *See also* ROBERT L. HAYMEN et al., JURISPRUDENCE CLASSICAL AND CONTEMPORARY; FROM NATURAL LAW TO POSTMODERNISM 156–58 (Jean Stefancic ed., West Group 2d ed. 2002)

139. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Muller v. Oregon, 208 U.S. 412 (1908); Lochner v. New York, 198 U.S. 45 (1905).

140. OLIVER W. HOLMES, THE COMMON LAW 5 (1963 ed.) (1881).

141. *See, e.g.*, BIX, *supra* note 105, at 166; HAYMEN et al., *supra* note 138, at 160–61.

142. For a discussion of the goals and impact of Legal Realism on legal education, *see* DUXBURY, *supra* note 138, at 135–49, and with specific reference to Llewellyn's goal of training lawyers for the New Deal, *see id.* at 162. *See also*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION (1960) (advocating for the Grand Style of adjudication in which judges embrace the role of using and making policy in their decisions); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 399 (1950).

cases.[143] Its advocates have applied the approach across the whole spectrum of law from commercial law to criminal law and even family law.   In its overly ambitious mode, the approach can become tautological, or merely conceptual in the definitional sense. What can happen is that all behavior is simply defined as being rationally self-interested, wealth-maximizing behavior. If this is the case, then the theory has no truth-value. It cannot be tested, nor can it give us new knowledge.

However, careful advocates of the view do not conceive of it as merely being tautological or true by definitional fiat. Advocates of the approach believe that it explains something significant about legal practice and that it sets a standard for how law should be approached.[144]   This approach goes much further than making conceptual claims.   It provides a model for trying to predict (relatively) determinative outcomes.[145] It is a model, or set of models, that its advocates believe has predictive power. Further, its advocates would like to see more legislative drafts, people, judges, practicing attorneys, and academics following the approach.[146] In fact, they would most likely also wish that everyone followed the approach (here in its more general rational choice and public choice variants). If everyone were to do so, the model would have even more empirical backing, explanatory power, and predictive power.

Adherants advocate for the approach not only because they believe the theory best fits legal practice (corresponding to the way law is actually practiced), but also because it would bring value and certainty to the law. Nonetheless, these two views need not go hand in hand. One may have good reason to believe that law and economics is a powerful model for explaining and predicting legal outcomes, but at the same time lament that fact. One may thoroughly critique a legal system based on the fact that its laws, and in particular its judicial decisions, can be predicted based on law and economic grounds. One may hold the view that, while it appears to be the case that most Americans are self-interested economic welfare-maximizers, and that the American courts tend to render decisions that maximize economic

---

143. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 19 (A. James Casner et al. eds., Little, Brown and Company 2d ed. 1977) (1972).

144. *See, e.g., id.* at 17–19. *See also* the preface to the first edition of WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS xxi–xxv (Academic Press 3rd ed. 1999) (1979).

145. *See e.g.* HIRSCH, *supra* note 144, at 21–22; A. MITCHELL POLINSKI, *Preface to* AN INTRODUCTION TO LAW AND ECONOMICS xiv–xv (Little, Brown and Company 1983) (stressing that the book's aim is normative, not descriptive).

146. *See* Saul Levmore, *Judges and Economics: Normative, Positive and Experimental Perspectives,* 21 HARV. J.L. & PUB. POL'Y 129 (1997).

welfare, this is an indication of social breakdown, a lack of concern for the disadvantaged, and for overall justice. Of course, one could also use law and economics and its underlying values to critique legal systems and judgments that fail to live up to its standards. The critique could be quite powerful in a country attempting to encourage a flourishing free market economy (e.g., in certain post communist countries).

4. Critical Theorists

Other approaches to the law share similar views on the relationship between what is and ought to be the law. Critical socialist and Marxist approaches to the law also believe that the law is tied to economics and that the law serves the ruling class.[147] Such claims are not merely conceptual, but can be empirically tested. This is also true of claims that the law can be reduced to politics, racial factors, gender bias, or heterosexism. In each case, be it critical legal studies, or critical race, feminist, or queer theory, advocates of this approach or model of understanding have a strong commitment to uncoupling what is the case from what ought to be the case. While much of the literature in this area has a very strong normative dimension (values about what the law ought to be), much of the work is concerned with uncovering or revealing the various ways in which the law is racist, sexist, etc.[148] In many instances, these theories provide tools for revealing facts that might otherwise go unnoticed.

Advocates of these theories are sometimes overly ambitious, attempting to reduce all of the law to politics, race, or sexism.[149] As with the case of law and economics, this is most likely a mistake.[150] In

---

147. *See, e.g.*, Karl Marx, Preface to *A Critique of Political Economy*, in KARL MARX SELECTED WRITINGS 389 (David McLellan ed., Oxford University Press 197); *see also Marxist Jurisprudence* in J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 371–74.

148. *See, e.g.*, BIX, *supra* note 105, at 203–20. *See also* Robert W. Gordon, *Some Critical Theories of the Law and Their Critics in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 641 (David Kairys ed., Basic Books 3d ed. 1998) (1982).

149. *See, e.g.*, Duncan Kennedy, *The Structure of Blackstone's Commentaries* 28 BUFFALO L. REV. 205, 211–14 (1979) (arguing that all law is politics). For the view that law is patriarchy, *see* Cathrine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 635, 645 (1983); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L. J. 83–84, 87–88, 92 (1980).

150. For instance, if our theoretical hypothesis, linking law and economics to the world, is limited to certain areas of contracts and business law, we may be content that the theory fits/corresponds and brings value to the area of the law. If the hypothesis is extended to cover criminal law, we may be less convinced. However, even here, we may think that certain crimes and their deterrence may be fruitfully explained in law and economics terms (e.g., car theft or white collar crimes, as opposed to rape and murder).

such cases, the mistake is in the theoretical hypothesis that links the model to the world. The extent to which any one of these given approaches or models is true depends on their fit with the relevant phenomena or practice. The key is to carefully delimit the hypothesized scope (e.g., not that x is "the" cause of y under every condition but rather x is a causal factor bringing about y under conditions a, b, and c). The hypothesized scope may turn out to be false if the model does not fit the world in the way the theory states; nonetheless, the model may still have some truth-value if the hypothesis can be revised. A model can be of great use in helping us understand discrete areas and or practices within the law and legal system even if the scope of the theory is quite limited.

It should be noted that these models are not necessarily mutually exclusive and that different models may uncover different aspects of a given practice or system. The models may explain different things, or they may combine as a series of causal factors that may or may not be competing to bring about a single event. For instance, factors that are identified by any number of approaches or models may influence the outcome in a given case. In some cases, the factors may pull in the same direction, while in others, they pull in opposing directions.

Much of the best work in this area of legal theory explicitly limits its theoretical hypothesis to discrete problems or aspects of the law. Much of it is opposed to grand theories that try to model every aspect of the law or even every aspect of doctrinal area of the law.[151] This is partially because those grand theories or models have often left out, marginalized, or have justified, the unfair treatment of certain members or groups of society.

5. Positivism

Legal positivists would like to go further in uncoupling what the law is from what the law ought to be. According to the positivist, what the law "is" is a matter of fact and is not a matter of value or morality. An advocate of any of the above views could logically also hold the positivist view.[152] They could, on the one hand, say that

---

151. *See, e.g.,* Katharine T. Bartlett, *Feminist Legal Methods,* 103 HARV. L.R. 829 (1990); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography,* 79 VA. L.R. 461, 464–516 (1993) (providing an extensive annotated bibliography on critical race theory).

152. Although it should be made clear that, in most instances, the advocates of the above views do not consider themselves positivists and are explicitly opposed to positivism, some actually rely on there being a fact of the matter about what the law is. If this is so, then they do hold some sort of positivist view. Some critical theorists and postmodernist are skeptics when it comes to claims of truth, and thus, do not believe that there are any facts of the matter that can be said to be true. Nonetheless, their claims, in order to make sense often rely on some implicit folk realism about the world.

there is a fact about what the law is, and that fact is to be found in certain x, y, or z places, or x, y, and z practices or events. At the same time, they could say that what causes the law to be there is determined by x, or y, or z factors (or some combination of these, be it race, class, or economic maximization). For instance, a positivist might hold that, amongst other things, the law is to be found in regularly enforced or obeyed commands, rules, statutes, or in the plain meaning of a judgment or prediction about what a judge would decide. A positivist may claim that there is an identifiable rule or set of rules for identifying these legal facts. That same positivist may also hold the view that the law was created in that way to serve the interests of the ruling class, or for gender-biased reasons, or even because that is what a majority of the people wanted. The same positivist may think this morally wrong and may in fact argue that the law ought to be other than it is. Nonetheless, on the positivist view, these further claims would not be legal claims but moral or philosophical claims about values.[153]

According to Brian Bix, the positivist is primarily putting forth a conceptual claim that is separate from claims regarding causes, functions, and the value of the law.[154] It is not necessarily opposed to such endeavors as long as confusion between what is the law and what ought to be law is avoided. While it may be true that the positivist claim is not centrally concerned with causes, functions, and predictions, the claim must be at least minimally empirical.[155] If the claim is that there is a fact of the matter about what the law is, then one must be able to identify that fact. If there is no such fact to be found in the place or practice that the positivist points to, then the positivist claim must fail because it will fail to correspond with our warranted beliefs about the world as we know it.[156]

---

153. A good example of a positivist who was also a famous moral theorist would be the utilitarian Jeremy Bentham (1748–1832). Note also that H.L.A. Hart was a socialist and promoted privacy rights for homosexuals. *See* FREDERICK SCHAUER, *Constitutional Positivism*, 25 CONN. L. REV. 797, 806 n.17 (1993).

154. *See supra* note 70.

155. Positivism is generally defined as a doctrine of knowledge that is derived from observable phenomena, rather than, mere speculation or pure reasoning. *See* BLACK'S LAW DICTIONARY 1182 (7th ed. 1999). However, legal positivists are not as concerned with what is observable as they are with identifying law according to its pedigree and according to its institutional source. *See, e.g.*, LON L. FULLER, ANATOMY OF THE LAW 7–8 (Greenwood Press 1976) (1968).

156. If the project is as H.L.A. Hart described in THE CONCEPT OF LAW as "descriptive sociology" then the question as to whether or not the law is as the positivist says it is depends on complex empirical questions regarding not only linguistic usage, but various practices and their meaning and/or significance for those engaged in the practices. *See* HART, *supra* note 18, at v.

It is commonplace that different positivists point to different places and/or practices to identify the law.[157] It may be argued that they are simply using different conceptions of the law: one using a conception of law as a set of commands, while another a conception of certain types of rules, while another a conception of predictions of judicial decisions. It would be a severe mistake to think that these were simply different labels for the same thing. Positivist claims say very little if they are simply tracking linguistic usage or placing labels in various places. The main question to keep in mind is why different positivists choose to locate "law's" empirical link in different places. What is at stake in saying that the law is a prediction of what a judge will decide rather than identifying it by reference to the plain meaning of a piece of text or in the intentions of the legislature?

There is an important question regarding the fit between the given positivist model of the law and the world. One can challenge the given positivist on more grounds than simply whether or not a given concept of law is best for a given purpose (be the purpose tracking linguistic practice, identifying something significant in the practice, or setting a standard). One can also challenge the positivist for failing to fit the practice. This is what H.L.A. Hart did to the positivism of Austin,[158] and it is arguably what Ronald Dworkin did to the positivism of Hart.[159] It is also what Iain Currie has recently attempted with some of Ronald Dworkin's views in the context of South Africa.[160]

In each case, up to the critique by Currie, the subsequent theorist added to the existing model. Austin described law as a set of commands. H.L.A. Hart did not argue that the law is devoid of commands, but rather that there was more to the law than simply commands from a sovereign to its subjects. For Hart, the law also

157. *E.g.,* JOHN CHIPMAN GRAY, NATURE AND SOURCES OF LAW 84 (Columbia University Press 2d ed. 1972) (1921) (putting the locus not in rules but in decisions by the courts). *Compare* AUSTIN, *supra* note 18 at (putting the locus in commands of the sovereign); and HART, *supra* note 18, at 79 (placing the locus in primary and secondary rules).

158. HART, *supra* note 18, at 79 (critiquing Austin's notion of "the model of law as the sovereign's coercive orders.").Notice that Austin was aware that customary law, international law, declarative laws, repealing laws, and laws that did not prescribe a punishment were not covered by his theory of law as a command. J. W. Harris considered this flaw to be a lack of largeness of aim. J.W.HARRIS, LEGAL PHILOSOPHIES 27–28 (Butterworths 1980).

159. *See* Ronald Dworkin, *The Model of Rules,* 35 U. CHIC. L. REV. 14 (1967).

160. Iain Currie, *Judicious Avoidance,* 15 S.A.J.H.R. 138 (1999) (following the work of Cass Sunstein in his critique of Dworkin's model of adjudication as captured by Dworkin's model judge, Hercules). *See also* Cass R. Sunstein, *Forward: Leaving Things Undecided,* 110 HARV. L. REV. 6 (1996); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (Oxford University Press 1ᵉ ed., 1996); Cass R. Sunstein, *Incompletely Theorized Agreements,* 108 HARV. L. REV. 1733 (1995).

consists of various types of rules, and as such, he put forward a "model of rules." Likewise, Dworkin does not argue that the law is devoid of rules, but that there is more to the law than simply rules.

6. Dworkin's Principles (Integrity)[161]

For Dworkin, our legal ontology (what exists in the world) is not limited to rules and commands, but also consists of legal principles.[162] In his *Order of the Coif Lecture: In Praise of Theory*, Ronald Dworkin addresses the question: "What makes a claim about the law true or false, or, in other words, What is an appropriate way to reason or argue about the truth of claims of law?"[163]

Dworkin's theory-embedded view is that, in practice, "you cannot think about the correct answer to the questions of law unless you have thought through or are ready to think through a vast over-arching theoretical system of complex principles about the nature" of the given area of the law.[164] A claim of law in a hard case that one party or the other should win "is tantamount to the claim, then, that one principle or another provides a better justification of some part of legal practice. . .better, that is, because it fits the legal practice better, and puts it in a better light."[165] While he acknowledges that lawyers will disagree about what principles best justify the area of law or the legal system,[166] when they do disagree, they will often receive and provide arguments meant to capture the idea that their chosen principle best fits and puts the law in a better light than its rivals.

Dworkin has employed a couple of models in the past to put his views across. He has used both the ideal model of Hercules and the model of a chain novel.[167] There has been some confusion over the

---

161. Note that much of the following discussion borrows and expands on my response to Iain Currie, Christopher J. Roederer, *Judicious Engagement: Theory, Attitude and Community*, 15 S.A.J.H.R. no.4, 486 (2000).

162. *See* Dworkin, *supra* note 159.

163. Ronald Dworkin, *Order of Coif Lecture: In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 354 (1997).

164. *Id.*

165. *Id.* at 356 (citation omitted). This is essentially the notion of law as integrity. We are drawn, in Dworkin's opinion, to this overarching theoretical system of principles, because of the need to treat people with equal concern and respect. We can only do this if we treat like cases alike. In situations where there are no clear or settled rules (when there is no straight forward like case), we need to turn to our set of principles in order to decide the case in line with the more general historical record of cases and laws. We must find the principle that best fits and justifies that record.

166. *Id.*

167. I will not address Dworkin's use of the chain novel. Let it suffice to say that the model is meant to draw out certain key features of the constraints that are put on judges who find themselves in structurally similar circumstances to the chain novel enterprise. *See* DWORKIN, *supra* note 54.

question as to whether Hercules is meant to be a model capturing actual adjudication or a model that is meant to be aspirational.[168] Hercules is both. He is an ideal type meant to abstract from the practice of judges certain key features. Hercules is meant to fit, to correspond to, those features of the practice, and perhaps, more importantly, to bring value to the practice.

Hercules, as the name suggests, is superhuman. He is super smart, and super quick, and since he is immortal, he has all the time in the world to think through his decisions. This enables him to "explore avenues and ideas [real judges] cannot; he can pursue, not just one or two evident lines in expanding the range of cases he studies but all the lines there are."[169] "Hercules can aim at a comprehensive theory, while theirs must be partial."[170] Hercules's decisions stem from justifications "drawn from the most philosophical reaches of political theory,"[171] and "[b]esides comprehensiveness, Herculean theorizing aims at generality—the development of general principles not only a particular outcome in a concrete case but, at its limit, also explaining the entire record of past and future decisions."[172]

Iain Currie argues that Dworkin's model does not fit the South African legal record.[173] It does not fit the way that judges decide cases, not even at the Constitutional Court. If the theoretical hypothesis linking Hercules to actual adjudication is that Hercules captures how judges in fact decide cases, then in most cases the theory would turn out to be false (it would not cohere with our warranted beliefs about our practice). If Hercules as a model is limited to how judges decide constitutional cases,[174] or bill of rights cases, or hard cases, then this might turn out to approximate truth more often within the more limited hypothesized scope of application.

Dworkin, however, limits the theoretical hypothesis further. He concedes that many cases are settled easily without much recourse to deep theoretical treatment because the rules and facts are

---

168. For instance, Dennis Davis notes that Dworkin never makes it clear whether or not Hercules is meant to be an analytic tool for understanding the judiciary or an ideal for judging. *See* Dennis Davis, *Democracy and Integrity: Making Sense of the Constitution*, 14 S.A.J.H.R. 127, 140 (1998) (noting the continued ambiguity in RONALD DWORKIN, FREEDOMS LAW (Harvard University Press 1996)).

169. DWORKIN, *supra* note 54, at 265.

170. *Id.*

171. *Id.* at 380.

172. Currie, *supra* note 160, at 145.

173. Currie puts forward a view that he thinks fits legal practice better; that view he labels "minimalism." *See id.* at 147–50. "Minimalism" is the idea that judicial decisions should be narrow in their impact and shallow in their justification. *Id.* (citation omitted).

174. Currie attacks Dworkin's theory of law based on the use of Herculean adjudication in constitutional cases. *See id.* at 138–65.

straightforward. As Dworkin states, "[m]ost of the time. . . we can cheerfully proceed on the footing of what we might call very local priority: in effect, looking no further in our interpretive arguments than the statutes or cases directly dealing with the matter at hand."[175] Herculeanism would neither describe what judges do in these cases nor would it set a standard for what they should do.

The difference between Hercules and his mortal counterpart (a judge who aspires to integrity) is that Hercules, because of his talents *might* proceed in the opposite direction. That is, Hercules might build a "gigantic 'over-arching' theory" good for all seasons.[176] But, as he states, "ordinary people . . . cannot do much of that. A judge . . . will rarely find either the time or the need to undertake long, laborious research or argument."[177]

As Dworkin states, "[t]he theory-embedded view I have been trying to explain is an account of legal reasoning-of how we properly argue toward a claim about what the law is. It is also an account of what truth in such claims consists in. It is not automatically an argument about the responsibilities of judges in ordinary cases or even in constitutional cases."[178]

Thus, we see that what could be taken as an exceptionally ambitious model that is most likely false, may be quite plausible when narrowed down to a limited theoretical hypothesis and taken to apply to all adjudication. Thus, whether or not a model is true, depends on how well it actually coheres with our warranted web of beliefs about our practices. Whether it has value is a question of what we think the proper role of the judiciary should be. It is important to ask, what justifies this model that abstracts from the practice in this way? Why take this perspective on the practice, rather than some other? For instance why do we want a theory that only applies to hard cases? What kind of theory works in the average case? Do we accept the distinction? Aren't all cases of any significance hard cases? Our answer to this second set of questions will impact the first set (the question of fit or correspondence) over time, for the practice of law by practitioners, academics, and judges cannot help but be shaped by what they view as their proper roles within the system.[179]

---

175. Dworkin, *supra* note 54, at 357.

176. *Id.* at 358.

177. *Id.*

178. *Id.* at 360. It should be acknowledged that this was not clearly Dworkin's view in LAW'S EMPIRE. *see* Dworkin, *supra* note 54. Dworkin may be seen as further refining the theoretical hypothesis that links his model of adjudication to the "real" world.

179. It should be noted that while Ronald Dworkin formerly held the view that there was a distinction between hard and easy cases, *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY

7. Values (Political Theory, History, Morality, Religion) in the Law

Like H.L.A. Hart's, Dworkin's model only allows theory and values to come into play in hard cases (which now, for Dworkin, may mean any and every case). Further, the values that he accepts as being relevant to the model must be those that come out of the legal system's history. The values must fit our legal system, not just make the system the best that it could be, all things considered. The justification for this comes out of a notion of law as integrity, as a system of rights, which people can expect to have respected. Those rights, and people's legitimate expectations, flow from the historical record of the legal system.

One difference between Hart and Dworkin is the type of values that come into play in hard cases. Strictly speaking, on Hart's view, any set of values held by the judge could come in. For Dworkin, this is legislating and not proper for the judiciary. Dworkin's theory-based view explained above asks for rights that could be generated out of a coherent set of values and principles. The coherent set of principles is to be drawn from political theory or political morality. The question is which coherent set best fits and justifies the legal system. For him, utilitarianism and pragmatism do not take the rights of individuals seriously enough. This is because individuals in hard cases would not necessarily have their rights vindicated, as any such notion of rights could always be sacrificed to the common good or to progress (as dictated by utilitarianism or pragmatism).

Dworkin prefers liberal welfare rights theory to its rivals as the fount of these principles and rights. But, of course, he is primarily talking about that theory providing principles that best fit and justify the legal systems of the U.S. and U.K. As noted above, he does not think this uncontroversial. Outside of the U.S. and U.K., other theories may be better suited to the legal system. Thus, socialist/communist, social democratic, or even libertarian theories may better fit and justify different systems.

Of course, as was noted above, others think the law is all politics or can all be reduced to various value judgements. This may be true even if one thinks that nearly every case is, in fact, a "hard case."[180] If

---

(Harvard University Press 1977), he has now largely dissolved that distinction, *see* DWORKIN, *supra* note 54.

180. One may argue that our practice shows us that nearly every case comes to court because it is a hard case. Hard cases are those cases or controversies in which there are plausible competing rules or interpretations of the rule or rules. If the case was not hard, it may be argued, it would be settled by the lawyers rather than by a court (at least most of the time). Thus, a model that takes most every case to be a hard case fits/corresponds to our legal practices better than one that does not. If every case is a hard case, then it opens us up immediately to the

there is any truth to this, then it is important to have a good grasp of the political options out there. Short of this view, others may think that, in hard cases, it is legitimate to draw on any of a number of values drawn from any of a number of sources. Those values may come out of international human rights standards, political theory, traditional beliefs, Sharia, Hindu, Christian, Jewish, or even Confucian value systems.

From within the South Africa context, one could generally agree with Dworkin-like views but disagree with that part of his model of adjudication that requires that the coherent set of principles fit and justify the past. Depending on one's view of the "new" South Africa, one may wish to scrap the past, save only to use it as a reference point from which to depart.[181] Are we to embark on a brand new set of values from that point on, or are some of the values of the previous regime to be retained? If one views the 1990's as a legal revolution and as the beginning of the re-birth, then the historical record begins anew with the revolution. Is it only apartheid that needs to be removed from the historical record? How much of the law did it actually infect? Can we hearken back to the thousands of years of Roman Dutch law? Do we include the English influence? Was capitalism and libertarianism part of the evil past, or was it part of what was good (itself being partially tainted by the apartheid past)? Does the new South Africa require going back to the suppressed and/or forgotten past? Does it require a renaissance of customary law and values?

8. The Historical School

The questions above are largely historical questions. Different advocates of the historical school of jurisprudence would have

---

question of judicial discretion and the values/principles that are to guide judges. Some argue that a judge's use of this discretion is always political.

    181. The late Justice Mohamed in *State v. Makwanyane and Another*, captured the idea nicely:

> In some countries the Constitution only formalises [sic], in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."

1995 (3) S.A. 391 (CC) ¶ 262 (concurring) (on file with Seattle University Law Review).

different views on the South Africa's legal history and its relation to South Africa's history as it is more broadly understood. They would bring different models to bear on the question of South Africa's past. Is it only the legal history that is important to legal questions? Can South Africa's legal history be separated from its political history, its economic history, and its cultural history? Is there a single South African history? Is there even a single history of South African law? Are there multiple legal histories, multiple cultural, political and economic histories?[182] Whose version of history is to be privileged in the new South Africa?

These historical questions raise questions about the possibility, or even the desirability, of finding a coherent set of principles. For instance, did the negotiations in Kempton Park allow for a coherent rule of recognition?[183] Were the principles embedded in the interim constitution coherent? Did the final Constitution solidify a coherent set of principles? Where the conflicts resolved? Do the conflicts continue through legal battles over the meaning of a document formed of compromise? Should practitioners, judges, etc., seek to exploit the inconsistencies created by such a compromise, or should they seek to give this foundational document as coherent and principled an interpretation as is possible?

The United States presents a much less dramatic example. While it is abundantly clear that South Africa, with its radically new Constitution and political system, has been going through an enormous transition, the U.S.'s constitutional moments have, as Bruce Ackerman would say, often been papered over.[184] According to Ackerman, the U.S. has gone through three historical ruptures or transitions: the extra-legal founding, which did not follow the procedures set out in the articles of Confederation; the Thirteenth and Fourteenth Amendments passed during reconstruction, which bypassed the proper Article V procedures; and the New Deal amendments, which passed largely through the pressure brought to bear on the courts to switch in time in order to save the nine. Thus it

---

182. For instance, certain post-modern/post-structuralist historians, like Michel Foucault, point out the disjunctions of history, the incoherence of history, and the multiplicity of histories.

183. Kempton Park is the place where the end of Apartheid law was negotiated, as well as the new constitutional framework. It was decided that there would be an interim Constitution that contained 34 principles to guide the elected Constitutional Assembly who would draft the final Constitution. The Constitutional Court had to certify that the proposed final Constitution complied with those principles before the Constitution could come into effect.

184. *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 41–44 (Belknap Press 1991). For a brilliant symposium on Ackerman's work, *see* Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 YALE L.J. 1917–2349 (1999) (providing contributions from legal academics, historians, and political scientists).

may be contended that there is not one U.S. constitutional history, but four. Ackerman himself can be criticized for papering over the complexity of these transitions with a theory of Constitutional change that sees each of these great changes taking place as a result of super-majority or "higher-lawmaking."[185] His theory helps legitimate the break and the new founding. But, as a number of contributors to the symposium on his work in the Yale Law Journal have noted, there is evidence of disruptions with these transformations, perhaps most notably the counter-reconstruction movement that brought about Jim Crow laws, segregation, and disenfranchisement.[186] As William Forbath also points out, "The historians' insights complicate Ackerman's storyline in another way, by suggesting that U.S. history has been punctuated by many more moments of constitutive change than three."[187]

Does Ackerman's theory fit the historical account? Can his theory account for these pieces of information? Can it accommodate these challenges on the "facts" without undermining the "value" of his theory which seeks to legitimate these constitutional moments with the idea of "higher-lawmaking?" If not, how much of the historical record can he bracket off? Is it his theory that is shaping the historical data that he is willing to accept, or did the data drive the formation of the theory? What should we, the people, do with these historical facts about the law?

9. The Multiplicity of Models

Like in the social sciences, it is important to realize that conflict over the correct model or set of models of the law is pervasive. This problem not only afflicts legal systems in transition, but is also a pervasive problem in countries like the U.S., which not only has the oldest written constitution, but perhaps the most stable political regime on earth. Disagreements over the proper interpretation and proper model to use in legal argument and judicial reasoning occur not only among academics, but also among practitioners and judges in legal briefs, opinions, and argument.

---

185. BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 32–38 (Belknap Press 1998) (detailing five stages that "higher-lawmaking" goes through, from signaling, proposing, triggering, ratifying, and consolidating).

186. *See* Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2007–10 (1999); Walter Dean Burnham, *Constitutional Moments and Punctuated Equalibria*, 108 YALE L. J. 2237, 2265 (1999).

187. William Forbath, *Constitutional Change and the Politics of History*, 108 YALE L.J. 1917, 1923 (1999).

It is, of course, debatable whether debate over the correct model should be termed a problem or not. Some think it is more honest, open, and transparent to admit that you are relying on one of a number of competing models and justify the relied-upon model rather than elevating it to the level of the single correct model.[188] As was illustrated with the case of Dworkin, it is important to see if, in fact, the models are competing or if they are simply picking out different aspects of the thing we call "law." To the extent that models are picking out different aspects of the same thing, they will be irreducible. Depending on how the theoretical hypothesis is drawn, most every model across the jurisprudence spectrum can sit along side the other models. In order to achieve this, the theoretical hypothesis may need to be drawn so narrowly so as to make many of the models uninteresting. Where there is overlap, quasi-experiments and counterfactuals might partially settle the issue. Ultimately, it is our tools of observation, open critique and argument that must settle these issues—to the extent that they can.

It must, however, be cautioned that which model best fits the legal practice will change as legal practice changes, and legal practices do change. A persuasive piece of scholarship, or, more commonly, a persuasive argument in front of the right judge, or a brilliantly written judicial opinion (which may or may not follow from persuasive arguments or legal scholarship) can change the way given models are viewed and used. New legislation and constitutional change may fundamentally impact the relevance of any given model. Again, compelling models of law not only track our practice but also guide future practice. Thus, a model that may best fit our past and present practices may lose out in the future to a model that is more appealing to our considered views. The model that best fits our practice tomorrow will not necessarily be the one that fits it today.

C. How does this view differ from Ronald Dworkin's notion of Constructive Interpretation?

Some of the language used in this paper may sound very much like that used by Ronald Dworkin particularly the use of the terms "fit" and "value." However, one should be careful not to confuse these standards for evaluating the whole range of models within jurisprudence with one theorist's views on the law. Ronald Dworkin

---

188. This, for instance, is likely the view Dennis Davis espoused in *Democracy and Deliberation*, and is a view not completely at odds with people like Etienne Mureinik. *See* DENNIS DAVIS, DEMOCRACY AND DELIBERATION (Juta & Company 1999); *compare* Etienne Mureinik, *A Bridge to Where: Introducing the Bill of Rights*, 10 S.A.J.H.R. 31 (1994).

is famous for using the notions of fit and value to determine what the law is in a given jurisdiction in hard cases. It is not a model that fits all aspects of the law; rather, Dworkin's model is primarily a model of adjudication, modeling how judges make their decisions in "hard" cases where there is not a clear answer to the legal question based on settled rules and principles. Furthermore, Dworkin bases his model on the idea that all adjudication is interpretation.[189] This is very different from evaluating the various models of aspects of the law in terms of fit and value.

It is true that, in Chapter 2 of *Law's Empire*, Dworkin puts forth something of a meta-theory of the social sciences that embraces what he calls "constructive interpretation."[190] He addresses conversational interpretation, scientific interpretation, and artistic interpretation, arguing that the interpretation of social practices, including law, is more akin to the interpretation of art than it is to interpreting each other in a conversation or to the scientific interpretation of data.[191] It is different from conversational interpretation because the practice to be interpreted is not only created by us, but is also separate from us.[192] It is different from the scientific interpretation of data in that we create the data of social practices in addition to that data being distinct from us.[193]

Scientific interpretation is not really interpretation for Dworkin because interpretation requires that one assign a purpose to the object under study rather than look for causal explanations.[194] According to Dworkin, "Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong."[195] We do not generally think that this polluting of what is the case with what ought to be the case to be appropriate in the natural sciences.

Dworkin briefly flirts with the idea that one can in fact view scientific interpretation and conversational interpretation through the lens of artistic constructive interpretation when he states, "the constructive account of creative interpretation, therefore, could perhaps provide a more general account of interpretation in all of its

189. *See* Dworkin, *supra* note 54, at 225–26.
190. *Id.* at 49–55.
191. *Id.* at 50.
192. *Id.*
193. *Id.*
194. *Id.* at 50–51.
195. *Id.* at 52.

forms."[196]   This would mean that all interpretation would be about making the object under study the best it could be, and that it is only the different standards of value (of what makes an object best) that distinguish between the different forms of interpretation.[197]   Dworkin references the work of Thomas Kuhn for the proposition that scientific interpretation can be viewed in this way.[198]   Notice that the values that Dworkin assigns to the natural scientific pursuit are those values we would term constitutive rather than contextual.   To take the point further than Dworkin does, one may view scientific practice in this interpretive light by saying that within the practice of natural science, the practice is conceived in its best light and considered most valuable when it excludes (or at least brackets as much as possible) contextual values (justice, morality, etc.).   This may be contrasted with the social sciences and law in which a number of participants in the practice believe that contextual values are also important values within the practice (e.g., a certain degree of justice, fairness etc.).

It should be cautioned that it is not at all clear that Dworkin has embraced this reduction of the natural sciences to interpretive theory. He does not pick up on the idea again and seems to confine himself to talking about conversational interpretation, the social sciences, and justice from that point onward.   If he were to reduce scientific practice, the social sciences, art, and conversation to constructive interpretation, this would be a fairly radical move that would sharply distinguish his views from the view put forward here.

The view put forward in this work acknowledges that one may evaluate theory across the spectrum in terms of both fit and value. It does not seek to integrate them in the manner that Dworkin does. Nor does it say that legal theory does or ought to make the best of the law that it can.   It in no way sees anything wrong with a theory that simply attempts to describe the law as it is, nor does it make any such claim for the social sciences in general or for the natural sciences.   It remains in some sense neutral between naturalistic, interpretative, rational choice, and critical approaches to the social sciences.   If anything, it is skeptical of the desire to reduce one or more of these approaches to the others.[199]

---

196. *Id.* at 53.

197. *Id.*

198. *Id.* at 53 n.13.   Note that Kuhn's interpretative approach to science is not generally considered mainstream.   There may be interesting conceptual similarities between Kuhn's view of scientific change/revolution and Dworkin's notion of what happens in a hard case.

199. *See, e.g., supra* notes 51, 83, 89–90 and following text (referring to the attempts by Braybrooke at the reduction of the social sciences to a naturalistic approach to rules.   Note that Dworkin at least flirts with a reduction in the opposite direction).

The position put forth here is concerned with identifying the theoretical hypothesis of a given theory, theorist, or set of theories and evaluating the hypothesis in terms of the two criteria of fit and value, both of which are to be conceived in light of a coherence theory of truth that is based on warranted assertability. Once the claim is identified, the theory can then be evaluated in one of a number of ways. If one is clear about the theoretical hypothesis, then one can compare the theory with other theories to see if they are describing, explaining, interpreting, or setting standards for different phenomena or for different aspects of the phenomena. If they are, then the theories do not compete, and one can evaluate the given theory either on its own terms as stated in the hypothesis or by standards we believe both relevant and important (constitutive or contextual). If the theory is concerned with the same object or aspect of that object as other theories or theorists, and thus appears to compete, then one can evaluate the given theories in terms of which one does a better job than the others in describing, predicting, interpreting, or setting a standard for the phenomena in question. Even here, one should distinguish strong competition in terms of causal and ontological claims versus weak competition in terms of theoretical explanations that are not causal or ontological in origin.

VI. APPLIED JURISPRUDENCE

A. *Constitutional Theory*

Jurisprudence, or legal theory, is not confined to general theories about all of law, or even law within a given state. One finds jurisprudential models in most every doctrinal area of the law. For instance, there are many models that inform criminal law, contract, and delict or torts. In some cases, models will cut across these doctrinal areas, but often they are confined by their theoretical hypothesis to one area or even to particular aspects of a doctrinal area of the law. Often times, there are numerous competing models in the given area of the law. Nowhere is the conflict over competing models more clear than in the area of constitutional law. Bobbitt, in CONSTITUTIONAL INTERPRETATION, puts forward six forms of argument, or what he calls modalities (in our terms, models), which are:

1. Historical (referring to the framers intent),

2. Textual (referring to the plain meaning view of the law),

3. Structural (referring to the rules that come out of the structures mandated by the Constitution),

4. Doctrinal (referring to precedent),

5. Ethical (referring to moral commitments/values that come out of society and that are reflected in the constitution), and

6. Prudential (referring to a cost-benefit analysis of adopting one rule rather than another).[200]

For him, the truth or falsity of law does not depend on something outside of the law such as politics, economics, or some other set of values. These six modalities are the six ways in which U.S. lawyers are said to argue about constitutional law. For him, law is a practice, and these modalities are said to be the tools of the trade. Truth is to be found in properly applying the modalities. If one is using arguments within these modalities, then one is making legitimate legal arguments within U.S. legal practice.

If one looks to South Africa, one finds very similar modes of argument. These modes of argument are, in fact, part of theoretical models. These models often carry with them a set of ideas or grander theory that justify their use (i.e., their fit and or value) as well as an approach or set of tools for interpreting the text of the constitution. In other words, the given model comes with a justification for its appropriateness or legitimacy. Sometimes this is partially based on its fit with our practices, but, more often than not, it is based on its fit with broader values (e.g., of the role of the courts and legislature in a democracy, the vulnerability of minorities in a democracy, a theory of rights, etc.). These values often cut across the text and the context of the Constitution.

For Bobbit, this value-based justification is not necessary. What is necessary is that the modalities that exist are actually the ones that fit the practice. For instance, the "historical" modality, which is well entrenched in the practice of U.S. constitutional interpretation, was not a modality that was accepted in South Africa prior to the "new" South Africa. However, with the certification judgments, the new Constitutional Court recognized its legitimacy as a form of argument.[201]

---

200. PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION 12–13 (Blackwell 1991).

201. How do we account for the change: the addition and reception of a new model? The practice was re-affirmed by Chaskalson JP in *State v. Makwanyane*, stating:

Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process. . . . The Multi-Party Negotiating Process was advised by

Other modalities may correspond with South African practice, but are likely captured in different terms. For instance, various purposive approaches/modalities are common in South Africa, and this is likely captured by Bobbit's notion of the "ethical" modality. Of course, the content of this modality will often be different from those in the U.S. For instance, while arguments regarding "transformation" are common in South African constitutional cases, this would likely appear too political to be a valid argument or to be part of a valid "ethics" modality in the U.S. at this point in history. The following quote from Mohamed in *State v. Makwanyane* (concurring) captures the idea nicely:

> In some countries the Constitution only formalises [sic], in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.[202]

As every American and South African student of constitutional law knows, or should know, the different modalities or different models dictate different interpretive tools that, when applied to the text of the Constitution, often give us different rules and thereby different results. They give us a different answer to the question: "what is the law in this case?" Lawyers will usually advocate the use of the modality/model that gives her client the best chance of success. The different models or theories are truly the tools of the trade, and the point is to use them well to one's advantage. While the choice for a lawyer may seem easy (although this is an overstatement), one would

---

technical committees, and the reports of these committees on the drafts . . . can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. . . . Background evidence may. . . be useful to show why particular provisions were or were not included in the Constitution. . . . It is sufficient to say that where background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a court in interpreting the Constitution.

1995 (3) SA 391, ¶¶ 17–19 (CC).

    202. *Makwanyane*, 1995 (3) SA 391 at ¶ 262.

hope the same is not true for judges. What are judges to do in the face of a plurality of models of argument brought before them with different conclusions? If there is nothing external by which to decide, then is not any model as good as any other?

On the view I have been putting forward, there are two ways to decide which model is best. One would be to see which model fits the practice best. Is there a hierarchy in the use of these modalities/models in South African practice? Are some generally accepted as having more persuasive force than others? This would seem to fit well with Bobbitt's theory, but it is not the option that he puts forward. Bobbitt did not address the problem in *Constitutional Fate*.[203] However, in a later work, Bobbitt sees the pervasiveness of modal conflict as a virtue as it provides "space for moral reflection."[204] His answer is to resort to personal moral theory. This, like the above value-based justification, must be extra-legal in the sense of being outside of the modalities/models. But, the question is, how does he justify resorting to moral conscience? Why shouldn't one turn to the best political/moral theory, all things considered, or to what will create the greatest good for the greatest number? Or to the decision that can be best justified to the legal community or the broader society? As noted above, in my view, these modalities/models already come with arguments about their value attached. The fact that they fit our practices may be a necessary condition for their inclusion in a legal argument. We may not allow modes of argument based on models that do not adequately fit or cohere with our beliefs about our practice. However, if there are multiple models that fit our practice, it is hard to imagine that the question of the various models' values will not play a significant role in choosing which one is to settle the issue. In law, our constitutive values often give way or blend into our broader contextual values.

We have, in fact, come back to the central problem of what to do in a hard case, in a case where the rules give out, where there may be more than one rule that is applicable, or where there is more than one interpretation of the rule. If, in fact, there are these multiple modalities/models that fit our practice and are recognized as legitimate forms of argument, and there is no over-arching modality that tells us which one trumps or wins out over the others, then is every constitutional case not a hard case?

---

203. *See* PATTERSON, *supra* note 28, at 143 n.63.
204. *Id.*, at 143, n.69, *citing* BOBBITT, *supra* note 200.

If this seems controversial, then one should simply pick up a South African constitutional text book[205] and turn to the interpretation chapter, or read a sample of cases from the Constitutional Court, or, even better, simply pick up the Constitution and read the sections on interpretation. Section 39 of the Constitution does not mention the textualist approach, although the Constitutional Court still accepts this model of argument.[206]   It does, however, say that, when interpreting the Bill of Rights, one:

(a)   must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b)   must consider international law; and

(c)   may consider foreign law.

This appears to fill out some of the parameters of a purposeful/ethical model of interpretation and would add at least one if not two very controversial modalities/models of interpretation to the list. Section 39(1)(a) would still allow for more than one possible model of interpretation, and 39(1)(b)-(c) requires that international law be considered in any interpretation and that foreign law can be considered. This brings discussions about international law and other systems of law on to centre stage. How much of our interpretation should be guided by the international community and what others think of the law?

What if conflicting arguments are put forward based on two or more of these models? What if they conflict with the "plain meaning" of the text? Does it matter that the others fit the actual practice of the Constitutional Court better than section 39(1)(b) as reflected in arguments before the Court and in its decisions? What if this is simply because lawyers and the Court are least experienced in this area? What if the use of section 39(1)(c) is more prevalent because of the number of foreign researchers on the Court and because of the

---

205. Jannet Kentridge and Derick Spitz address "originalism," "political process theory," "value based/purposive," and "textual based" interpretations of the constitution. CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 11 (Mathew Chaskalson et al. eds., Juta & Co., Ltd. 1999); JOHANN DE WAAL ET AL., THE BILL OF RIGHTS HANDBOOK 126–143 (Juta & Co., Ltd. 2001) (1998) (addressing "literal," "purposive," "generous," "political history," "drafting history," and "contextual" models of interpreting the Constitution).

206. *See, e.g., State v. Zuma* 1995 (2) 642 (CC) (on file with Seattle University Law Review); *State v. Mhlungu* 1995 (3) SA 391¶¶ 48–84 (CC) (Kentridge, A.J., dissenting) (on file with Seattle University Law Review).

Court's interest in justifying itself to the international community? Is there any way around the question of value in Bill of Rights cases?

B. *The Constitution's Radiating Effect: All of South African Law is Affected*

Of course, one may try to seek refuge in the comfort that the rest of the legal domain is not infested by multiple modalities/models. Transitional/transformative ideals or values underlying an open and democratic society, comparative law, and international law have no place in the settled tradition of law outside of the Constitution. In fact, outside of the Bill of Rights, it may be argued that the rest of the Constitution can and should be read using the modalities/models that have been established and used over the past thousand years or so.[207] Unfortunately, for some, the spirit of the Bill of Rights comes back to haunt all of the law including those other sections of Act 108 of 1996 (The Final Constitution). Section 39(2) requires that:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.[208]

What models promote the spirit, purpose, and objects of the Bill of Rights? Note that it is not as if the private law is devoid of models. Many models already inform our understanding, application, and development of private law. Do the previous models suffice? Some of them, no doubt, embody some of the values of the Bill of Rights. Others may, or may not, adequately embody those values, but rather embody values left over from a prior regime. Would models based on section 39(1) and section 1 not be legitimate? Is there any way to avoid values, or at least the conflict of values, in non-Bill of Rights cases?

VII. CONCLUSION

Is the conflict of models likely to be the exception or the rule in jurisdictions like the U.S. or the new South Africa? How should we teach our students to deal with conflicting models? How should

---

207. Although there have always been minority positions that have exploited certain common law presumptions and maxims or that have looked to the Roman heritage of interpretation up to the point of the new constitutional dispensation, the dominant model in South Africa has been the plain meaning model (along with its golden rule) as developed in English practice.

208. This includes Act 108 of 1996, the final Constitution. *See* SOUTH AFRICAN CONST. act 108.

lawyers, judges, and academics deal with such conflicts? There is no magic formula, but any formulation that thinks that "fit" will get us there alone will be insufficient. Hopefully, legal theory/jurisprudence can give our students, future lawyers, judges, and academics the tools to responsibly and persuasively meet the challenges of the day. While it is naïve to think that there are knock down airtight arguments that will settle our disagreements about the law, as we have seen, this does not mean that any theory or model (or legal argument generated by them) is as good as any other. There is no mysterious secret for discovering the legal truth or for determining which theories are better or worse than others. Instead, what we have are the standard tools of experimentation, observation, and critical analysis. These tools, combined with a careful delimitation of any given model's theoretical claims or hypotheses, are all we need to determine which models are better or worse for our given purposes. This is all we need in order to determine which models give us results that cohere with our warranted beliefs, values, and aspirations; this is, in fact, all we really have for making those determinations.